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Re: Ruling Request
XXX
Real Property Transfer Tax
FLR: 13-4938

Dear XXX:

This letter responds to your request, dated February 28, 2013, on behalf of XXX (“Holdings”), XXX (“BA LLC”), and XXX (“LC LLC”) (collectively, the “Taxpayers”) for a ruling applying the New York City Real Property Transfer Tax (the “RPTT”) to the proposed transaction described below. This office received additional information concerning this request on March 15 and April 25, 2013.

FACTS

The facts presented are as follows:

The Taxpayers. LC LLC and BA LLC are New York limited liability companies formed in November 2010. Before being LLCs, those firms operated as partnerships (reference to “LC LLC” and “BA LLC” herein includes their former status as partnerships). LC LLC and BA LLC have the same principal, XXX. Holdings, a Delaware limited liability company, is a real estate developer. Holdings is not affiliated with LC LLC and BA LLC.

The Original Contract. LC LLC and BA LLC owned property in Manhattan on Block XXX, tax lots XXX (the “Property”). By a contract of sale dated as of XXX (the “Original Contract”), LC LLC and BA LLC (collectively, the “Owner”) agreed to sell a portion of the Property to Holdings. The Original Contract provided the Owner with the option to sell to Holdings a “fee above the plane” following a subdivision of the Property, with the result that the Owner would retain the cellar and the first two floors to be used for commercial purposes (the “Commercial Space”) and convey to Holdings the portion above that for its use, which would include residential units (the “Holdings Space”). Following the closing, Holdings would build a new building, with each party bearing the cost of the construction on its respective portion of the Property. For technical reasons, the subdivision called for in the Original Contract could not be completed in a timely fashion.

The conveyance and the TIC Agreement. In place of the Original Contract, Taxpayers entered into a tenants-in-common arrangement. Pursuant to that arrangement, on XXX, the Owner conveyed by deed an undivided XXX percent tenancy-in-common interest in the Property to Holdings, an amount of space corresponding to the floor space of the Holdings Space, and the Owner retained an undivided XXX percent tenancy-in-common interest in the Property, an amount of space corresponding to the floor space of the Commercial Space. At the closing, the RPTT and other transfer taxes were paid. Holdings would pay the real property taxes and send an invoice to the Owner for LC LLC and BA LLC's pro-rata share of those taxes.

Simultaneous with the conveyance to Holdings, the Owner and Holdings entered into the TIC [Tenants-in-Common] and Retail Construction and Exchange Agreement to provide for the construction of a building on the Property. That agreement was subsequently amended by the Amendment to the TIC and Retail Unit Construction and Exchange Agreement dated as of XXX, 2007. (That amended agreement is referred to herein as the "TIC Agreement.") The Taxpayers intended to subject the Property to a condominium regime. Agreeing to a condominium declaration, however, would require the parties to address numerous technical matters, such as building construction and the allocation of common expenses, that could not be adequately resolved at that the time of the TIC Agreement. As a result, the TIC Agreement provided that the Property would be subject to a condominium regime pursuant to Article 9-B of the Real Property Law upon completion.

The building. Pursuant to the TIC Agreement, Holdings engaged a contractor to construct the building. During the construction of the building, the Owner had no control except with respect to the Commercial Space. Each party was responsible for costs related to its space: the Owner for construction expenses related to the Commercial Space and Holdings for the balance. Construction costs (hard and soft) for the Project were detailed in the development draws submitted to the lender with the cost assigned either to the Owner or Holdings. The Owner is required to reimburse Holdings for the construction costs related to the Commercial Space.

The parties originally estimated the construction costs to be paid by the Owner to Holdings at \$XXX. The amount was subsequently modified to \$XXX by a settlement agreement dated as of XXX.

As provided for in the TIC Agreement, the Property was subject to a condominium regime (the "Condominium") by the Declaration of

Condominium, signed by the Owner and Holdings, dated as of XXX, and filed with the City Register. The Condominium uses the name The XXX Condominium. The Commercial Space is one unit, called the Commercial Unit, and is located on the tax map of Manhattan at block XXX, lot XXX. The Condominium also includes residential units in the floors above the Commercial Unit, which Holdings will retain for sale. Under the Condominium plan, the Owner has no control over the residential units and cannot benefit from their sale or lease, and Holdings has no control over the Commercial Unit and cannot benefit from its sale or lease.

The transfer. Pursuant to Article VII of the TIC Agreement, upon completion of construction and the payment of the construction costs, the Owner would transfer its XXX percent tenant-in-common interest in the Property to Holdings, and Holdings would transfer its undivided interest in the Commercial Unit to the Owner. That proposed transfer of title would include the respective percentage of common interest attributed to the Commercial Unit in the Declaration of Condominium because such percentage interest must be transferred with title. Because the Units are separately assessed for real estate taxes, each party would be responsible for its own real estate tax bill. Following the transfers described in Article VII of the TIC Agreement, the Owner would hold all right, title and interest in and to the Commercial Unit, and Holdings would hold all right, title and interest in and to the remaining Condominium units, except that each would share proportionate ownership of the common space.

ISSUES

You have requested the following rulings:

1. The proposed transfer of the Owner's XXX percent undivided tenant-in-common interest in the Property by the Owner to Holdings would be considered exempt under Code section 11-2106(b)(8) of the New York City Administrative Code (the "Code") as a transfer that effects a mere change of identity; and
2. The proposed transfer of Holdings' undivided interest in the Commercial Unit by Holdings to the Owner would be considered exempt under Code section 11-2106(b)(8) as a transfer that effects a mere change of identity.

CONCLUSIONS

Based upon the facts presented and the representations submitted, we conclude that

1. The proposed transfer of the Owner's XXX percent undivided tenant-in-common interest in the Property by the Owner to Holdings would be considered exempt under Code section 11-2106(b)(8) as a transfer that effects a mere change of identity; and
2. The proposed transfer of Holdings' undivided interest in the Commercial Unit by Holdings to the Owner would be considered exempt under Code section 11-2106(b)(8) as a transfer that effects a mere change of identity.

DISCUSSION

The RPTT applies to each deed conveying an interest in New York City real property and to each instrument or transaction whereby any economic interest in real property is transferred when the consideration for the real property or economic interest exceeds \$25,000. Code sections 11-2102(a) and (b). Code section 11-2106(b)(8) exempts from tax transfers or conveyances of real property or an interest that effects a mere change of identity or form of ownership, to the extent that the beneficial ownership of the property remains the same. When that section applies, both the grantor and the grantee are exempt.

Code section 11-2106(b) provides that a transfer or conveyance of real property or an interest therein that effects a mere change of identity or form of ownership is exempt from the RPTT to the extent that the beneficial ownership of the property remains the same. Under section 23-05(b)(8)(iv) of title 19 of the Rules of the City of New York (the "RCNY"), the determination of the beneficial ownership of real property before a transaction and the extent to which the beneficial interest remains the same following the transaction will be based on the facts and circumstances. The operation of this exemption, in the case of a transfer of real property interests held as tenants-in-common for another interest, is illustrated by the following example in 19 RCNY section 23-05(b)(8):

Example A: A and B, two equal tenants-in-common of parcel 1, transfer their interests in parcel 1 to X corporation on January 1, 1995, each receiving 50% of the outstanding stock of X. The transfer is wholly exempt from tax as a mere change in identity or form of ownership or organization because the beneficial ownership of the real property remains 100%, the same as before the transfer.

In the facts presented, before the proposed transaction, the Taxpayers own the Property as tenants-in-common with undivided interests, and, following the proposed transaction, each would own specific units in a condominium. The New York State Department of Taxation and Finance, applying the same exemption under New York State Real Property Gains and Transfer taxes, addressed a similar situation in In 115 Spring Street Company, TSB-94(3)-R (March 30, 1994). In that case, a partnership, with four equal partners, owned a building that included four residential units and space that was rented out for commercial use. The partnership agreement specified which residential unit in the building was to be occupied by each of the partners. The building was converted to a condominium, with the commercial space being one unit and the four residential units being another unit. The four partners owned the residential unit as a cooperative housing corporation. Each of the four partners would receive shares in that corporation allocated to the unit it had previously occupied. Although the partnership had owned all the units before the conversions, the Department found that each partner held a beneficial interest only in the unit he had occupied under the partnership agreement. As a result, the transfer of the shares allocated to the units occupied by a partner to that partner did not result in a change in beneficial ownership and was exempt from tax as a mere change of form. See also Vacation Village Homeowners Association, Inc., TSB-A-94(6)-R (May 24, 1994) (conversion of homes held within a homeowners association to condominium units exempt as mere change of form); Armory Place LLC, TSB-A-99(3)-R (May 19, 1999); Columbus Centre LLC and its Members, TSB-A-01(3)-R (April 18, 2001).

The transfer of Holdings' undivided interest in the Commercial Unit to the Owner. In this case, the Owner would exchange its XXX percent undivided interest in the Property for a deed to the Commercial Unit. Like 115 Spring Street Company, supra, while the Owner's interest in the Property was undivided, it is apparent that under the TIC Agreement, the Owner's beneficial interest was limited to the Commercial Space. For example, during construction the Owner had no control over that construction except with respect to the Commercial Space; the Owner was responsible only for costs related to the Commercial Space and was required to reimburse Holdings for only those costs; the Owner has no right to benefit from the proceeds or sale or lease of the residential units; and Holdings would pay the real property taxes and send an invoice to the Owner for LC LLC and BA LLC's pro-rata share of those taxes represented by the Commercial Space. In addition, it has been the intent of the parties since the Original Contract that LC LLC and BA LLC would own the lower floors and that Holdings would own and market the upper floors, and it was the result of certain technical issues that both legal and beneficial ownership did not come to pass at an earlier time.

The TIC Agreement, as modified by the settlement agreement, requires the Owner to pay Holdings \$XXX. The facts presented demonstrate that that amount is paid to reimburse Holdings, the real estate developer, for construction costs it has incurred and not as consideration for the transfer.

Following the proposed transfer, LC LLC and BA LLC would have a deed to the Commercial Unit and would continue to be beneficial owners of that space. Based on the representations submitted, the beneficial ownership of the Commercial Space following the proposed transfer would be the same as the beneficial ownership before the conveyance. Because there would be no change in beneficial ownership as a result of the proposed conveyance, that conveyance would effect a mere change of form and would be exempt from the RPTT under Code section 11-2106(b)(8).

The transfer of the Owner's XXX percent undivided interest to Holdings. In this case, Holdings would exchange a deed to the Commercial Unit for the Owner's XXX percent undivided tenant-in-common interest in the Property. As is the case with the Owner's transfer of its undivided interest, addressed above, while Holding's interest in the Property was undivided, it is apparent under the TIC Agreement that its beneficial interest is limited to the Holdings Space. For example, during construction, Holdings had no control over that construction except with respect to the Holdings Space; Holdings was responsible only for costs related to the Holdings Space and must be reimbursed by the Owner for costs related to the Commercial Space; Holdings alone benefited from the proceeds or sale or lease of the residential units; and Holdings would be reimbursed by the Owner for the share of real property taxes represented by the Commercial Space. In addition, it has been the intent of the parties since the Original Contract that LC LLC and BA LLC would own the lower floors and that Holdings would own and market the upper floors, and it was the result of certain technical issues that both legal and beneficial ownership did not come to pass at an earlier time.

The facts presented demonstrate that the \$XXX that the Owner is required to pay Holdings under the TIC Agreement, as modified by the settlement agreement, is to reimburse Holdings for construction costs it has incurred and not as consideration for the transfer.

Following the proposed transfer, Holdings would have title to the units that had constituted the Holdings Space and would continue to be the beneficial owner of that space. Based on the representations submitted, the beneficial ownership of the Holdings Space following the proposed transfer would be the same as the beneficial ownership before the conveyance. Because there would be no change in beneficial ownership as a result of the proposed conveyance, that conveyance



would effect a mere change of form and would be exempt from the RPTT under Code section 11-2106(b)(8).

* * *

This opinion is based on the facts as presented. The Department of Finance reserves the right to modify its opinion in the event that the facts upon which this opinion is based are other than as described above.

Very truly yours,

Beth Goldman
General Counsel

cc: XXX

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