

TAX SECTION

New York State Bar Association

Report on Proposed Amendment to Rules Relating to the
New York City Real Property Transfer Tax

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October 15, 1993

Simon G. Salas, Esq.
Deputy Commissioner for Legal Affairs
345 Adams Street
Brooklyn, NY 11201

Re: New York City Real Property Transfer Tax
Rules

Dear Mr. Salas:

I enclose the report on the proposed amendment to the Rules relating to the New York City Real Property Transfer Tax, which was approved by the Executive Committee of the Tax Section at its meeting yesterday, October 14.

Sincerely yours,

Robert J. Levinsohn

RJL:bld
enclosure

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NEW YORK STATE BAR ASSOCIATION
TAX SECTION
COMMITTEE ON NEW YORK CITY TAX MATTERS

Report on Proposed Amendment to Rules Relating to the
New York city Real Property Transfer Tax¹

The Commissioner of Finance has published a proposed amendment to the Rules relating to the New York City Real Property Transfer Tax ("Transfer Tax"), in relation to mergers and consolidations of limited partnerships. A copy of the proposed amendment is attached.

The existing Transfer Tax Rules, § 23-03(e)(2), provide as follows with respect to corporate mergers:

"A transfer of real property in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation is not subject to tax. However, the related transfer of shares of stock in a statutory merger or consolidation may be subject to tax."

Under the first sentence of the above Rule, there is no tax on the entity-level conveyance from the merging to the surviving corporation. Under the second sentence, however, there may be a shareholder-level tax because the transaction effects a transfer of a controlling economic interest in real property (50% or more of the stock of the merging corporation), taxable under Adm. Code §§ 11-2101 subd. 7 and 8, 11-2102.b(1). The existing Rule goes on

¹ This report was prepared by Robert J. Levinsohn. Helpful comments were received from Carolyn Joy Lee.

to give examples of situations where there is and is not a shareholder level tax, the latter involving the merger of a wholly-owned subsidiary into a parent and the merger of two wholly-owned subsidiaries.

The proposed amendment, covering mergers or consolidations of limited partnerships under the New York Revised Limited Partnership Act, which was effective July 1, 1991, or under comparable provisions of other states' partnership laws, essentially tracks the language of the existing Rule on corporate mergers. However, there follows only an example of a situation where there is no tax at either the entity or the partnership level, in a case where the interests of the partners in both of the merging partnerships are identical. There is no example of a situation where there is a partner-level tax because a controlling economic interest is transferred, which the above statutory provisions define for this purpose as 50% or more of the capital or profits in a partnership.

We commend the City for updating its rules to correspond to New York's revised limited partnership law. We offer the following comments suggesting improvements in the proposal.

1. We believe it would be helpful to practitioners if the illustrations were expanded to include an example of the application of the second sentence of the proposed Rule, where a tax is incurred at the partner level. This could be done by a cross reference to Illustration (i) of the corporate merger rule, or by adding an example with facts corresponding to that illustration covering a limited partnership merger where a partner-level tax is clearly incurred.

2. We recommend that the proposed Rule be expanded to apply to any type of merger permitted under the laws of any state, such as the merger of a Delaware limited partnership (which owns New York City real property) into a pre-existing Delaware corporation, a merger specifically permitted under Delaware law. In such a merger, there would be no entity level tax, and taxation at the partner-shareholder level would depend on whether a controlling economic interest was being transferred. Thus, there should be no tax where the interests of the members of the merging partnership were identical to their interests as shareholders of the surviving corporation.

3. In the alternative, we recommend that the proposal at least be expanded to cover any mixed-entity merger permitted under New York law. The effect of such a provision would be to automatically cover mergers of limited liability companies and limited partnerships, as permitted under the pending LLC legislation, if and when it is enacted. This would obviate the need to amend the Rules again when the pending LLC legislation becomes law. Such a change would be entirely within the spirit of the proposed application of the rules to limited partnership mergers.

THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

NOTICE OF OPPORTUNITY TO COMMENT ON
PROPOSED AMENDMENT TO THE RULES RELATING TO
THE REAL PROPERTY TRANSFER TAX

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE Commissioner of Finance by section 11-2112(1) of the Administrative Code of the City of New York, and in accordance with the requirements of section 1043 of the New York City Charter, that the New York City Department of Finance intends to adopt the following proposed Amendment to Rules Relating to the Real Property Transfer Tax which is necessary to carry out the powers and duties delegated to the Commissioner of Finance by chapter 21 of title II of the Administrative Code of the City of New York.

Written comments regarding this proposed amendment must be submitted to the office of Sim6n G. Salas, Deputy Commissioner for Legal Affairs, 345 Adams Street, Brooklyn, New York 11201 on or before October 14, 1993.

A hearing for public comment will be held on October 14, 1993 at 345 Adams Street, 3rd Floor, Brooklyn, New York at 9:30 A.M. Persons seeking to testify are requested to notify Natalie Schultz at (718) 403-3747 at least three business days prior to the date scheduled for the hearing, although such notice is not required by law.

Written comments and an audio tape recording of oral comments received at the hearing will be available for public review, within a reasonable time after such hearing, by

appointment between the hours of 9:00 A.M. and 5:00 P.M. on weekdays at the office of Gerald Koszer, Records Access Officer, 345 Adams Street, 3rd Floor, Brooklyn, New York.

Note: New matter underscored.

AMENDMENT TO RULES RELATING TO THE
REAL PROPERTY TRANSFER TAX

Section 1. Subdivision (e) of section 23-03 of Title 19 of the Compilation of the Rules of the City of New York Relating to the Real Property Transfer Tax, promulgated July 30, 1968 and last amended November 29, 1990, is amended to add a new paragraph (4) thereto to read as follows:

(4) Limited Partnership Mergers. A conveyance of real property or a transfer of a controlling economic interest in real property In a merger or consolidation of two or more limited Partnerships from a constituent limited partnership to the continuing or new limited partnership is not subject to tax if the merger or consolidation is pursuant to Article 8-A of the New York Partnership Law or pursuant to comparable provisions of the partnership laws of another state, territory, possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico_ However, the related transfer, of partnership interests in the merger or consolidation may be subject to tax.

To illustrate: A owns a 90% limited partnership interest in capital and profits in each of limited partnerships X and Y. B is a general partner of both partnerships and owns the remaining 10% partnership interest in capital and profits in each limited partnership, X owns real property in New York City. Pursuant to Article B-A of the New York Partnership Law, x will merge into y. Following the merger A will have a 90% limited partnership

interest in capital and profits in Y, and B will be the general partner with a 10% partnership interest in capital and profits in Y. The related transfers of partnership interests in this transaction are not subject to tax because there is no transfer of an economic interest in real property. The vesting of X's assets in Y by operation of law, is also not subject to tax.

BASIS AND PURPOSE OF PROPOSED AMENDMENT

This amendment affects the provisions of the Rules Relating to the Real Property Transfer Tax governing conveyances to corporations and partnerships. The current rules address the transfer tax consequences of a statutory merger or consolidation of corporations only. With the enactment of the Revised Limited Partnership Act, effective July 1, 1991, limited partnerships are now expressly permitted to merge or consolidate under New York law. This amendment is intended to reflect this legislation and provide rules for the treatment of mergers and consolidations of limited partnerships.

As in the case of corporations, the transfer of the merged or consolidated limited partnership's real property or economic interests in real property to the continuing or new limited partnership will not be subject to tax if the transfer is pursuant to the Revised Limited Partnership Act or comparable limited partnership laws of another permissible jurisdiction. The jurisdictions enumerated in the amendment are those jurisdictions with whose partnerships the Revised Limited Partnership Act permits a New York limited partnership to merge or consolidate. The corresponding transfer of limited partnership interests may be subject to tax.

The amendment is effective for mergers or consolidations of limited partnerships occurring on or after July 1, 1991.

Kathleen Grimm

Acting Commissioner of Finance