

August 9, 2001

RE: Ruling Request

Real Property Transfer Tax
FLR-014779-021

Dear Mr. :

This letter responds to your request, dated June 21, 2001, on behalf of (the "Taxpayer"), for a ruling regarding the application of the New York City Real Property Transfer Tax (the "RPTT") to the transfer of cooperative apartments¹ ("Unit 1") and ("Unit 2") at .

FACTS

The facts presented are as follows:

On 1988, the Taxpayer purchased Unit 1 without mortgage financing. On 1992, the Taxpayer married (the "Spouse"). On 1995, the Taxpayer and the Spouse jointly purchased Unit 2, intending to combine Unit 1 and Unit 2 into one apartment. The Taxpayer and the Spouse paid \$ for Unit 2, of which about \$ came from the Taxpayer's personal funds. The remaining \$ came from a mortgage loan from (the "Bank"), secured by the shares appurtenant to Unit 2.

The Taxpayer and the Spouse acquired Unit 2 as joint tenants. Because Unit 1 and Unit 2 were to be combined into one apartment, the Bank required Unit 1 also to be held in joint ownership by the Taxpayer and the Spouse, and, as a result, ownership of Unit 1 was transferred by the Taxpayer to the Taxpayer and the Spouse as joint tenants. Thus, following the acquisition of Unit 2, both Unit 1 and Unit 2 were owned jointly by the Taxpayer and the Spouse.

The Taxpayer and the Spouse separated. On 1998 they executed a separation agreement, and, on of that year, they were divorced. Under the terms of the separation agreement, the Taxpayer and the Spouse agreed to transfer ownership of Units 1 and 2 to the Taxpayer individually.

¹ In a cooperative, the ownership of an apartment involves owning the shares of stock of the cooperative that are appurtenant to the apartment, and entering into the related proprietary lease. References in this ruling to owning or transferring ownership of the cooperative apartments mean transferring the shares and entering into a proprietary lease that reflects the ownership change.

In 1999, the mortgage loan on Unit 2 was paid in full with funds furnished by the Taxpayer.

ISSUE

You have requested a ruling that the RPTT is not imposed on the transfer of Units 1 and 2 from joint ownership by the Taxpayer and the Spouse to individual ownership by the Taxpayer under the terms of the separation agreement. You propose that RPTT should not apply to that transfer because, the Taxpayer having furnished the consideration for the Units, the Spouse never owned more than a nominal interest. As a result, when the Taxpayer and the Spouse transfer the stock to the Taxpayer, there will not be a transfer of an interest in real property, rather, the Spouse will merely relinquish his nominal interest.

CONCLUSION

Based upon the facts presented and the representations submitted, we conclude that the Spouse's joint ownership of Units 1 and 2 cannot be ignored for RPTT purposes. Before the proposed transfer, the Spouse owns 50 percent of each Unit. When the Units are transferred to the Taxpayer individually, the Spouse will be transferring 50 percent of each Unit to the Taxpayer. The RPTT will be computed based on 50 percent of the fair market value of the Units at the time of the transfer.

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 RPTT applies to transfers of stock in a cooperative housing corporation in connection with the transfer of a proprietary leasehold. Code §2102(b)(2). Code section 11-2101.9 defines "consideration" as the price paid or required to be paid for the property by money, property, or anything of value. It includes the amount of any indebtedness on the property, whether or not that indebtedness is assumed by the grantee.

Regulations promulgated under the RPTT address consideration in the context of the transfer from one spouse to the other pursuant to the terms of a separation agreement. Section 23-03(d)(3) of Title 19 of the Rules of the City of New York (the "RCNY") provides that "in the absence of evidence establishing the consideration, it is presumed that the consideration for the conveyance, which includes the relinquishment of marital rights, is equal to the fair market value of the interest in the property conveyed."

In this case, the shares of stock relating to Units 1 and 2 are being transferred pursuant to the terms of a separation agreement. As a result, under 19 RCNY section 23-03(d)(3), the consideration is equal to the fair market value of those shares, absent evidence otherwise establishing the consideration.

You have represented that, although Units 1 and 2 are owned jointly by the Taxpayer and the Spouse, the Taxpayer alone furnished the consideration to acquire both Units: she acquired Unit 1 individually before she was married; and, with respect to Unit 2, the Taxpayer provided \$ from her personal

funds at he closing and later repaid the mortgage loan from her own funds. You have also represented that the Units were owned jointly only because the Bank required joint ownership of both Units as a condition of mortgage financing.

Based on those representations, you propose that the Taxpayer already owns the Units individually and the Spouse owns merely a nominal interest and that, when the Taxpayer and the Spouse transfer the Units to the Taxpayer, there will not be a transfer of an interest, rather the Spouse will merely relinquish his nominal interest.

The RPTT, however, does not include an exemption based on the source of the consideration for the acquisition of real property. In addition, the source of consideration for such acquisition does not affect property rights. For example, in Grishaver v. Grishaver, 225 N.Y.S.2d 924 (N.Y. Sup.Ct. 1961), a wife acquired certain securities that had belonged to her father by paying her siblings certain amounts from her own funds. The securities were later registered as jointly owned by the wife and husband. The wife claimed that she was the sole owner of the securities on the ground that she alone had provided the consideration for their acquisition. The court rejected that argument, concluding that even if the wife had "alone furnished the consideration for the acquisition of the property, held in their joint names, this fact without more, in no way rebuts or alters the joint ownership interest of the securities, but is, on the contrary consistent with the creation of joint ownership " Id., at 931.²

Similarly, it may be that the Units would constitute separate property of the Taxpayer for purposes of equitable distribution under the New York State Domestic Relations Law. However, equitable distribution rights apply in the context of matrimonial actions and do not bear upon RPTT issues. See In re Barash, TAT(H)96-121(RP) (August 8, 1997).

We conclude that the Spouse's joint ownership of Units 1 and 2 cannot be ignored for RPTT purposes. Before the proposed transfer, the Spouse owns 50 percent of each Unit. When the Units are transferred to the Taxpayer individually, the Spouse will be transferring 50 percent of each Unit to the Taxpayer. Under 19 RCNY section 23-03(d)(3) the consideration will equal one-half of the fair market value of those Units at the time of the transfer.

If Units 1 and 2 are combined into one apartment at the time of the transfer, the transfer will be subject to tax at the rate applicable to the transfer of an individual cooperative apartment under Code section 11-2101.b(1)(B)(i). If not, the rate set out in Code section 11-2101.b(1)(B)(ii) will apply. Finance Memorandum 00-6, July 19, 2000.

* * *

² Under common law, there were cases that held that where a husband provided the consideration for the acquisition of property, the wife had a right of survivorship in the property, but no present interest. That common law rule was nullified by the enactment in 1959 of section 56-a of the New York State Domestic Relations Law. That section has since been recodified as section 3-311 of the New York State General Obligations Law. See Grishaver, supra, at 930-31. (The common law rule would not have affected this case; it did not apply when the wife alone furnished the consideration.)

The Department of Finance reserves the right to verify the information submitted.

Sincerely,

Devora B. Cohn
Assistant Commissioner
for Legal Affairs

LED:ld