



January 14, 2010

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RE: Ruling Request  
Anonymous  
Real Property Transfer Tax  
FLR 094898-021

Dear XX XXXXXX

This letter responds to your request, received August 10, 2009, for a ruling regarding the application of the Real Property Transfer Tax (the "RPTT") to the hypothetical facts presented concerning the reconstitution of a cooperative housing corporation ("Old Taxpayer"), organized and operated under the rules and regulations of the Mitchell-Lama program, as a corporation ("New Taxpayer") under the New York State Business Corporation Law ("BCL").

**FACTS**

The hypothetical facts presented are as follows:

Old Taxpayer, a corporation organized under Article II of the Private Housing Finance Law (the "PHFL"), owns and operates a residential cooperative apartment building in New York City (the "Property"). The Property includes 1,651 residential units and several commercial spaces. As a cooperative housing corporation, Old Taxpayer's stock is owned by its occupants. Those occupants also enter into proprietary leases appurtenant to their units. Old Taxpayer has 45,768 issued and outstanding shares.

Having been formed under the PHFL, Old Taxpayer operates the Property under supervision of the New York State Division of Housing and Community Renewal (the "DHCR") on a not-for-profit basis as part of the Mitchell-Lama housing program. That program places a number of restrictions on Old Taxpayer's operations, including that: persons to be occupants and shareholders are selected from an income eligible list compiled by the DHCR; maintenance and assessments charges must be approved by the DCHR; and the amount that the shareholders can realize from the sale of their units is limited to the amount that they contributed plus amortization.

To permit the owners of shares in Old Taxpayer to realize the full market value of their ownership interests upon disposition, a Voluntary Restitution Plan (the "Plan") to convert Old Taxpayer has been proposed. Under the Plan, Old Taxpayer would restate its certificate of incorporation as a for-profit corporation under

the New York State Business Corporation Law (the “BCL”), as permitted under the PHFL. The restated corporation (“New Taxpayer”) would have 100,038 shares issued and outstanding, which would be allocated to the occupants of the Property based on the value of their units. The occupants would enter into proprietary leases with New Taxpayer appurtenant to their units. For purposes of this hypothetical ruling, you have asked us to assume that the shares of New Taxpayer would have a fair market value of \$XXX XXX XXX.

Following the implementation of the Plan, New Taxpayer would own the Property, and shares of New Taxpayer would be owned by occupants who had been the shareholders of Old Taxpayer. Because New Taxpayer would be organized under the BCL, involvement of the DCHR in Property would end: there would no longer be a list of income-eligible tenants; the DCHR would not be involved in establishing maintenance charges and assessments; and the shareholders would be able to sell their shares for market prices.

### **ISSUE**

You have requested a ruling concerning the RPTT consequences of the Plan, in which Old Taxpayer, a not-for-profit corporation under the PHFL, would be reconstituted as New Taxpayer, a for-profit corporation under the BCL.

### **CONCLUSION**

Based upon the facts presented and the representations submitted, we conclude that the reconstitution of Old Taxpayer as New Taxpayer under the Plan would, for RPTT purposes, be treated as a conveyance of the Property from Old Taxpayer to New Taxpayer in exchange for the shares of stock in New Taxpayer. Because that conveyance would be a conveyance to a cooperative housing corporation of the land and buildings comprising the cooperative dwelling or dwellings, it would not be exempt from the RPTT, and the amount of tax owed would be 2.625 percent of the consideration.

### **DISCUSSION**

The RPTT applies to the transfer of real property or a controlling economic interest in real property where the consideration exceeds \$25,000. Section 11-2102 of the Administrative Code of the City of New York (the “Code”). Concerning transfers in connection with cooperative housing corporations, Code section 11-2102(b) provides that tax is imposed on the transfer of shares in a cooperative corporation in connection with the grant or transfer of a proprietary leasehold, and section 23-03(h)(1) of title 19 of the Rules of the City of New York (“RCNY”) makes clear that a “conveyance of realty by a sponsor or other party to an entity formed for the purpose of cooperative ownership of real property (including a cooperative housing corporation) is subject to the tax.”

Code section 11-2106(b) exempts from tax certain transactions that would otherwise be subject to the RPTT. Under paragraph (8) of that subdivision, a deed conveying real property that effects a mere change of identity or form of ownership is exempt from the RPTT to the extent that the beneficial ownership of the property remains the same. Paragraph (8) further provides, however, that that exemption does not apply to a conveyance to a cooperative housing corporation of the land and building or buildings comprising the cooperative dwelling or dwellings.

For purposes of the tax, the term consideration means the price actually paid or required to be paid for the real property or economic interest therein, without deduction for mortgages, liens and encumbrances,

whether or not expressed in the deed or instrument and whether paid or required to be paid by money, property, or any other thing of value. Code § 11-2101.9. In the case of a conveyance of realty by a sponsor or other party to an entity formed for the purpose of cooperative ownership of real property (including a cooperative housing corporation), the consideration includes the amount of cash paid or required to be paid, the amount of any mortgages, liens or encumbrances on the realty and the fair market value of interests in the cooperative entity received by the sponsor. 19 RCNY § 23-03(h)(1).

The RPTT is imposed at a rate of 2.625 percent of the consideration where the consideration exceeds \$500,000, with certain exceptions not relevant here. Code § 11-2102(a)(9).

The reconstitution of Old Taxpayer under the Plan. Under the Plan, Old Taxpayer would be reconstituted as New Taxpayer under the provisions of the PHFL, New Taxpayer would own the Property, and the former shareholders of Old Taxpayer would own New Taxpayer. While not a conveyance in the conventional sense, the reconstitution of Old Taxpayer as New Taxpayer, a corporation under the BCL not subject to the restrictions of the Mitchell Lama program, would result in a substantive change in the nature of the entity owning the Property. Accordingly, for RPTT purposes, the reconstitution of Old Taxpayer as New Taxpayer under the Plan would constitute a conveyance by the plan sponsor to a cooperative housing corporation of the real property comprising the cooperative dwelling, which transaction is subject to RPTT under Code section 11-2102(b) and 19 RCNY section 23-03(h)(1). See New York Advisory Opinion, TSB-A-08(3)R (06/17/2008).

Because, under the Plan, the Property would be conveyed by Old Taxpayer to New Taxpayer in exchange for shares of New Taxpayer with consideration exceeding \$25,000, the reconstitution of Old Taxpayer under the Plan would be subject to the RPTT, unless otherwise exempt.

In this case, the exemption under Code section 11-2106(b)(8) does not apply. Before the Plan is implemented, Old Taxpayer owns the Property and Old Taxpayer is owned by its shareholders; as a result, the shareholders are the beneficial owners of the Property. Following the conveyance of the Property, New Taxpayer would own the Property, and the former shareholders of Old Taxpayer would own New Taxpayer. As a result, the shareholders of Old Taxpayer would be the beneficial owners of the Property. Thus, in the conveyance of the Property by Old Taxpayer to New Taxpayer in exchange for shares of New Taxpayer the beneficial ownership of the Property would remain the same.

Under Code section 11-2106(b)(8), an otherwise taxable transfer may be exempt to the extent the beneficial ownership of the property remains the same. That section, however, by its terms, does not apply to a conveyance to a cooperative housing corporation of the land and building or buildings comprising the cooperative dwelling or dwellings. As a result, the proposed transfer of the Property by Old Taxpayer to New Taxpayer in exchange for shares of New Taxpayer would not be exempt under Code section 11-2106(b)(8), and would be subject to tax.<sup>1</sup>

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<sup>1</sup> This ruling does not address the RPTT consequences to the shareholders of Old Taxpayer resulting from their exchange of shares of Old Taxpayer for shares in New Taxpayer under the Plan. It should be noted that the exception under Code section 11-2106(b)(8) applicable to conveyance to a cooperative housing corporation would not apply to that exchange of stock by the shareholders. As a result, that exchange may be exempt from the RPTT under Code section 11-2106(b)(8), if others conditions of that section are satisfied.

In this case, under 19 RCNY section 23-03(h)(1), the consideration would include the amount of cash paid or required to be paid, the amount of any mortgages, liens, or encumbrances on the realty and the fair market value of interests in the cooperative entity received by the sponsor. That amount would be taxed at the rate of 2.625 percent. In this case, shares in New Taxpayer were received in exchange for the Property. For purposes of this hypothetical ruling, you have asked us to assume that the shares of New Taxpayer would have a fair market value of \$XXX XXX XXX. Assuming that the shares are the only consideration for the transfer, the amount of RPTT owed would be \$XX XXX XXX XX.

Very truly yours,

Beth E. Goldman  
General Counsel

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