



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

January 13, 2004

**Re:** Request for Ruling  
Real Property Transfer Tax

FLR 034811-021

Dear \_\_\_\_\_ :

This is in response to your request dated September 3, 2003 for a ruling regarding the application of the New York City Real Property Transfer Tax (the "RPTT") to the situation described below. Additional information was received by this office on September 19, 2003 and October 23, 2003.

**FACTS**

The facts presented are as follows:

(the "Taxpayer") is establishing an "Islamic Home Acquisition Transaction" program (the "Program") "designed to assist individuals who, for religious reasons, are prohibited from paying interest to attain home ownership." The program has two components, an acquisition component and a replacement component.

Acquisition Transactions

In an acquisition transaction, a "consumer" will purchase a home as a tenant-in-common with a "co-owner," an affiliate of Taxpayer, and will subsequently make "monthly payments" to the co-owner, until the consumer has acquired full ownership of the property.

The following transactions will occur:

1. The consumer will enter into a Co-Ownership Commitment Agreement with the Taxpayer, which will include a list of conditions that must be satisfied prior to closing and an itemization of estimated closing costs. The list and itemization are the same as those typically included in a loan commitment agreement.

2. At closing the consumer will make the “Initial Acquisition Payment”, which is the equivalent of a down payment. The remaining part of the purchase price will have been advanced by the Taxpayer to its affiliate, the co-owner, and placed into escrow for use in the transaction. The property will be purchased by the consumer and the co-owner as tenants-in-common. The deed will not reference the respective percentage ownership interests of the consumer and the co-owner. Changing co-ownership percentages will be referenced on a schedule attached to the “Co-Ownership Agreement,” which will not be recorded.

3. At closing the parties will execute several documents specific to the program. The documents include the Co-Ownership Agreement, which sets forth the respective rights of the consumer and the co-owner in the property, the Security Instrument, the Obligation to Pay, and the Assignment and Amendment of the Security Instrument, as well as any other documents that would apply in a traditional mortgage situation.

Under the Co-Ownership Agreement the consumer has the sole and exclusive right to occupy and possess the property and has the ability to purchase the rights of the co-owner at any time. The Co-Ownership Agreement also provides that the consumer will have all of the tax benefits and burdens related to the property including the obligation to pay 100% of any taxes related to the property and the right to claim any tax credit or deduction for the payments of such sums or of any items related to the property. In addition to taxes, the consumer is obligated to pay all general assessments levied and assessed against the property, utility bills and homeowners' association dues, if any. The consumer is also obligated to maintain and repair the property and is required to obtain property insurance. At any time, the consumer has the right to purchase the co-owner's interest in the property by paying the “buyout amount”, which is essentially the equivalent to the remaining principal balance in a standard mortgage acquisition.

Under the Obligation to Pay the consumer is required to make monthly payments to the co-owner that are similar to the payments made under a typical mortgage agreement. The main components of the monthly payment as delineated in the “Definition of Key Terms” are the “profit” payment and the “acquisition” payment. You have represented that the profit payment is the monetary equivalent of the interest portion of a conventional mortgage. The acquisition payment is that portion of the consumer's monthly payments that is applied to increase the consumer's ownership interest in the property, which varies month by month in accordance with the schedule. Acquisition payments are calculated in the same manner as, and thus will simulate, principal amortization under a traditional mortgage. As a result of the acquisition payment portion of the monthly payments the consumer's ownership interest in the property increases and the co-owner's interest decreases during the term of the agreement.

The Security Instrument sets forth in detail the protections afforded the co-owner, which are similar in all material respects to the rights of a mortgagee in a traditional home mortgage financing.

It is anticipated that the co-owner will enter into the Assignment and Amendment of the Security Instrument in order to assign its rights and interests under the Co-ownership Agreement, the Obligation to Pay and the Security Instrument to a third party. Notwithstanding the assignment, the co-owner will remain the legal owner of its interest as tenant-in-common in the property.

## Replacement Transactions

The “replacement transaction” is for the purpose of refinancing. The consumer initially owns 100 percent of the fee simple interest in the property. Thus, there is no residential contract of sale from a third party seller to the consumer and the co-owner in a replacement transaction.

In a replacement transaction, the consumer transfers title to itself and the co-owner as tenants-in-common and records a new deed to reflect this co-ownership. The co-owner’s ownership interest is determined by dividing the mortgage replacement amount by the initial property value. In other respects replacement transactions resemble acquisition transactions. In particular, the respective rights of the parties and monthly payment requirements are similar.

## ISSUES

You have requested rulings that:

- 1 The real property transfer tax is payable in an Acquisition Transaction only on the transfer of the property by the seller to the consumer and the co-owner. The consideration is equal to the purchase price payable to the seller under the residential contract of sale.
2. No RPTT is payable on any other agreement executed in an Acquisition Transaction under the Program.
3. No RPTT is payable on any agreement executed in a Replacement Transaction under the Program.

## CONCLUSION

Based on the facts presented and the representations submitted we have determined that the real property transfer tax is payable only on the transfer of the property by a seller to the consumer and the co-owner in an “Acquisition Transaction”. The consideration is equal to the purchase price payable to the seller under the residential contract of sale.

## 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"). Code section 11-2101.9 defines "consideration" as the price paid or required to be paid for the property in 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.

Code section 11-2106(b) provides that the RPTT will not apply to:

A deed or instrument given solely as security for, or a transaction the sole purpose of which is to secure, a debt or obligation or a deed or instrument given, or a transaction entered into, solely for the purpose of returning such security.

In order to determine if a deed or transaction is entered into solely for the purpose of securing a debt, in analogous situations to the one under consideration, specifically, in cases dealing with finance leases, the Department of Finance has based its position on the economic substance of the transaction. The critical issue is the determination of who is the beneficial owner of the property.

For federal income tax and New York State tax purposes, a taxpayer can be the beneficial owner of property if it enjoys the benefits and bears the burdens of ownership, despite not having title to the property. *See, Frank Lyon Co. v. United States*, 435 U.S. 561 (1978); *Helvering v. F & R Lazarus & Co.*, 308 U.S. 252 (1939); Rev. Rul. 68-590, 1968-2 C. B.66; FSA Memo 199920003 (May 21, 1999); *Matter of Sherwood Diversified Services, Inc.*, 382 F. Supp. 1359 (interpreting New York State sales tax law); *General Electric Co., Inc*, TSB-A-96 (5)R (June 25, 1996) (synthetic lease situation); *Eastman Kodak Co.*, TSB-A-90(8)S (March 12, 1990).

In our opinion, based upon the facts presented, it is appropriate to apply the above "benefits and burdens of ownership" analysis to determine if the consumer should be treated as the sole beneficial owner of the property for purposes of Code section 11-2106(b)(8).

The factors relevant to determining whether a party enjoys the benefits and bears the burden of owning property include: (1) which party exercises control over the property; (2) who bears the risk of loss from a casualty or condemnation; and (3) which party has the potential to obtain profit or incur loss from the holding of the property. *See, Sun Oil Co. v. Commissioner*, 562 F.2d 258, 268-269 (3 rd Cir. 1977); *Illinois Power, supra*, 1437-1440; *Pacific Gamble Robinson and Affiliated Companies v. Commissioner*, T.C. Memo 1987-533; *Eastman Kodak*, TSB-A-90(8)S; FLR-93-110. *See also, Levy v. Commissioner*, 91 T.C. 838, 860 (1988); *Larsen v. Commissioner*, 89 T.C. 1229, 1267 (1987), *aff'd in part and reversed in part sub nom Casebeer v. Commissioner*, 909 F.2d 1360 (9th Cir. 1990); *Torres v. Commissioner*, 88 T.C. 702, 720-722 (1987); *Coleman*, 87 T.C. 178, 205; *Grodt & McKay Realty Inc. v. Commissioner*, 77 T.C. 1221 (1981).

In the transactions in question, it is the consumer who exercises control over the property. The consumer has the exclusive right to occupy the property, the right to lease the property and the right to purchase the rights of the co-owner at any time for a specified buyout amount. The consumer is obligated to make all payments with regard to the property, including payments for taxes, insurance, utilities, dues and maintenance and repairs and has the right to claim tax credits and deductions related to the property. The rights of the co-owner with regard to the property are similar to the rights normally held by a mortgagee and not those of an owner. These include the right of reentry upon notice for purposes of inspection, the right (but not the obligation) to cure defects, the right to notice if the consumer places new encumbrances on the property, the right to approve significant improvements, the right to approve certain leases and the ability to exercise rights and remedies under the Co-ownership Agreement.

In the event of a casualty loss, if repair of the property is not economically feasible, proceeds of insurance are distributed first to the co-owner up to the amount of the co-owner's interest in the property. Again, this is consistent with the interest of a mortgagee. After the co-owner's interest is satisfied, the remaining balance is then distributed to the consumer.

With regard to the potential for profit and loss, the consumer's right to purchase the co-owner's interest in the property at any time by paying the "buyout amount" ensures that it is the consumer and not the co-owner that has the potential for profit and loss. This is the same as a typical mortgage transaction.

It is our opinion that the initial transfer by the seller to the consumer and the co-owner in an acquisition transaction creates benefits and burdens of ownership that are analogous to the rights that would be created if the property were deeded to the consumer with the co-owner functioning as a mortgagee. Thus, insofar as the consumer bears benefits and burdens of ownership that are consistent with those of ordinary mortgage acquisitions, the deeds to and from the co-owner in the transactions in question, including the quitclaim deed transferring the full interest in the property back to the consumer at the end of the transaction, are deemed to be for purposes of financing and are not subject to the New York City Real Property Transfer Tax. Similarly, because the replacement transaction creates benefits and burdens that are analogous to a mortgage refinancing, both the initial deed and the final quitclaim deed in a replacement transaction are deemed to be entered into solely to effect and secure the co-owner's financing and are not subject to tax.

The Department reserves the right to verify the information submitted.

Sincerely,

Ellen E. Hoffman  
Assistant Commissioner  
For Tax Law and Conciliations