



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

November 28, 2003

RE: Ruling Request

Real Property Transfer Tax
FLR: 034808-021

Dear _____ :

This letter responds to the request of _____ (the "Taxpayer"), received August 22, 2003, for a ruling regarding the application of the New York City Real Property Transfer Tax (the "RPTT") to the proposed conveyance described below.

FACTS

By deed executed on _____, 2003, the Taxpayer purchased property known as _____, in Brooklyn, NY (block _____, lot _____) (the "Property") from the trustee of the bankruptcy estate (the "Trustee") of _____ (the "Association"). The Association had been incorporated in _____ under section 402 of the New York State Not-for-Profit Law in order to " _____" in Brooklyn. The Association's certificate of incorporation was amended in _____, _____, and _____, to add additional corporate purposes.

The Association became the subject of a bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of New York. The proceeding was conducted under chapter 7 of the Bankruptcy Code (11 U.S.C. sections 701 through 766). Before the bankruptcy proceedings, the Association had owned the Property. On _____, 2003, the Bankruptcy Court authorized and approved the sale of the Property by the Trustee to the Taxpayer for \$ _____.

ISSUE

You have requested a ruling that the sale of the Property by the Trustee to the Taxpayer is exempt from the RPTT.

CONCLUSION

Based upon the facts presented and representations submitted, we have determined that the sale of the Property by the Trustee to the Taxpayer is not exempt from the RPTT.

DISCUSSION

The RPTT applies to each deed conveying an interest in New York City real property when the consideration for the real property interest exceeds \$25,000. Section 11-2102(a) of the New York City Administrative Code (the "Code"). The Code and the Rules of the City of New York (the "RCNY") include exemptions so that certain conveyances that otherwise would be taxable are not subject to tax.

Exemptions related to the conveyance by the Trustee.

Title 19 RCNY section 23-03(d) describes certain conveyances that are subject to the RPTT. These include deeds given by referees, receivers, sheriffs, etc., for realty sold under foreclosure or execution.

Title 19 RCNY section 23-03(j) exempts from the tax the following types of deeds:

- (5) A deed executed by a debtor conveying real property to an assignee for the benefit of his creditors; however, when the assignee conveys such property to a creditor or sells it to any other person, the deed by him is taxable if the consideration exceeds \$ 25,000.
- (6) Conveyance to a receiver of realty included in the receivership assets, and reconveyance of such realty upon termination of the receivership.
- (8) Transfers made pursuant to a confirmed plan of reorganization as provided under 11 U.S.C. § 1146(c) [Title 11 of the U.S.C. is the Bankruptcy Code].

Each of these exemptions is addressed below.

Assignee of creditors: The above section 23-03(j)(5) provides that when an assignee for the benefit of a debtor's creditors sells real property to any other person, the deed by that assignee is taxable if the consideration exceeds \$ 25,000.¹ In this case, because the Trustee sold the Property, if the Trustee is an assignee for the benefit of the Association's creditors, the sale is subject to tax. It is well-accepted law that a bankruptcy trustee acts a fiduciary for the bankrupt entity's creditors and not as an agent of the bankrupt entity. *In re Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988), *cert. den.*, 490 US 1006 (1989). Thus, unless the sale is otherwise exempt, it will be subject to tax under 19 RCNY 23-03(j)(5).

Bankruptcy plan exception: Section 23-03(j)(8) exempts "[t]ransfers made pursuant to a confirmed plan of reorganization as provided under 11 U.S.C. § 1146(c)." Section 1146(c) provides that the "issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." Section 1129 is entitled "Confirmation of a Plan," and sets out the

¹ Section 23-03(j)(5) of 19 RCNY also exempts from tax the conveyance from the debtor to the assignee from tax. While that may have applied to the conveyance from the Association to the Trustee, a ruling has not been requested on that conveyance.

requirements that a plan must meet be confirmed. Both sections 1146 and 1129 are in chapter 11 the Bankruptcy Code, which is titled "[r]eorganizations."

The bankruptcy proceeding involving the Association, in contrast, was carried out under chapter 7 of the Bankruptcy Code, which is entitled "[l]iquidations." Proceedings under chapter 7 of the Bankruptcy Code are not subject to the requirements that a plan be confirmed as set out in 11 U.S.C. section 1129. As a result, 11 U.S.C. section 1146(c) does not apply to a sale pursuant to chapter 7 of the Bankruptcy Code, and the sale by the Trustee is not exempt under 19 RCNY section 23-03(j)(8).

Receivership Exemption: Under section 23-03(j)(6), a "conveyance to a receiver of realty included in the receivership assets, and reconveyance of such realty upon termination of the receivership" is not subject to the RPTT. The Code and the RCNY do not define "receiver." Generally, a receiver is appointed by a court as an impartial intermediary to take possession of a debtor's assets for the benefit of the creditors to manage or dispose of the assets as directed by the court. In the present case, the Trustee was appointed by the Bankruptcy Court to facilitate the liquidation of the Association's assets. The Trustee performed a function comparable to that of a receiver. Thus, 19 RCNY section 23-03(j)(8) would apply in this case.

That section, however, does not exempt all conveyances by the receiver; it only exempts "reconveyance of such realty upon termination of the receivership." The RPTT and the RPTT rules do not define "reconveyance." The common meaning of "reconvey," as provided by Webster's Third New International Dictionary, Unabridged, is "to convey back...to restore (as an estate) to a previous owner..." That interpretation is also consistent with section 23-03(j)(5) and other provisions, such as those in section 23-03(d), which provide that a transfer to a third-party is subject to tax. Because in this case the Trustee conveyed the Property to a third-party and not back to the original owner, the transfer is not exempt under 19 RCNY section 23-03(j).

Exemption related to conveyances by a not-for-profit corporation.

Code section 11-2106(b)(2) and 19 RCNY 23-05(b)(2) exempt conveyances of real property by not-for-profit corporations operated exclusively for religious, charitable, or educational purposes, if certain other conditions are met. Because the Association was incorporated as a not-for-profit corporation, that exemption may have applied had the Association conveyed the Property directly to the Taxpayer. However, it did not do so, rather the Property was first conveyed to the Trustee. Thus, Code section 11-2106(b)(2) and 19 RCNY section 23-05(b)(2) do not apply.

Summary.

Because no exemption applies to the conveyance of the Property by the Trustee to the Taxpayer, that conveyance is subject to tax.

* * *

The Department reserves the right to verify the information submitted.

Sincerely,

Ellen E. Hoffman
Assistant Commissioner for Tax Law and Conciliation
Office of Legal Affairs

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