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May 23, 2016

RE: Request for Ruling  
Real Property Transfer Tax

FLR-15-4974

Dear Mr.:

This letter is in response to your request for a ruling dated October 13, 2015 regarding the application of the New York City Real Property Transfer Tax (“RPTT”) to the transactions involving the (the “Applicant”) and Real Estate Holdings LLC (the “LLC”) described below. Additional information was received on December 15, 2015, February 8 and 11, March 8 and 9, and May 8, 2016.

### **FACTS**

You have represented that the Applicant is an education corporation which is chartered by the New York State Education Department. It was founded in xxxx. The Applicant’s current charter will expire in 20xx, but can be renewed. The Applicant is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code (the “IRC”). The Applicant operates a museum located in the City. The LLC owns the real property (the “Property”) on which the Applicant is situated and leases the Property to the Applicant. Under the LLC’s operating agreement, the individual members of the LLC hold such membership as nominees of the Applicant. All of the LLC’s members are required to act with respect to their membership as the Applicant directs, including the transfer of their membership interest as the Applicant may require. Absent a court order, the LLC’s members are prohibited from transferring their membership interest to any person other than the Applicant. All distributions from the LLC are solely payable to the Applicant. All income and losses are allocated solely to the Applicant. The LLC’s sole purpose is to own and hold the Property for the benefit of the Applicant and it engages in no other activity. The LLC is a disregarded entity for federal income tax purposes.

You further represent the Applicant will engage in two real property transactions involving the Property. First, the Applicant will cause the LLC to sell the Property to a developer for cash (the "Sale Transfer") with the Applicant using the consideration for its exempt purposes, to wit: the expansion and improvement of its facility. The developer will then construct two or more condominium units on the Property. One unit will house the Applicant (the "Applicant Unit"). The other unit or units will consist of residential apartments (individually or collectively, the Residential Unit(s)). Upon completion of the condominium units, the developer will transfer the Applicant Unit either directly to the Applicant or to a new LLC entity (the "New LLC Entity"). If the Applicant Unit is transferred to the new LLC Entity, the Applicant will wholly own and be the sole member of the New LLC Entity. The Applicant will have complete control over the New LLC Entity, the sole purpose of which would be to own and hold the Property for the Applicant and engage in no other activity. This New LLC Entity will be disregarded for federal income tax purposes. The developer will retain the Residential Unit(s) for either rental of the apartments or their sale to purchasers as either condominium or cooperative apartments. Inasmuch as the Applicant is a not-for-profit corporation, the above-described transfer transactions are subject to the approval of the New York State Attorney General and the New York Supreme Court.

## **ISSUES**

- 1) Whether the LLC's sale of the Property to the developer in the Sale Transfer would be exempt from RPTT?
- 2) Whether the developer's transfer of the Applicant Unit directly to the Applicant would be exempt from RPTT?
- 3) Whether the developer's transfer of the Applicant Unit to the New LLC Entity would be exempt from RPTT?
- 4) Alternatively, if the Sale Transfer is not exempt from RPTT:
  - a. Whether the LLC's transfer of the Property to the Applicant would be exempt from RPTT? And
  - b. If the Applicant then sells the Property to the developer, would this conveyance be exempt from RPTT?

## **CONCLUSION**

The LLC's sale of the Property in the Sale Transfer is exempt from RPTT. The developer's transfer of the Applicant Unit directly to the Applicant would be exempt from RPTT. The developer's transfer of the Applicant Unit to the New LLC Entity, instead of directly to the Applicant, would also be exempt from RPTT. These conclusions are conditioned on (1) the Applicant continuing to exist beyond its 20xx expiration date; (2) the New LLC Entity's sole purpose would be to own and hold the Applicant Unit for the benefit of the Applicant; and (3) the New LLC Entity will engage in no other activity. In light of these conclusions, no ruling is rendered on the alternative issues raised in number 4, above.

## DISCUSSION

The RPTT applies to each a transfer or conveyance of New York City real property or an interest therein when the consideration for the real property interest exceeds \$25,000. Administrative Code of the City of New York (the “Code”) § 11-2102(a). Subdivision (b) of Code section 11-2106 exempts from tax certain deeds, instruments or transactions that would otherwise be subject to the RPTT. When subdivision (b) applies both the grantor and the grantee are exempt. Paragraph (2) of that subdivision exempts:

A deed, instrument or transaction conveying or transferring real property or an economic interest therein by or to any corporation, or association or trust, or community chest, fund or foundation organized and 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 and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; 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....

In the Sale Transfer, the LLC will sell the Property to a developer. Given the similarities between Code section 11-2106(b) and IRC section 501(c)(3), pursuant to which the Applicant is an exempt organization for federal income tax purposes, if the Applicant were to directly sell the Property to a developer, there would be no question that sale would be exempt from RPTT. The question is whether section 11-2106(b)(2) will still apply given that the LLC, rather than the Applicant, will sell the property in the Sale Transfer. The transfer of real property by or to an entity that is legally separate from the organization described in that provision would, ordinarily, not be exempt from RPTT. However, we have determined that under the facts and circumstances presented here, Code section 11-2016(b)(2) applies to exempt the Sale Transfer from RPTT.

Under the LLC’s operating agreement, the LLC’s sole purpose is to own and hold the Property for the Applicant and the LLC’s members must act as the Applicant directs, the Applicant clearly has complete ownership and control over the LLC. Therefore, the LLC has no other purpose than to own and hold the property for the benefit of the Applicant and engages in no other activity. Further, from the information submitted, it is obvious the LLC carries out the Applicant’s exempt purposes. For these reasons, and based on other facts and circumstances in this matter, there is no possibility of different parties seeking inconsistent tax treatment. See *Comdisco, Inc. v. United States*, 756 F.2d 569, 578 (7<sup>th</sup> Cir. 1985).

The developer’s transfer of the Applicant Unit directly to the Applicant would clearly be exempt from RPTT under section 11-2106(b)(2) as discussed above. Based on the previous analysis concerning the LLC’s sale of the Property in Sale Transfer, the developer’s transfer of the Property to the New LLC Entity, instead of the Applicant directly, would be exempt from RPTT if the conditions set forth below are satisfied: (1) the Applicant continues to exist beyond its 20xx expiration date; (2) the New LLC Entity’s sole purpose would be to own and hold the Applicant Unit for the benefit of the Applicant; and(3) the New LLC Entity will engage in no other activity.

The above conclusions are conditioned on (1) the Applicant continues to exist beyond its 20xx expiration date; (2) the New LLC Entity's sole purpose would be to own and hold the Applicant Unit for the benefit of the Applicant; and (3) the New LLC Entity would engage in no other activity.

The Department reserves the right to verify the information submitted. Please advise the Department of any material change in the facts presented.

Sincerely,

Diana Beinart  
General Counsel