



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

August 9, 2004

Re:  
Request for Ruling  
New York City Real Property Transfer Tax  
FLR No.: 044824-021

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

This is in response to your request for a ruling dated March 25, 2004 on behalf of (the "Assignor") as to the applicability of the New York City Real Property Transfer Tax ("RPTT") to the transaction described below. Additional information was received on May 16 and June 28, 2004.

**FACTS**

Prior to the transactions described below, the Assignor was a lessee of a fifth floor loft apartment (the "Loft") at \_\_\_\_\_ in \_\_\_\_\_ (the "Building"), which he had leased since the 1980s. On \_\_\_\_\_, the Assignor also owned shares (the "Old Shares") in \_\_\_\_\_ (the "Apartment Corporation"), the owner of the Building.<sup>1</sup>

On \_\_\_\_\_, in anticipation of the conversion of the Apartment Corporation into a cooperative housing corporation, which occurred on \_\_\_\_\_, the Assignor entered into a subscription agreement (the "Subscription Agreement") with the Apartment Corporation under which the Assignor agreed to acquire the \_\_\_\_\_ shares (the "New Shares") allocated to the Loft and

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<sup>1</sup> The current shareholders of the Apartment Corporation also own \_\_\_\_\_ ("LLC"). Previously, the LLC leased certain commercial space in the Building. Pursuant to the Offering Plan submitted as part of this ruling request, title to a commercial condominium unit was transferred to the LLC prior to the first unit closing. All current tenant-shareholders in the Apartment Corporation have a proportionate interest in the LLC and any future shareholder will receive a proportionate interest in the LLC. This ruling does not address any RPTT issues involving the interests in the LLC.

to enter into a proprietary lease for the Loft (the "Proprietary Lease"). The price of the Loft is listed in the Subscription Agreement as \$ . Although the price under the Subscription Agreement is stated to be \$ , no money would actually be owed with respect to this transaction because of the Assignor's previously contributed capital and equity in the Apartment Corporation ("Equity Credit").<sup>2</sup>

In , Assignor entered into an assignment agreement ("Assignment Agreement") with (collectively the "Assignees") whereby Assignor assigned all right, title and interest in the Subscription Agreement, the \$ downpayment, and the Assignor's Equity Credit to the Assignees for the sum of \$ (the "Purchase Price").

Paragraph 2 of the Assignment Agreement provides that the Assignees will reimburse the Assignor for the \$ deposit paid pursuant to the Subscription Agreement. Paragraph 3 of the Assignment Agreement provides that the "total purchase price for the Assignee's purchase of the Shares and Lease appurtenant to the Loft" is \$ of which only \$ is required to be paid in escrow upon execution of the Assignment Agreement with the balance due at the closing. Paragraph 14 of the Assignment Agreement provides that in addition to the Purchase Price, the Assignees will be responsible for the payment of any additional fees and expenses required to be paid by the Assignor pursuant to the Offering Plan. The Assignor agreed to pay to the Apartment Corporation, as sponsor, the flip tax or Assignment Fee of 5% of the Purchase Price, as required under the Offering Plan. The release of the funds held in escrow was contingent on the closing of title to the apartment at the closing under the Offering Plan.

At the closing, the Assignor's Old Shares were surrendered and New Shares were issued to the Assignees. The Equity Credit was fully applied and no refund of any excess was available.

## ISSUE

You have requested a ruling that the consideration for purposes of the RPTT should be limited to the amount set forth in the Subscription Agreement as the price for the Loft, i.e., \$ .

## CONCLUSION

Based on the facts presented, it is our opinion that the transaction constituted the sale of shares of a cooperative housing corporation in connection with the granting of a proprietary lease. Consequently, the RPTT is imposed on the consideration paid for the Loft by the Assignees pursuant to the Assignment Agreement rather than the amount specified in the Subscription Agreement.

## DISCUSSION

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<sup>2</sup> The Assignor's Equity Credit is listed in the Offering Plan as \$ . To the extent this amount exceeded the purchase price stated in the Subscription Agreement, it was nonrefundable.

Section 11-2102.b(1) of the Administrative Code of the City of New York (the “Code”) imposes a tax on each instrument or transaction (unless evidenced by a deed subject to tax under Code section 11-2102.a) at the time of the transfer whereby any controlling interest in real property is transferred by a grantor to a grantee if the consideration exceeds \$25,000. Code section 11-2102.b(2) provides that, notwithstanding the definition of controlling interest, in the case of any transfer of stock in a cooperative housing corporation in connection with the grant of a proprietary leasehold, the RPTT applies to (i) the original transfer of such shares of stock by the cooperative corporation or cooperative plan sponsor, and (ii) any subsequent transfer of such shares of stock by the owner.

Section 23-02 of Title 19 of the Rules of the City of New York (“RCNY”) defines “Consideration” as the price actually paid or required to be paid for real property or an economic interest therein whether or not expressed in the deed or instrument.

Section 23-03(j)(3) of Title 19 of the RCNY provides that the RPTT does not apply to an option for the purchase of real property or a contract for the sale of real property if the option or contract does not vest legal or equitable title.

In this case, the Assignor is asserting that pursuant to the Assignment Agreement he is merely conveying a contractual right under the Subscription Agreement to purchase the Loft and, consequently, any payment pursuant to the Assignment Agreement in excess of the amount specified in the Subscription Agreement is not subject to the RPTT. However, the facts and circumstances of the case and the wording of the Assignment Agreement are inconsistent with this conclusion. The Assignor was for all practical purposes the owner of the Loft rather than a subscriber to purchase it. The Assignor was a shareholder of the Apartment Corporation for over years before the transfer of the Loft to the Assignee and was a lessee of the Loft since the 1980s. Under the Subscription Agreement all of the purchase price other than the downpayment was to be satisfied by the Equity Credit, which represented the Assignor’s prior contribution to the Apartment Corporation. The wording of the Assignment Agreement indicates that it was a contract for a sale of the Loft rather than an assignment of the right to purchase the Loft: the “total purchase price for the *Assignee’s purchase of the Shares and Lease appurtenant to the Loft*” [emphasis added] is \$ . Another indication that the transaction between the Assignor and the Assignees was a sale of the Loft and not merely the assignment of a contractual right, is that the closing under the Assignment Agreement was simultaneous with, and dependent upon, the closing under the Offering Plan when the New Shares and the Proprietary Lease were to be transferred to the Assignees.

At the closing on , the Assignor relinquished the Old Shares and his lease, the Assignees paid the Assignor the monies owed him under the Assignment Agreement, the Assignees paid the Sponsor certain fees and the New Shares and the Proprietary Lease were issued to the Assignees by the Apartment Corporation. Thus, all of the necessary components of a taxable transfer under Code section 11-2102.b(2) occurred at that closing. Therefore, under the facts and circumstances of this case, it is our opinion that the transaction was a sale of shares of stock in a cooperative housing corporation by the Assignor in connection with the granting of a proprietary lease, rather than the assignment of a contract right. Consequently, the RPTT is imposed on the consideration paid for the Loft including amounts paid under the Assignment Agreement.

The Department reserves the right to verify the information submitted.

Sincerely,

Ellen E. Hoffman  
Assistant Commissioner for Tax Law and Conciliations

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