



FINANCE  
NEW • YORK  
THE CITY OF NEW YORK  
DEPARTMENT OF FINANCE

December 26, 2003

Re: Request for Letter Ruling  
Anonymous  
FLR-034812-021

Dear \_\_\_\_\_ :

This is in response to your request for a ruling dated September 9, 2003 on an anonymous basis regarding the application of the New York City Real Property Transfer Tax ("RPTT") to a proposed transfer of a trust's assets to a new trust.

FACTS

The facts presented in your ruling request are as follows:

Currently several parcels of New York City real property are held indirectly by a trust ("Trust I") as result of the trust holding a 99% interest in a Limited Liability Company ("LLC") that holds real estate investments. Some of the real property is encumbered by debt.

The relevant terms of the trust are as follows:

- For federal income tax purposes the grantor of Trust I is treated as the owner of the trust's assets.
- Currently, the trustees are four of the grantor's five children (children 1 through 4). Child 5 may also become a trustee at any time.
- The beneficiaries are the grantor's children, grandchildren and the issue of grandchildren.
- Trust I will terminate on the earlier of the death of the last survivor of the beneficiaries or three years after the death of the grantor, who is now in his early 70's.
- The income and principal of Trust I can be paid to any of the beneficiaries, in any amount, at any time, as determined by the trustees. However, no trustee who is a child of the grantor can make a distribution to any child of the grantor. A non-

beneficiary independent trustee can be appointed by the existing trustees to make such a distribution.

- On the termination of Trust I, the trust principal will be divided into as many shares as there are living children of the grantor or deceased children with issue. At the present time this would result in 5 shares.
- These shares will be used to form secondary trusts. The secondary trusts will be formed for the benefit of each then living child of the grantor and that child's issue. If a child has no issue, then the share is held in trust for the benefit of that child. If the child is over 50 and has no issue, then the property goes outright to the child. The secondary trusts will be funded with equal amounts. Currently, each secondary trust would receive 20% of the assets.
- The secondary trusts will terminate on the earlier of the death of the survivor of the beneficiaries or the perpetuities date.

The trustees of Trust I, as empowered to do so under the trust terms, want to transfer the trust's assets to a new trust with virtually identical terms. The new trust ("Trust II") will be exactly the same as Trust I until three years after the death of the grantor (who is now in his early seventies). Thereafter, secondary trusts will be created but instead of dividing the trust property by the number of children, it will be divided by the number of grandchildren. The beneficiaries of each secondary trust will be one grandchild and that grandchild's parent (the grantor's child). The secondary trusts will provide that as new grandchildren are born, a portion of each existing trust will be severed and the severed portions will be joined into one trust for the new grandchild and his or her parent, who is a child of the grantor.

If the secondary trusts were created today under the terms of Trust I, the trust assets would be allocated as follows:

<u>Trust</u>	<u>Beneficiaries</u>	<u>Percent</u>
Trust A	Child 1 Grandchild 1 Grandchild 2	20%
Trust B	Child 2 Grandchild 3 Grandchild 4	20%
Trust C	Child 3 Grandchild 5 Grandchild 6 Grandchild 7	20%
Trust D	Child 4 Grandchild 8 Grandchild 9 Grandchild 10	20%

Trust E	Child 5	20%
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Under the proposed terms of Trust II, if the secondary trusts were created today, the trust's assets would be allocated as follows:

<u>Trust</u>	<u>Beneficiaries</u>	<u>Percent</u>
Trust A	Child 1 Grandchild 1	10%
Trust B	Child 1 Grandchild 2	10%
Trust C	Child 2 Grandchild 3	10%
Trust D	Child 2 Grandchild 4	10%
Trust E	Child 3 Grandchild 5	10%
Trust F	Child 3 Grandchild 6	10%
Trust G	Child 3 Grandchild 7	10%
Trust H	Child 4 Grandchild 8	10%
Trust I	Child 4 Grandchild 9	10%
Trust J	Child 4 Grandchild 10	10%

Under Trust II, the trustees would have the same power to distribute trust income and assets to the beneficiaries as they did under Trust I.

#### ISSUE

You have requested a ruling that the proposed transaction would be exempt from the RPTT under section 11-2106(b)(8) of the New York City Administrative Code (the "Code") as a mere change of identity or form of ownership.

#### CONCLUSION

Based upon the facts presented, we conclude that the proposed conveyance of the assets of Trust I to Trust II is a taxable event that would be exempt under the RPTT pursuant to

Code section 11-2106(b)(8), except to the extent that the beneficial interests of Child 3, and his or her issue, and Child 4, and his or her issue, have increased under the terms of Trust II. Because the valuation of the amount by which those beneficial interests have increased involves factual questions, we cannot render an opinion on that issue.

## DISCUSSION

Code section 11-2102 imposes the RPTT on the conveyance of real property or the transfer of a controlling economic interest in real property located in the City, where the consideration for the conveyance or transfer exceeds \$25,000. An interest in a partnership, association, trust or other entity holding real property located in New York is a controlling economic interest if it represents fifty percent or more of the capital, profits or beneficial interests in the partnership, association, trust or other entity. Code §11-2101.8. For purposes of the RPTT, the term “partnership” means an entity classified as a partnership for federal income tax purposes, including a subchapter K limited liability company. Code §11-126. When the controlling economic interest is transferred as the result of the liquidation of a trust, the RPTT is measured by the greater of the consideration or the property’s fair market value. Code §11-2102(c)(1). Code section 11-2101(9) defines “consideration” as the price paid or required to be paid and includes the amount of any indebtedness on the property.

Under Code section 11-2106(b)(8), a deed, instrument or transaction conveying or transferring real property or an economic interest that effects a mere change of identity or form of ownership or organization is exempt from the RPTT to the extent the beneficial ownership of such real property or economic interest remains the same. When a liquidating entity transfers a controlling economic interest in real property, the consideration for the transfer is reduced to the extent the beneficial ownership of the real property remains the same. Title 19 of the Rules of the City of New York (“RCNY”) §23-03(g)(2)(ii).

Trust I holds a 99% interest in LLC that constitutes a controlling economic interest in real property for purposes of the RPTT. Under the plan, trustees of Trust I will liquidate Trust I and form Trust II. This is a transfer subject to the RPTT. The RPTT in this case is measured by the greater of the consideration or a proportionate share of the underlying property’s fair market value. Because the grantor’s beneficial interest in Trust II is identical to his interest in Trust I, the transfer of the assets from Trust I to Trust II will be exempt as a mere change of form under Code section 11-2106(b)(8) to the extent of the grantor’s beneficial ownership.

Under the terms of both Trust I and Trust II, assuming the secondary trusts were created now, Child 1 and Child 2, and their respective children, would each have a 20% beneficial interest in the assets of the trust. However, comparing the terms of Trust I to the proposed terms of Trust II, Child 5’s beneficial interest would be reduced from a 20% beneficial interest under the terms of Trust I to a 0% beneficial interest under the terms of Trust II. This reduction in beneficial interest corresponds to an increase in the beneficial interests of Child 3 and his or her issue and Child 4 and his or her issue. For this reason, there is a change of beneficial ownership upon the transfer of the assets to Trust II. Thus,

the transfer of Trust I's assets as it relates to the residual interests is exempt except to the extent of the change in beneficial ownership by Child 3 and Child 4, and their respective issue. Because the valuation of this change in beneficial interests involves questions of fact, it is not an appropriate subject for a letter ruling. See 19 RCNY §16-01(c)(5).

Very truly yours,

Ellen E. Hoffman  
Assistant Commissioner for Tax Law and Conciliations

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