

October 25, 1996

Re:

Real Property Transfer Tax
FLR-964675-021

Dear _____ :

This letter is in response to your request, received July 24, 1996, for a ruling regarding the application of the New York City Real Property Transfer Tax to the transaction described below. Additional information was submitted on September 27 and October 7, 1996.

FACTS

The facts presented are as follows:

_____ (the "Taxpayer") was a domiciled _____ insurance company. The Taxpayer owned a _____ percent _____ limited _____ partnership _____ interest in (the "Partnership"), which held various interest in New York City real property including deeds of trust on apartments and on cooperative apartment buildings, as well as unsold commercial and residential cooperative corporation shares and condominium units (collectively the "real estate assets"). A portion of the property held by the Partnership was held by a wholly owned subsidiary of the Partnership, _____ (the "Subsidiary"). The Taxpayer also owned 100 percent of the stock of _____ the corporate general partner of the Partnership. Thus, the Taxpayer owned 100 percent of the beneficial interest in the Partnership.

The Taxpayer was placed into conservation under a court order obtained by the _____ Insurance Commissioner on _____. The Superior Court of _____ issued an order of liquidation of the Taxpayer on _____. Certain of the assets of the Taxpayer were placed into one of three liquidating trusts. The real estate assets were transferred into the _____ Real Estate Trust (the "Trust"). Record title to the real estate assets remains in the

name of the Taxpayer or the Insurance Commissioner until the assets are transferred to third parties. On _____, the court ordered the sale of the real estate assets. The total price is estimated to be approximately \$ _____ million.

ISSUE

You have requested a ruling that the New York City Real Property Transfer Tax ("RPTT") will not apply to the transfer of the real estate assets of the Taxpayer by the Trust.

CONCLUSION

Based upon the facts presented and representations submitted, we have determined that the real estate assets consisting of deeds of trust on various interests in New York City real estate do not constitute real property for purposes of the RPTT. As to the real estate assets consisting of cooperative housing corporation shares and condominium units, the RPTT will not apply to the transfer of those assets to the Trust but will apply to the transfer of those assets under the court ordered liquidation of the Taxpayer.

DISCUSSION

The RPTT applies to the delivery of every deed conveying an interest in real property located in New York City where the consideration for the deed exceeds \$25,000. The RPTT also applies to every transaction whereby a controlling economic interest in real property located in New York City is transferred if the consideration exceeds \$25,000. §11-2102 of the Administrative Code of the City of New York (the "Code"). An interest in real property includes every "estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments" located in New York City but does not include a mortgage or the release of a mortgage. A deed of trust is an instrument used in some jurisdictions that is equivalent to a mortgage. Therefore, those of the real estate assets of the Taxpayer consisting of deeds of trust on real property located in New York City are not interests in real property subject to the RPTT.

A controlling economic interest in real property is 50 percent or more of the total combined voting power of all classes of stock of a corporation owning directly or indirectly an interest in real property in New York City or 50 percent of the capital, profits or beneficial interests in a partnership owning directly or indirectly an interest in real property in New York City. Because the Partnership owns directly, or through 100 percent ownership of the Subsidiary, interests in cooperative

corporation shares and condominium units, the 100 percent beneficial ownership of the Partnership by the Taxpayer represents a controlling economic interest in real property located in New York City.

Title 19 of the Rules of the City of New York ("RCNY") Relating to the Real Property Transfer Tax, section 23-03(j) describes certain conveyances that are not subject to the RPTT. These include:

... (5) A deed executed by a debtor conveying real property to an assignee for the benefit of his creditors; however, when the assignee conveys such property to a creditor or sells it to any other person, the deed by him is taxable if the consideration exceeds \$25,000.

(6) Conveyance to a receiver of realty included in the receivership assets, and reconveyance of such realty upon termination of the receivership....

(8) Transfers made pursuant to a confirmed plan of reorganization as provided under 11 U.S.C. §1146(c) [the Federal bankruptcy law].

Title 19 RCNY section 23-03(d) describes certain conveyances that are subject to the RPTT. These include deeds given by referees, receivers, sheriffs, etc., for realty sold under foreclosure or execution.

Application of Federal Bankruptcy Law. The exclusion of conveyances pursuant to a confirmed plan or reorganization under Chapter 11 of the Federal bankruptcy law pursuant to Title 11 U.S.C. section 1146(c) merely reflects the Federal law, which preempts state and local laws and exempts transfers under the bankruptcy law from state and local transfer taxes. Nothing in the Code otherwise exempts from the tax transfers or conveyances to third parties under a bankruptcy plan or similar plan for the benefit of creditors. The Federal bankruptcy law excludes insurance companies as debtors who may be covered by Chapters 7 and 11. 11 U.S.C. §109, subdivisions (b) and (d). Because the Taxpayer is a insurance company not eligible for reorganization under the Federal bankruptcy law, 11 U.S.C. section 1146(c) does not apply to transfers to or by the Trust.

Application of Receivership Exception. The RPTT and the RPTT rules do not define "receiver" for purposes of the exception to the application of the RPTT. Generally, a receiver is appointed by a court as an impartial intermediary to take possession of a debtor's assets for the benefit of the creditors to manage or dispose of the assets as directed by the court. Thus, a receiver is not intended to acquire beneficial ownership of assets but

merely acts as a agent. In the present case, the Trust was created under a plan of liquidation of the Taxpayer as requested by the Commissioner of Insurance of and as ordered by the court. Because the Trust was created to facilitate the liquidation of the Taxpayer's real estate assets fulfilling a function comparable to that of a receiver and because the Trust acquired mere legal title to the assets, with record title remaining in the Taxpayer, in our opinion, the transfers of the real estate assets to the Trust are not subject to the RPTT to the extent those assets represent interests, or economic interests in, real property located in New York City.

The RPTT rules cited above provide that transfers by an assignee for the benefit of creditors to creditors or third parties are subject to the RPTT. Those rules further provide that transfers by a receiver, sheriff or referee under a foreclosure or execution are subject to the RPTT. It is clear from these provisions that, with the exception of transfers exempted by Federal bankruptcy law, transfers to third parties pursuant to the liquidation of a debtor's assets are intended to be subject to the RPTT without regard to whether the proceeds of any liquidation are paid over to the creditors.

The provision of the RPTT rules exempting from the tax reconveyances by a receiver is not an exception to the general intent to tax liquidating transfers. The term "reconvey" is defined by Webster's Third New International Dictionary, Unabridged (1971) as "to convey back...to restore (as an estate) to a previous owner...." Thus the provision excepting from the tax reconveyances by a receiver are not inconsistent with provisions applying the tax to transfers to third parties in liquidation of a debtor's assets and are consistent with other provisions of the RPTT exempting from the tax transfers between a principal and an agent, dummy, straw man or conduit. Code §11-2106.7; 19 RCNY §23-03(d).

Therefore, in our opinion, the transfers of the real estate assets by the Trust to third parties in liquidation of the Taxpayer are subject to the RPTT to the extent those assets represent interests, or economic interests, in real property in New York City.

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

Sincerely,

Devora B. Cohn
Assistant Commissioner

for Legal Affairs