

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

TSB-A-90(8)-R
Real Property
Transfer Gains Tax
Real Estate Transfer Tax
October 24, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M900608B

On June 8, 1990, a Petition for Advisory Opinion was received from CrossLand Savings, FSB, 211 Montague Street, Brooklyn, New York 11201.

The issue raised by Petitioner, CrossLand Savings, FSB, is whether the recapitalization of the Petitioner by reclassifying non-voting preferred stock of the Petitioner into voting common stock is a transfer or an acquisition of a controlling interest in a corporation which has an interest in real property in New York State and, therefore, subject to the Real Property Transfer Gains Tax (hereinafter the "gains tax") or the Real Estate Transfer Tax (hereinafter the "transfer tax").

Petitioner owns and leases real property located in New York State. The Petitioner currently has three issues of stock outstanding: (i) 13,828,878 shares of common stock par value \$1.00 per share (the "Common stock"), (ii) 5,175,000 shares of \$1.8125 Cumulative Convertible Preferred Stock, Series A (the "Series A Preferred Stock"), and (iii) 2,500,000 shares of \$12.75 Cumulative Preferred Stock, Series B (the "Series B Preferred Stock" and, together with the Series A Preferred Stock, the "Preferred Stock"). The Common Stock is the only class of voting stock. The Preferred Stock currently has the right to vote only in certain limited circumstances, including proposed amendments to the Petitioner's charter that may adversely affect the holders of the Preferred Stock.

The Petitioner intends to ask the holders of the Common Stock, Series A Preferred Stock and Series B Preferred Stock to vote on the following proposed amendments, among others, to the Petitioner's charter: (a) to reclassify each share of Series A Preferred into specified number of shares of Common Stock and (b) to reclassify each share of Series B Preferred Stock into a specified number of shares of Common Stock (the "Reclassification"). Under the Petitioner's charter, the reclassification of the Series A Preferred Stock to Common Stock requires the affirmative vote of the holders of a majority of the shares of Common Stock and of two-thirds of the shares of the Series A Preferred Stock. The reclassification of the Series B Preferred Stock requires the affirmative vote of the holders of a majority of the shares of the Common Stock and of a majority of the shares of the Series B Preferred Stock.

The holders of the Common Stock currently hold 26.12 percent, the holders of the Series A Preferred Stock currently hold 24.77 percent, and the holders of the Series B Preferred Stock currently hold 49.11 percent of the total market value of the outstanding stock of the Petitioner, based on the closing prices of the various issues of stock on the New York Stock Exchange on May 31, 1990. Based on these percentages, it is expected that after the Reclassification, the current holders of the Common Stock will hold less than 50 percent of the Common Stock, and the

former holders of the Preferred Stock will hold more than 50 percent of the Common Stock. Because the reclassification ratios have not yet been fixed, the exact percentage changes cannot be provided.

The Petitioner believes that the Reclassification is a necessary step in bringing the Petitioner into compliance with the new regulatory capital requirements established by its primary regulator, the Office of Thrift Supervision ("OTS") (as successor to the Federal Home Loan Bank Board) from which the Petitioner holds its charter under the Home Owners' Loan Act of 1933, as amended. These new regulatory capital requirements are being imposed on the Petitioner as a result of the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Cumulative Preferred Stock, which represents approximately 74 percent of the Petitioner's equity and which counted as regulatory capital when issued, no longer qualifies for inclusion in regulatory capital as defined by the OTS regulations promulgated pursuant to FIRREA. Since the Petitioner is not permitted to include the Preferred Stock in its regulatory capital, it fails to satisfy the new leverage, tangible and risk-based capital requirements mandated by FIRREA. This failure to meet the capital requirements could subject the Petitioner to severe regulatory sanctions, unless the plan filed by the Bank to bring the Bank into compliance with the new requirements is accepted by the OTS. After consultation with its financial advisor, the Board of Directors of the Petitioner has concluded that the only practical way to bring the Petitioner into compliance with the new capital requirements is to reclassify the Preferred Stock into Common Stock and, as a result, the Reclassification is the principal element in the plan filed by the Petitioner with the OTS.

The gains tax is a ten percent on the gain derived from the transfer of real property, which includes the transfer or acquisition 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 in accordance with Sections 1440 and 1441 of the Tax Law.

Gains Tax Regulation 590.6 defines the term "controlling interest" to mean:

Question: What constitutes a controlling interest in an entity which has an interest in real property?

Answer: A controlling interest means:

- (1) in the case of a corporation, either 50 percent or more of the total combined voting power of all classes of stock of such corporation, or 50 percent or more of the capital, profits or beneficial interest in such voting stock of such corporation; and
- (2) in the case of a partnership, association, trust or other entity, 50 percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.

For purposes of the gains tax, in the case of a corporation which has an interest in real property, the transfer or acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, transfers or acquires a total of fifty percent or more of the voting stock in such corporation.

Gains Tax Regulation 590.45(b) provides as follows:

(b) Question: When is a group of persons acting in concert?

Answer: When the various purchasers have a relationship such that one purchaser influences or controls the actions of another. For example, if a parent and a wholly owned subsidiary each purchase a 25-percent interest in an entity, the two corporations will be considered to have acted in concert to acquire a controlling interest (i.e., 50 percent) in the entity.

Where the individuals or entities are not commonly controlled or owned, persons will be treated as acting in concert only when the unity with which the purchasers have negotiated and will consummate the transfer of ownership interests supports a finding that they are acting as a single entity. If the acquisitions are completely independent, each purchaser buying without regard to the identity of other purchasers, then the acquisition will be treated as separate acquisitions. The transferees must provide affidavits swearing that their acquisitions are independent of each other. Factors that will indicate whether persons are acting in concert include the following:

- (1) The acquisitions are closely related in time.
- (2) There are few purchasers.
- (3) The contracts to purchase contain mutual terms.
- (4) The purchasers have entered into an agreement in addition to the purchase contract binding themselves to a course of action with respect to the acquisition. (emphasis added)

The criteria for "acting in concert" would apply in a similar manner to transferors who are acting in concert to transfer a controlling interest.

The transfer tax is imposed on each conveyance of real property or interest therein, including the conveyance of shares in a cooperative housing corporation, when the consideration exceeds \$500.00 in accordance with Sections 1401 and 1402 of the Tax Law.

Transfer Tax Regulation 575.1(e)(1) defines the term "conveyance" to mean the "transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance by liquidation or by a receiver, or transfer or acquisition of a controlling interest in any with and interest in real property." (emphasis added)

The term "controlling interest" is defined in Transfer Tax Regulation 575.1(b), in part, to mean in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital profits or beneficial interest in such voting stock of such corporation.

Further, Transfer Tax Regulation 575.6 provides, in part, that the transfer or acquisition of a controlling interest occurs when a person, or group of persons acting in concert, transfers or acquires a total of 50% or more of the voting stock in such corporation.

Transfer Tax Regulation 575.1(d)(4) provides that in the case of the transfer or acquisition of a controlling interest in any entity that owns real property, consideration means the fair market value of the real property or interest therein, apportioned based on the percentage of the ownership interest transferred or acquired in the entity.

"(2) Where the individuals or entities are not commonly controlled or owned, persons will be treated as acting in concert when the unity with which the sellers or purchasers have negotiated and will consummate the transfer of ownership interests indicates that they are acting as a single entity. If the transfers or acquisitions are completely independent, each grantor selling or grantee buying without regard to the identity of the other grantors or grantees, then the transfers or acquisitions will be treated as separate transfers or acquisitions. The grantors or grantees may be required to provide a sworn statement that their transfers or acquisitions are independent of each other. Factors that will indicate whether persons are acting in concert include the following:

- (i) The transfers or acquisitions are clearly related in time.
- (ii) There are few grantors or grantees.
- (iii) The contracts of sale contain mutual terms.
- (iv) The grantors or grantees have entered into an agreement in addition to the sales contract binding themselves to a course of action with respect to the transfer or acquisition." (emphasis added)

In the instant case, while fifty percent or more of the total combined voting stock of the corporation is being transferred to the preferred stockholders, no single common stockholder will transfer fifty percent or more of his interest in the corporation. Also, no single preferred stockholder will acquire fifty percent or more of the combined voting stock of the corporation. Moreover, neither the common stockholders nor the preferred stockholders are acting in concert to transfer or acquire a controlling interest in the corporation. The fact that a vote is being taken at a special stockholders meeting does not in itself result in the stockholders acting in concert. Both before and after the reclassification of the Preferred Stock, as well, as during the votes on the reclassification, each stockholder in the bank is able to vote and take any action as a stockholder independently of all other stockholders and without any stockholder agreed restrictions on any action to be taken. Accordingly, the reclassification of the non-voting preferred stockholder's stock into voting common stock

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will not constitute the transfer or acquisition of a controlling interest, and, therefore, will not be subject to either the gains tax or the transfer tax.

DATED: October 24, 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.