

April 19, 2001

Re:

Request for letter ruling
Real Property Transfer Tax
FLR-004770-021

Dear _____ :

This letter is in response to your request, dated May 22, 2000, for a ruling regarding the application of the New York City Real Property Transfer Tax (“RPTT”) to the transactions described below. As mentioned in our letter dated June 6, 2000, this ruling will not address any transactions concerning _____, involving the Leasehold Unit¹ which are the subject of a separate ruling. Additional information was received on or about July 25 and October 3, 2000. You have agreed to extend the time period for us to respond to this instant request so that this ruling is issued simultaneously with our response to your separate ruling request regarding the Leasehold Unit dated December 7, 2000.

FACTS

The facts presented are as follows:

_____ (“Taxpayer”) is a limited liability company which has six members: the “Leasehold member”, the “Hotel member”, the “Residential member”, the “Office member”, the “Retail member” and the “Garage member” (the “Members”). The latter four (4) Members are affiliated (“Affiliated Members”) in that each one is controlled by the same entities:

The Taxpayer is developing a multi-use real estate project situated on land adjacent to _____ in New York City. When constructed, the project is intended to consist of seven condominium units (the “Units”), each including an undivided interest in the appurtenant common elements described in the Condominium Declaration. One Unit will be owned by each of the Members and one Unit will be owned by a charitable organization, _____ (the “Charity”), that is exempt from federal income taxation pursuant to section 501(c)(3) of the Internal Revenue Code (“IRC”).

Because the Units will be housed in one integrated structure, the project will be submitted to a condominium regime. However, historically, it has not been possible to file a Declaration of _____

¹ The construction of the Leasehold unit will be financed in part through a “synthetic lease” transaction in which the fee title to the unit will be conveyed to a trust that will hold title to the unit and lease it to the unit’s occupant. The conveyance to the trust and the synthetic lease transaction is the subject of FLR-004773-721 (issued herewith).

Condominium and convey title to individual condominium units prior to the substantial completion of construction. For this and other reasons, the Taxpayer has taken title to the land and will hold title to the structure during the project's construction. Upon completion of a Member's Unit, the Taxpayer will convey that Unit to the Member. On the completion of the Charity's Unit, the Taxpayer will convey such Unit to the Charity for no consideration, free and clear of any debts, liens or encumbrances. Once all of the Units have been conveyed, the Taxpayer's existence will terminate.

The Taxpayer's Operating Agreement provides that each Member is the sole beneficial owner of such Member's Unit. The Operating Agreement further provides that each Member will receive all benefits, and bear all obligations, attributable to its respective Unit. All items of profit and loss, tax deductions and credits, and cash flow, attributable to a Member's Unit, will be fully allocated to that Member. No Member will have any beneficial interest in any other Member's Unit, and each Member will be closely involved in the design and construction of its particular Unit.

The project will be financed through a combination of Member investments ("Member Equity"), and an Acquisition Loan, a Construction Loan, and a Mezzanine Loan under one or more notes or mortgages (the three loans are collectively referred to as "Project Financing"). The Operating Agreement and the Project Financing documents have apportioned separate shares of the Project Financing to the Leasehold member and the Hotel member and a single, combined share to the Affiliated Members. Each Member's share of the Project Financing will reflect: 1) That the Leasehold member is not participating in the Acquisition Loan because its share of the land acquisition costs are being financed through the "synthetic lease" transaction (see footnote 1,) and 2) That the Mezzanine Loan proceeds will be used to fund a portion of the construction costs for the Affiliated Members only.

The Construction Loan portion of the Project Financing will be determined by calculating loan amounts for each Unit separately, based upon the value such Member's Unit, the debt service coverage of such Member's Unit, or the total costs attributable to such Unit. Such total construction cost will include the Unit's share of the construction costs of the common elements and the Charity's Unit. The Project Financing documents state that Members are to provide Member Equity equal to the difference between the loan amounts and the total cost necessary to complete the project.

Upon the conveyance of each of the Leasehold Unit and the Hotel Unit to its respective Member/owner, the Project Financing and the mortgage or mortgages securing the Project Financing will be severed into separate loans and mortgages reflecting each such Unit's allocable share of the Project Financing ("Allocable Share"), and the owner of each such Unit will replace its Allocable Share with permanent mortgage financing. Upon receipt of the required repayment amount, the Project Financing lender will release such Units from the lien of the mortgage or mortgages securing the Project Financing. Upon its conveyance by the Taxpayer, the Charity's Unit will be released from the lien of the mortgage or mortgages securing the Project Financing loans. Following the conveyance of their respective Units, the Affiliated Members will remain liable on the Project Financing loans, and their Units will remain subject to a common "blanket" mortgage or mortgages.

ISSUES

You have requested a ruling as to whether the conveyance of the Units to the Members and the conveyance to the Charity will be exempt from the RPTT. As stated in our letter of June 6, 2000, our ruling will exclude the conveyance of the Leasehold unit.

CONCLUSIONS

Based on the facts presented and the representations submitted, we have determined that the conveyance of the Charity's Unit is exempt pursuant to section 11-2106(b)(2) of the Administrative Code of the City of New York (the "Code"), as a transfer to a charitable organization. We have also determined, based on the facts presented and representations submitted, that the conveyances of the Units from the Taxpayer to its Members, other than its conveyance to the Leasehold member, which is the subject of FLR-004773-721, are exempt under Code section 11-2106(b)(7).

DISCUSSION

The Conveyance of the Charity's Unit

Code section 11-2102 imposes a tax on the transfer of real property or an economic interest therein when the consideration exceeds \$ 25,000. However, Code section 11-2106(b)(2) exempts from the RPTT a deed or transfer of real property, or the transfer of an economic interest in real property, to an organization or entity "organized or operated exclusively for religious, charitable or educational purposes ... no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation." The Charity is a non-profit entity organized for charitable or educational purposes, and is exempt from federal taxation under section 501(c)(3) of the IRC. Accordingly, the Taxpayer's conveyance of the Charity's Unit to the Charity is exempt from the RPTT under Code section 2106(b)(2).

The Conveyances to the Members Other Than the Leasehold Member

As stated above, the RPTT is applicable to transfers of real property interests in which the consideration is in excess of \$ 25,000. Code section 11-2106(b)(7), however, provides an exemption from the RPTT for transfers of real property interests "from a person acting as a mere agent, dummy, straw or conduit to his principal, or from the principal to such a person...."

In these circumstances, pursuant to its Operating Agreement, the Taxpayer will obtain and hold the real property for the benefit of its Members. The interest of each Member is limited to its interest in its respective Unit and the common elements of the condominium. All benefits and obligations regarding a

particular Member's Unit will be attributed to that Member, and all items of profit and loss, tax credits and deductions, and cash flow for such Member's Unit will be allocated to that Member.

The Taxpayer has applied the "Member Equity" received from the Members and the proceeds of the Project Financing for the land acquisition and construction. The Project Financing has been separately allocated to the Leasehold Unit, the Hotel Unit and the Affiliated Members' Units. The Allocable Share of the Project Financing, and the accompanying mortgage or mortgages, attributable to the Leasehold Unit and the Hotel Unit will be completely separated and replaced with permanent mortgage financing at the time of the conveyance of these Units to their corresponding Members. The Charity's Unit will be transferred free and clear of the Project Financing and the accompanying mortgage or mortgages. The Affiliated Members' Units will remain subject to the Project Financing and the accompanying mortgage or mortgages. However, the Affiliated Members have the exact same beneficial owners, and it is clear that, under the Operating Agreement, neither the Affiliated Members nor their beneficial owners will be able to shift their responsibilities thereunder or under the Project Financing loans to other, unaffiliated, Members of the Taxpayer.

Upon completion of the Units, the Taxpayer will file a condominium declaration, and transfer the Units to their respective Members. Once the Taxpayer has transferred all of the Units, it will cease to exist. The Taxpayer will never derive any benefit from the property, nor incur any detriment or obligation. It will be acting as a mere conduit for its Members, who will enjoy all of the benefits and bear all of the obligations of the project.

Based on the facts presented and representations submitted, we have determined that the Taxpayer's conveyances of the Units to the Members upon completion of the project, other than the Taxpayer's conveyance to the Leasehold member, are exempt from RPTT under Code section 11-2106(b)(7). In light of this determination, we need not consider whether the conveyances are exempt as a mere change in form under Code section 11-2106(b)(8).

The Department reserves the right to verify the information submitted.

Sincerely,

/s/ Devora B. Cohn
Associate Commissioner
for Legal Affairs