

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

TSB-A-94 (10) R
Real Property
Transfer Gains Tax
July 14, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M940510A

M940510B

M940510C

M940510D

On May 10, 1994, Petitions for Advisory Opinion were received from Mikal Moskeland and Anny Moskeland, 336 West Hills Road, Huntington, New York and Harry Tobiassen and Olaug Tobiassen, 27 Heckscher Drive, Huntington, New York.

The issue raised by Petitioners, Mikal Moskeland, Anny Moskeland, Harry Tobiassen, and Olaug Tobiassen, is whether the transfer of real property from Petitioners to their respective trusts will be subject to the Real Property Transfer Gains Tax (the "gains tax").

Petitioners own the following properties which are subject to the proposed conveyances:

41 Covington Street
8 Chicory Lane
444 Jericho Turnpike
281 Walt Whitman Road
5074 Jericho Turnpike

All of the properties are deeded as follows:

"MIKAL MOSKELAND and ANNY MOSKELAND, both residing at 336 West Hills Road, Huntington, New York and HARRY TOBIASSEN and OLAUG TOBIASSEN, both residing at 27 Heckscher Drive, Huntington, New York, each as tenants in common as to the other."

Notwithstanding the record ownership of the properties, the income and expenses associated with all of the properties have historically been reported by Petitioners on partnership returns of "Viking Realty Co." The proportionate shares reported on the partnership returns have been as follows:

Mikal Moskeland	50%
Harry Tobiassen	50%

Petitioners desire to alter the record ownership of the properties to facilitate their respective estate plans.

TSB-A-94 (10) R
Real Property
Transfer Gains Tax
July 14, 1994

The plan is to divide the properties between the two Petitioner families so that each family has exclusive title to property with an aggregate fair market value approximately equal to the fair market value of property to be deeded to the other family.

Each Petitioner will form a trust having provisions which create a "Grantor Retained Annuity Trust". The trusts will be known, respectively, as the Harry Tobiassen Family Trust, the Olaug Tobiassen Family Trust, the Mikal Moskeland Family Trust and the Anny Moskeland Family Trust.

The terms of each trust will be identical. The pertinent dispositive provisions of each of the trusts are as follows:

- * The trust term will be 10 years from the creation of the trust or the earlier date of death of the Grantor.
- * Pending the termination of the trust, the trust will pay to the Grantor an annuity of \$65,000 per annum, in quarterly installments.
- * Upon expiration of the trust, if the Grantor is then living, the property will be distributed to the Grantor's issue, in equal shares, per stripes. However, if the Grantor is not then living, the capitalized value of the annuity must be paid to the Grantor's estate and the remainder of the trust property, if any, will be distributed to the Grantor's issue, in equal shares, per stripes.

If the Grantor dies before the conclusion of the trust term, the entire property within the trust will be required to be distributed to the Grantor's estate since the value of the property at the date of the Grantor's death cannot now be known with certainty, and the capitalized value of the annuity could equal or exceed the value at the date of death.

Based on appraisals received by Petitioners, it is proposed that the properties be deeded as follows:

The Harry Tobiassen Family Trust and the Olaug Tobiassen Family Trust, as tenants-in-common, will receive:

41 Covington Street
281 Walt Whitman Road
5074 Jericho Turnpike

The Mikal Moskeland Family Trust and the Anny Moskeland Family Trust, as tenants-in-common, will receive:

8 Chicory Lane
444 Jericho Turnpike

Following the deeding of the properties in the foregoing manner, based on the fair market values of the properties each of the trusts will own property equal in value to the share of partnership property previously beneficially owned by the grantor of such trust.

Notwithstanding the proposed change of record ownership, pending the death of one of Petitioners the properties will continue to be operated in a manner identical to the present mode of operation, with all income and expenses to be shared equally. The income and expense sharing agreement will be evidenced by a written document.

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 property by any method. This would include 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:

* * *

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.

Section 590.50 of the Gains Tax Regulations provides, in pertinent part, as follows:

(a) Question: Section 1443(5) of the Tax Law exempts a transfer from the gains tax to the extent it "consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest." Does this exempt:

* * *

(2) The transfer by tenants-in-common of their interest in real property to a partnership, to be owned in the same pro rata share as by the tenants-in-common?

Answer: Yes. This is a mere change of identity or form of organization. The partnership's original purchase price of the property is the same as the original purchase price of the tenants-in-common before such transfer (carry-over original purchase price).

(3) The transfer of real property by a corporation to its shareholders, who will hold the real property as tenants-in-common in the same pro rata share as they own the corporation?

Answer: Yes. This is a mere change of identity or form of ownership or organization. The shareholders will have a carry-over original purchase price in the real property.

* * *

(5) The transfer by tenants-in-common of real property to a corporation which the tenants own in the same pro rata share?

Answer: Yes. This is a mere change of identity or form of ownership or organization. (emphasis added)

Pursuant to Section 1443.5 of the Tax Law, a transfer of real property is totally or partially exempt from gains tax to the extent it consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest. Pursuant to Section 590.50 of the Gains Tax Regulations a transfer of real property is totally exempt from gains tax as a mere change of identity if it is demonstrated that following the transfer the same parcel of real property is owned in the same pro rata share by the transferee as such transferee held such property prior to the transfer.

In the instant case, while the income and expenses associated with all of the properties have historically been reported on the partnership returns of "Viking Realty Co.", actual title to all of the properties is held by Mikal Moskeland, Anny Moskeland, Harry Tobiassen and Olaug Tobiassen, each as tenants-in-common as to the other. Presently, to facilitate their respective estate plans, it is proposed to divide the properties between the two Petitioner families so that each family has exclusive title to property with an aggregate fair market value approximately equal to the fair market value of property to be deeded to the other family. Such properties will be held by Grantor Retained Annuity Trusts created by Petitioners. Specifically, the Harry Tobiassen Family Trust and the Olaug Tobiassen Family Trust, as tenants-in-common, will have exclusive title to 41 Covington Street, 281 Walt Whitman Road and 5074 Jericho Turnpike. The Mikal Moskeland Family Trust and the Anny Moskeland Family Trust, as tenants-in-common, will have exclusive title to 8 Chicory Lane and 444 Jericho Turnpike. Accordingly, since Petitioners held an equal interest in all the properties as tenants-in-common prior to the transfer and following the transfer will hold an interest in only some of the properties pursuant to Section 1443.5 of the Tax Law and Section 590.50 of the Gains Tax Regulations such transfer will effectuate a mere change of identity or form of ownership or organization but only to the extent there is no change in the beneficial interest in the real property.

TSB-A-94 (10) R
Real Property
Transfer Gains Tax
July 14, 1994

To the extent, however, Petitioners will no longer have the same pro rata share interest in the real property following the transfer, pursuant to Section 590.50 of the Gains Tax Regulations such transfer will be subject to the gains tax.

Therefore to the extent that the value of any of the properties exceeds \$1,000,000 at the time of the transfer, the individual Petitioner who transfers his or her interest in said property will be subject to the gains tax on the gain on his or her interest transferred to the other Petitioners.

DATE: July 14, 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.