



February 19, 2009

RE: Request for Ruling
Real Property Transfer Tax
Hypothetical
FLR-084885-021

Dear Mr.

This letter is in response to your request, received on October 1, 2008, for a ruling on hypothetical facts regarding whether the conveyance of a residential apartment building by the entity described below would be subject to the New York City Real Property Transfer Tax (the "RPTT"). Additional information was received on or about November 10, 2008.

HYPOTHETICAL FACTS

The Taxpayer is an operating business corporation that was organized under the Business Corporation Law in 1948. The Taxpayer's sole asset is a 24-unit, residential apartment building located in New York City (the "City"). The Taxpayer manages the building and rents apartments to individual tenants with the assistance of a managing agent.

The Taxpayer is 100 percent owned by a foundation (the "Foundation"). The Foundation is a type B corporation that was established under the Not-for-Profit Corporation Law in 1996. The Foundation is a charity that awards educational grants to young musicians. The Internal Revenue Service has determined that the Foundation is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code (the "IRC") commencing in 1996.¹ The Foundation uses the funds it receives from the Taxpayer to help fund its operations. The Taxpayer's apartment building represents approximately 80 percent of the value of the assets owned directly or indirectly by the Foundation. The Foundation is contemplating having the taxpayer sell the apartment building.

ISSUES

You have requested a ruling that the Taxpayer's sale of the apartment building is exempt from RPTT. Alternatively, you have requested a ruling that if the Taxpayer's sale of the apartment building is not exempt from RPTT, that the conveyance of the apartment building from the Taxpayer to the Foundation and the Foundation's subsequent sale of the apartment building to an unrelated third party who was not an RPTT-exempt entity would be exempt from RPTT.

¹ The taxpayer does not appear to have a federal tax exemption under IRC section 501(c)(2) or any other IRC provision.

CONCLUSION

Based on the information presented, we have determined that the Taxpayer's sale of the apartment building would not be exempt from the RPTT. In addition, the alternative scenario under which the Taxpayer conveys the apartment building to the Foundation, and the Foundation then sells the apartment building to an unrelated third party, would not be exempt from RPTT, if the conveyance and subsequent sale were part of a plan to ultimately convey the apartment building to a non-RPTT-exempt person.

DISCUSSION

Code section 11-2102 imposes a tax on any deed conveying an interest in real property or any instrument or transaction transferring a controlling economic interest in real property when the consideration exceeds \$25,000. Code section 11-2106(b) exempts from the tax any deed, instrument or transaction conveying or transferring real property or an economic interest therein by or to any entity

organized or operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual...; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph;....

Based upon the facts presented, we have determined that a deed, instrument or transaction by or to the Taxpayer is not exempt because the Taxpayer's principal purpose is the ownership and operation of real property for profit. The fact that the Taxpayer is wholly owned by and pays its profits to the Foundation, an entity that would appear to meet the exemption under the above provision, is not material. Accordingly, the Taxpayer's conveyance of the apartment building to any entity not exempt under Code section 11-2106 would not be exempt from the RPTT.

Further, the alternative scenario under which the Taxpayer conveys the apartment building to the Foundation, and the Foundation then sells the apartment building to an unrelated third party, would not be exempt if the conveyance and subsequent sale were part of a plan to ultimately convey the apartment building to a non-RPTT-exempt person. In this scenario, the Department would apply the step-transaction doctrine. Under this doctrine, the Department would ignore the conveyances to and from the Foundation and treat the two conveyances as a single taxable conveyance between two non-RPTT exempt persons. See *Comm'r v. Clark*, 489 U.S. 726, 738 (1989); *Matter of Kelly*, #819863, New York Division of Tax Appeals, ALJ determination (12/08/2005) (applying step transaction doctrine in State Real Estate Transfer Tax case).²

² Note that the department has issued SAP No. 08-1-RPTT, which provides that if the two conveyances take place within a period of six months, the conveyances will be presumed to be part of a plan and the step transaction doctrine will be applied. If the transfers occur over a period of more than six months, the Department will look at all facts and circumstances to see if the step transaction doctrine should be applied, and transfers taking place within a period of between six months and one year will be automatically audited to see if the step transaction doctrine should be applied.

The Department reserves the right to verify the information submitted.

Very truly yours,

Dara Jaffee

Assistant Commissioner
Legal Affairs