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November 22, 2013

Re: Request for Ruling
XXX
Real Property Transfer Tax
FLR: 13-4941/RPTT

Dear XXX:

This letter responds to your request, dated April 22, 2013, on behalf of XXX (the "Taxpayer") in its capacity as Receiver for XXX (the "Corporation") for a ruling applying the New York City Real Property Transfer Tax (the "RPTT") to the sale of an office building located XXX (the "Property") owned by the Corporation, as described below. This office received additional information concerning this request on May 16, July 21, and September 11, 2013.

FACTS

The facts presented are as follows:

The Taxpayer. The Taxpayer, a New York not-for profit corporation exempt from tax under section 501(c)(3) of the Internal Revenue Code (the "IRC"), provides XXX. The Taxpayer is requesting this ruling in its capacity as a Court-appointed receiver (the "Receiver") for the assets and operations of the Corporation. The Corporation is a subsidiary of XXX ("Foundation 1").

The Foundations. Foundation 1 and XXX ("Foundation 2") (Foundation 1 and Foundation 2 are referred to collectively as the "Foundations.") are New York not-for-profit corporations exempt from federal tax under IRC section 501(c)(3). The Foundations, both formerly run by the same executive, XXX (the "President"), claimed to provide XXX New York consumers.

On XXX, The New York State Attorney General (the "AG") filed a verified complaint (the "Complaint") against the Foundations and the President, alleging XXX.¹

Among its many causes of action, the Complaint set forth eight causes arising from numerous violations of the New York State Not-for Profit law ("N-PCL")

¹ For example, the AG alleged that XXX

by the Foundations and the President. (XXX) Among others allegations, the Complaint states that:

XXX

While the AG does not enforce federal income tax statutes, the Complaint states that the Foundations were carrying on “activities not permitted to be carried on by a corporation exempt from federal income tax under [IRC section 501(c)(3)].”

The Corporation. The Corporation was formed in XXX as a New York business corporation. Its original Certificate of Incorporation described its purpose as: "To purchase, lease, own and operate real property; To do all things necessary or incidental to the purposes for which the corporation is formed." During this period the Corporation acquired the Property. There is some evidence that in XXX. From some point after that time, the Corporation’s only asset was the Property.

In XXX, the Foundation 1 acquired 100% of the Corporation’s stock. After that acquisition, the Foundations used the Property as office space to conduct their business. You have indicated that Foundation 1 failed to observe required corporate record keeping, including filing tax returns, with respect to the Corporation for many years, and written records are generally sparse. The AG’s Complaint sets out XXX

The Receivership. On XXX, the New York Supreme Court granted the AG’s request for a temporary restraining order against the Foundations and the President. According to the order, XXX

Following the AG’s recommendation, the New York Supreme Court (the “Court”) appointed the Taxpayer as temporary receiver for the Foundations on XXX, 2011. The Taxpayer’s duties as Receiver include XXX.

In its temporary receivership order, the Court directed the Taxpayer as Receiver to “take immediate custody, control and possessions of all property and assets of the [Foundations].” Pursuant to the Court’s order, the Taxpayer occupied the Property. Because the Property had served as the headquarters for the Foundations, the Taxpayer’s staff visited the Property to review the client files. Apart from its use as the headquarters of the Foundations (operated by the Taxpayer as Receiver) and as a base for the Taxpayer as Receiver to perform its Court-ordered charitable work, the Property was unused.

Receivership Sale. When the Court continued the Taxpayer’s receivership in XXX, it ordered the Taxpayer as Receiver to sell the Property on behalf of Foundation 1 and the Corporation and deposit the proceeds in an escrow account created and controlled by the Taxpayer as Receiver. Complying with the Court’s order, the Taxpayer as Receiver caused the Corporation to convey title to an unrelated third party (the “Receivership Sale”), using the proceeds to pay off a mortgage on the Property, and depositing the balance in an escrow account in accordance with the further instructions of the Court. The Receivership Sale occurred on XXX, and in connection with that sale, the Taxpayer as Receiver on behalf of the Corporation, paid RPTT in the amount of \$XXX.

The Settlement. On XXX, the AG announced that it had reached an agreement under which the Foundations would be dissolved as a result of their unlawful XXX.

Refund request. The Taxpayer’s request for a refund of the RPTT paid in connection with the Receivership Sale was timely received by this Department on XXX. In addition to financing the ongoing management of the Foundations’ client files, the Taxpayer uses the proceeds of the Receivership Sale and would use any refund proceeds to pay off the Foundations’ numerous creditors and to make restitution to the Foundations’ clients pursuant to a settlement of the lawsuit between the AG and the Foundations.

ISSUES

You have requested a ruling that the RPTT should not apply to the Receivership Sale as a transfer by an entity exempt from tax under section 11-2106(b)(2) of the New York City Administrative Code (the “Code”) for one of the following reasons:

1. Because the Taxpayer as Receiver had custody, control, and possession of the Property at the time of the Receivership Sale and the Taxpayer is a tax-exempt entity, the Receiver should be considered the effective owner of the Property and transfer should be exempt as a transfer by an exempt entity; or
2. Because Foundation 1 is the beneficial owner of the Corporation, and Foundation 1 was an exempt entity, Foundation 1 should be considered the effective owner of the Property and the Receivership Sale should be considered exempt as a transfer from an exempt entity.

CONCLUSIONS

Based upon the facts presented and the representations submitted, we conclude that

1. The Receivership Sale is not exempt as a result of the Taxpayer's tax-exempt status.
2. Because Foundation 1 has not been organized or operated exclusively for tax-exempt purposes, even if it were to be considered to be the effective owner of the Property, the Receivership Sale is not exempt.

DISCUSSION

The RPTT applies to each deed conveying an interest in New York City real property when the consideration for the real property interest exceeds \$25,000. Code section 11-2102(a). Code section 11-2101.9 defines "consideration" as the price paid or required to be paid for the property and includes the amount of any indebtedness on the property, whether or not that indebtedness is assumed.

Code section 11-2106(b)(2) exempts conveyances of real property by or to any corporation:

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 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 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;

19 RCNY 23-05(b)(2), promulgated under Code section 11-2106(b)(2) provides:

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.

This RPTT exemption is very similar to the federal charitable exemption found in section 501(c)(3) of the IRC. Generally, when a charitable organization shows the Department that it is exempt from federal tax under IRC section 501(c)(3), it is also exempt from the City's transfer tax. New York City Statement of Audit Procedure (“SAP”) No. 08-1-RPTT, 02/29/2008.

Because Code section 11-2106(b)(2) provides an exemption from tax, when the taxpayer claims its benefit, the burden of proof is shifted to the taxpayer, and the statute construed more strongly against him. Matter of Michael P. Grace, v New York State Tax Commission, 37 NY2d 193 (1975).

In this case, the Corporation, a business corporation, was the title holder of the Property at the time of the Receivership Sale. Despite that, you have presented two reasons why that transfer should be considered exempt under Code section 11-2106(b)(2). First, because the Taxpayer as Receiver had custody, control, and possession of the Property at the time of the Receivership Sale and the Taxpayer is a tax-exempt entity, the Receiver should be considered the effective owner of the Property for purposes of Code section 11-2106(b)(2) and transfer should be exempt as a transfer by an exempt entity. Second, because Foundation 1 is the owner of the Corporation, and Foundation 1 is an exempt entity, Foundation 1 should be considered the effective owner of the Property for purposes of Code section 11-2106(b)(2) and the transfer should be considered exempt as a transfer from an exempt entity.

The Receivership sale should not be considered to be exempt as a result of the Taxpayer’s status as a tax-exempt entity. You have requested that we rule that the Receivership Sale should be exempt under Code section 11-2106(b)(2) because the Taxpayer, as an entity exempt from tax under IRC 501(c)(3), was the effective owner of Property at the time of the Receivership Sale by reason of

the Court’s order giving the Taxpayer as Receiver “custody, control and possession of all Property and assets of [the Foundations],” which included the Corporation. Pursuant to the Court’s order, the Taxpayer occupied the Property. Because the Property had served as the headquarters for the Foundations, housing all of the Foundations’ client case files, the Taxpayer’s staff acting as the Receiver made frequent visits to the Property to review the client files on site. Apart from its use as the headquarters of the Foundations (operated by the Taxpayer as Receiver) and as a base for the Taxpayer as Receiver to perform its Court-ordered charitable work, the Property was unused. Under your reasoning, the Taxpayer should be treated as the effective owner of the Property pursuant to the Court’s orders on XXX, until the Property’s sale on XXX, and thus, because the Taxpayer is tax-exempt, the Receivership Sale should be exempt under Code section 11-2106(b)(2).

You have represented that the Property was operated by the Taxpayer, a tax-exempt entity for exempt purposes, as Receiver for a period of slightly over a year. The nature of a receivership, however, is that while the receiver takes custody and has control of assets it does so merely as a custodian and agent of the court, and its functions are limited to the care and preservation of the property. See, e.g., Cohen v. Sherman, 279 A.D. 939 (2d Dep’t 1952). In addition, unlike an owner, the receiver acquires no title to the property, but only the right of possession as the officer of the court. See, e.g., Daro Industries, Inc. v. RAS Enterprises, Inc., 56 A.D.2d 776 (1st Dep’t 1977). Thus, while a receiver has control of property much like an owner, it is actually holding it as an agent of the court to exercise fiduciary responsibilities on behalf of parties holding an interest in the assets. See, e.g. Insurance Co. v City of New York, 71 NY2d 983, 985 (1988) and Matter of Schwartzberg v Whalen, 96 AD2d 974, 975, (3rd Dep’t 1983)

Consistent with the treatment of a receiver as a custodian of the property and not the owner, the tax consequences arising from actions undertaken by the party in its capacity of a receiver and determined as if the actions were undertaken by the debtor and not the receiver. Code section 11-664 sets out the principle in the context of the New York City General Corporation Tax:

Any receiver, liquidator, referee, trustee, assignee, or other fiduciary or officer or agent appointed by any court, who conducts the business of any corporation, joint-stock company or association shall be subject to the tax or taxes imposed by this subchapter in the same manner and to the same extent as if the business were conducted by the agents or officers of such corporation, joint-stock company or association.

In this case, the sale of the Property was conducted by the Taxpayer. The Taxpayer also exercised control over the Property for XXX and had control over the use of the proceeds, much like an owner of the Property would. Unlike an owner, however, as a receiver, the Taxpayer's control over the use and sale of the Property, as well as the proceeds derived from the sale, is limited by its fiduciary responsibilities to Foundations' creditors, as guided by the Court's directives. Applying the rule set out in Code section 11-664 and other receivership law, the tax consequences will be the same if the sale had been made by the party owning the Property, the Corporation. As a result, the Receiver should not be considered to be the effective owner of the Property for purposes of Code section 11-2106(b)(2) and the sale is not exempt as a result of the Taxpayer's tax-exempt status.

The Receivership sale should not be exempt as a result of the Taxpayer's status as a tax-exempt entity. You have requested that we rule that the Receivership Sale should be exempt under Code section 11-2106(b)(2) because Foundation 1, an entity that was exempt from tax under IRC 501(c)(3), was the effective owner of the Property as the sole-shareholder and beneficial owner of the Corporation, the title holder of the Property. As such, despite the fact that the Corporation was a business corporation without not-for-profit status, the Foundation 1 should be considered the effective owner of the Property, and the Receivership Sale should be considered to be exempt from tax under Code section 11-2106(b)(2)..

A threshold issue, then, is whether a transfer of the Property by Foundation 1, had it owned the Property directly, would have qualified for exemption under Code section 11-2106(b)(2). The facts as presented do not show that the Foundation 1 was either "organized" or "operated" for tax-exempt purposes.²

² By only requiring that an organization be "organized or operated" exclusively for religious, charitable, or educational purposes...", Code section 11-2106(b)(2) stands in contrast to other exemption law. For example, 19 RCNY 23-05(b)(2), promulgated under Code section 11-2106(b)(2), requires that the organization be both "organized and operated exclusively" for charitable purposes. Significantly, IRC section 501(c)(3), on which the Code exemption is based and on which this Department has expressly stated in SAP No. 08-1-RPTT that it relies, requires that an organization, to be exempt, must be both "organized and operated" for one of the exempt purposes. In addition, exemptions in other city statutes for charitable, educational, and religious organization also require that the organizations be both "organized and operated" exclusively for those exempt purposes.

It is unclear why the exemption statute under the RPTT is an outlier among exemptions statutes and regulations. The predecessor section to Code section 2106(b)(2), Code section II46-6.0(b)(2), like the IRC, had required that the organization be both organized and operated for exempt purposes. In addition, Tax Law section 1230(d), part of the act enabling the RPTT and other local taxes, exempts from tax transactions by or with organizations "organized and operated" for charitable, educational, and religious purposes. The use of "or" entered the Code when it was recodified by the 1985 McKinney Session Laws, chapter 907, §7 and enacted by Section of Local Law 1986 Number 71. We are not aware of any reason for that change, and it seems possible that it may have been a mistake in drafting.

Concerning operation, Foundation 1 may at some time have operated for those purposes; however, it is clear that for many years it had been operated in a way to generate a profit. Indeed, according to the Complaint and the Settlement, Foundation 1 was operated, not merely for profit, but for profit by misrepresenting its qualifications to provide XXX. That is far from being operated for charitable purposes as required by Code section 11-2106(b)(2).

Concerning being “organized” for non-profit purposes, Foundation 1 was originally organized under the N-PCL. It has failed, as shown by the Complaint and the Settlement, to comply with the authority conferred upon it by law, and acted beyond its capacity or power as provided by law and its charter. For example, it has conducted activities for profit or gain, in violation of N-PCL § 102(a) (5)(1); (b) distributed income and profits in violation of N-PCL §§ 102(a) (5)(2) and 515; and (c) engage in private inurement, in violation of N-PCL § 102(a)(5)(2) and its Certificate of Incorporation. As a result, long before the Receivership Sale, Foundation 1 had forfeited any status it may have enjoyed under the N-PCL and could not be considered to be “organized” for charitable purposes as required by Code section 11-2106(b)(2).

Also of note concerning Foundation 1’s tax-exempt status, in light of the similarities between Code section 11-2106(b)(2) and IRC section 501(3)(c) (see SAP No. 08-1-RPTT, 02/29/2008), is that the Complaint alleges that Foundation 1 had been carrying on “activities not permitted to be carried on by a corporation exempt from federal income tax under [IRC section 501(c)(3)].”

As a result, long before of the Receivership Sale, Foundation 1 had forfeited any status it may have enjoyed under the N-PCL could not be considered to be “organized” or “operated” for charitable purposes under and Code section 11-2106(b)(2). For reasons set out above, we conclude that the Receivership Sale is not exempt under Code section 11-2106(b)(2) by reason of Foundation 1 not being exempt under Code section 11-2106(b)(2).

Finally, we note that even if Foundation 1 were exempt under Code section 11-2106(b)(2), the Receivership Sale would likely not be considered exempt under the last sentence of Code section 11-2106(b)(2) which provides 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.” The Corporation has been a business corporation since its formation and it has not been demonstrated that it stopped carrying on a business until it was taken over by the Receiver. The activities following its takeover by the Receiver would likely not be sufficient to overcome the fact that it was organized and operated



to make a profit over the course of its existence.³ However, because we conclude that Foundation 1 was not exempt, we do not reach a conclusion based on the on the last sentence of Code section 11-2106(b)(2).

For reasons set out above, we conclude that the Receivership Sale is not exempt under Code section 11-2106(b)(2) by reason of Foundation 1 being considered the effective owner of the Property.

* * *

This opinion is based on the facts as presented. The Department of Finance reserves the right to modify its opinion in the event that the facts upon which this opinion is based are other than as described above.

Very truly yours,

Dara Jaffee
Acting General Counsel
Office of Legal Affairs

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³ You have cited a ruling letter issued by this Department, FLR-074873-021 (Nov. 21, 2007), as support that the title-holder need not be a not-for-profit corporation to be exempt from the RPTT if it is wholly-owned by a not-for profit. In FLR-074873-021, however, the entity owned by the tax-exempt entity was a single-member LLC. For federal, state, and city tax purposes, a single -member LLC is disregarded, and its activities are considered those of its owner. Thus, when that LLC transferred property it was considered to be a transfer by its owner, an exempt-entity and thus was considered exempt under Code section 11-2106(b)(2). While it may have been possible that the corporation could have been converted to a single-member LLC, at the time of the Receivership Sale it was not.