



FINANCE
NEW • YORK
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE

January 13, 2004

Re: Request for Ruling
Commercial Rent Tax

FLR#034816-007

Dear _____ :

This is in response to your request received on November 12, 2003 for a ruling regarding the application of the Commercial Rent Tax ("CRT") to the hypothetical circumstances discussed below. Additional information was received on December 18, 2003.

HYPOTHETICAL FACTS

A lease ("Lease") exists between one lessor ("Lessor") and one lessee ("Lessee") who are unrelated entities. Lessee is subject to CRT on the rental payments it makes to Lessor pursuant to the Lease for the leased space (the "Leased Premises"). Lessee has subleased various sections of the Leased Premises to multiple subtenants (the "Subtenants"). The Subtenants are related to the Lessee in that each has the same stockholders or owners as Lessee. You have represented that each Subtenant is occupying its space with its own employees and is using the subleased space to conduct its own business that is separate and apart from the business of Lessee. Lessee may receive payments or other consideration from a Subtenant, including property or services, or payments made by the Subtenant on behalf of the Lessee, that could be construed as being paid in lieu of rent.

ISSUE

You have requested a ruling as to whether, notwithstanding that the Subtenants are related to Lessee, Lessee can claim the subtenant deduction for amounts received from each Subtenant regardless of whether the Subtenant's rent is above or below the taxable threshold.

CONCLUSION

Based on the hypothetical facts presented and representations submitted, we have determined that Lessee can claim a subtenant deduction for rent received from the Subtenants regardless of whether they pay rent that is above or below the taxable threshold.

DISCUSSION

Section 11-702 of the Administrative Code of the City of New York (the “Code”) imposes the CRT on the base rent paid to occupy taxable premises. Under section 11-701(5) of the Code, “taxable premises” are

[a]ny premises ... occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, including any premises so used even though it is used solely for the purpose of renting, or granting the right to occupy or use, the same premises in whole or in part to tenants....

The Code defines “base rent” as “rent paid ... by a tenant to his or her landlord for a period, less the amounts received by or due such tenant for the same period from any tenant of any part [of the taxable premises] as rent for premises which constitute taxable premises of such tenant....” Code § 11-701(7).¹ The Code defines “rent” as

[t]he consideration paid or required to be paid by a tenant for the use or occupancy of premises, valued in money, whether received in money or otherwise, including all credits and property or services of any kind and including any payment required to be made by a tenant on behalf of his or her landlord for real estate taxes, water rents or charges, sewer rents or any other expenses (including insurance) normally payable by a landlord who owns the realty other than expenses for the improvement, repair or maintenance of the tenant’s premises.

Code § 11-701(6).

Section 7-01 of Title 19 of the Rules of the City of New York (“RCNY”) provides that the deduction from base rent of “amounts received by or due such tenant for the same period from any tenant” includes “amounts received by or due such tenant ... from any subtenant....” Moreover, Title 19 RCNY section 7-01 defines “tenant” as including “a corporation which leases the premises from another corporation ... with which it is affiliated.”

¹ An exception, which precluded the deduction of rental amounts received from other tenants who were not subject to CRT because they were below the taxable threshold, was repealed for tax periods beginning on or after June 1, 1995. See Code § 11-701(7) as amended by L.L. 22/1994.

Section 11-704(b)(2) of the Code exempts from CRT a tenant paying base rent in an amount up to the taxable threshold calculated on an annualized basis. For tax years beginning on or after June 1, 2001, the taxable threshold is \$249,999. Code § 11-704(b)(2)(x).

In the hypothetical situation presented here, you have represented that each Subtenant is occupying its space with its own employees and is using the space to conduct its own business that is separate and apart from the business of the Lessee. Based on that representation, the portion of the Leased Premises occupied by each Subtenant will constitute the taxable premises of that Subtenant. Accordingly, Lessee will be entitled to claim the subtenant deduction for the rent received from each Subtenant even though each Subtenant is related to Lessee and regardless of whether a Subtenant's base rent is below the taxable threshold. However, each Subtenant's base rent must include all consideration due under the sublease including property or services, or payments made by the Subtenant on behalf of the Lessee, that could be construed as being paid in lieu of rent. *See* Code §§ 11-701(6), 11-701(7). Moreover, a Subtenant will be subject to CRT on its base rent that exceeds the taxable threshold.

Sincerely,

Ellen E. Hoffman
Assistant Commissioner for Tax Law and Conciliations