

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-13(3)R
Mortgage Recording Tax
July 15, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M121119A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioners recently purchased an individual residential condominium unit, which was adjacent to their present condominium residential unit, for the purpose of combining the units into a single-family residence. Petitioners ask whether the mortgage recording tax due upon the recording, prior to the units being combined, of a mortgage secured by both condominium units, each securing a principal debt of \$500,000 or more, will be subject to the combined New York State (NYS) and New York City (NYC) mortgage recording tax (MRT) at the highest rate of 2.8% instead of a residential rate of 2.175%.

We conclude that the applicable combined tax rate for the recording of the mortgage described above is 2.175%.

Facts

Petitioners own and reside in an individual residential condominium unit (unit C) in NYC, which they bought in 2008 from the Corporation Sponsor. When the adjacent condominium (unit B) went up for sale by a private party, Petitioners wanted to buy it for the purpose of combining the two condominiums into their primary residence. Although the Condominium's governing documents permitted building alterations for the purpose of combining units, they did not permit a unit owner to make any alterations, additions, or improvements to any areas within the condominium building that were not specifically owned by that condominium unit owner. Thus, Petitioners could not make any alterations, additions, or improvements to unit B prior to their closing.

Throughout the fall of 2012, Petitioners consulted with representatives of the Condominium's Board of Managers, various architects and contractors, and the New York City Department of Buildings to ascertain whether a construction project to combine the units would be approved. Architectural plans for the combination were completed on November 7, 2012. An Apartment Alteration Agreement was submitted by the Petitioners to the Property Management agent requesting consent of the Condominium to the construction. It included requirements that Petitioners commence construction within 30 days of executing the Agreement with the Board and complete construction with 120 days of commencement. Petitioners closed on the purchase of unit B on December 12, 2012. They received formal written notice of approval for the project by the Condominium Board on January 16, 2013. A work permit was issued by the NYC Department of Buildings the same day. Work began on the combination on January 18, 2013 and was completed on February 11, 2013.

Prior to Petitioner's acquisition of unit B, unit C was subject to a mortgage securing debt in the amount of \$880,000.¹ On December 12, 2012, Petitioners purchased unit B for which they were approved for new funds in the amount of \$704,000. When Petitioners advised their lender of their intent to combine the two units into one residence, the lender recommended that Petitioners spread the mortgage at closing across both units. Thus at closing, the two mortgages were consolidated into a new mortgage in the amount of \$1,584,000 secured by both units C and B. Upon the recording, the Petitioners paid NYC MRT at the highest rate.

Applicable Statutes and Regulations

NYS imposes a MRT on the recording of a mortgage securing real property located in NYC at the rate of \$1.05 for each \$100 and each remaining fraction thereof of principal debt or obligation secured at the date of execution or at any time thereafter. *See* Tax Law section 253. This rate does not vary according to the use of the real estate or the amount of the mortgage debt.

NYC is authorized to impose a City MRT under Tax Law section 253-a, and it has done so under the New York City Administrative Code (the Code) section 11-2601.d. Unlike the Tax Law, the Code provides for different rates, depending on the use of the property mortgaged and the amount of debt secured:

d. With respect to: (1) real property securing a principal debt or obligation of less than five hundred thousand dollars, a tax of one dollar, (2) **with respect to one, two or three-family houses and individual residential condominium units** securing a principal debt or obligation of five hundred thousand dollars or more, a tax of one dollar and twelve and one-half cents, and (3) with respect to all other real property, a tax of one dollar and seventy-five cents, for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof, or at anytime thereafter by a mortgage on such real property situated within the city and recorded on or after August first, nineteen hundred ninety, is hereby imposed on each such mortgage and shall be collected and paid as provided in this chapter. If the principal debt or obligation which is or by any contingency may be secured by such mortgage is less than one hundred dollars, a tax of one dollar is hereby imposed on such mortgage and shall be collected and paid as provided in this chapter.

A regulation, 20 NYCRR §642.4(a)(2)(ii) adopted in 1994, explains §11-2601 of the Code, but its words are slightly different from those in the Code.²

Where the amount of such principal debt or obligation is \$500,000 or more and the mortgage is of real property consisting **only of a one-, two- or three-**

¹ When Petitioners closed on unit C, that property secured a mortgage in the amount of \$920,000. Immediately prior to closing on the adjacent unit B on 12/12/12, that mortgage on unit C had been paid down to \$880,000.

² These words track with words in Tax Law §1402 imposing the real estate transfer tax (RETT).

family house or an individual residential condominium unit, the rate of tax is one dollar and 12 ½ cents. For purposes of determining whether the mortgage is of real property consisting only of a one-, two- or three family house or an individual residential condominium unit, **the nature of the property as of the date that the mortgage is executed must be used.**

Analysis

In this case, with respect to “individual residential condominium units”, the Code specifics that the NYC MRT is imposed at a rate of \$1.125 for each \$100 of principal debt and remaining fraction thereof securing a principal debt or obligation of \$500,000 and each remaining fraction thereof. If, at the closing, only unit B had been named on the mortgage securing the new purchase money, the appropriate MRT rate would clearly be the lower rate applicable to one, two or three-family houses and individual residential condominium units. Here, though, Petitioner executed a new mortgage that spread the combined debt to both units. Because this mortgage covered two condominium units that were not already combined into one residence, the City assessed the MRT at the highest rate.

Similar aggregation issues have arisen with regard to assessments of the NYC Real Property Transfer Tax (RPTT), which is similar to the NYC MRT in that the rates are imposed according to the amount of consideration and the type of use. *See* Code section 11-2101.a(9). In 2000, NYC Finance took the position that a transfer of adjacent cooperative apartments or residential condominium units which had been combined into a single residence would not be considered a “bulk sale” if the facts and circumstances indicate that the units have been physically combined.³ NYC Finance updated this guidance in 2011, reaffirming that an analysis of specific facts and circumstances is necessary to determine whether a transfer constitutes a bulk sale subject to the higher commercial RPTT rate.⁴

In 2006, the NYC Tax Appeals Tribunal sustained the cancellation of NYC Finance notices assessing the RPTT at the higher commercial rate on a transfer of three contiguous residential condominium units to a single buyer where the record clearly reflected the buyer’s intention to combine the three units into one residential space.⁵ NYC Finance reached a similar conclusion in a letter dated September 2, 2008, opining that the conveyance of two adjoining apartments from a development corporation would be subject to the lower RPTT rate applicable to a single residential apartment, because the buyer intended to combine them immediately after obtaining title to his primary residence. The buyer had requested that the units be combined prior to closing, but the Corporation Sponsor refused, citing additional costs and expenses that would be incurred. As evidence of the buyer’s intent to combine the units, he submitted invoices and checks totaling over \$6,000 to a firm providing the design and architectural drawings necessary for the construction. The letter noted that “...when the facts are particularly clear with

³ NYC Finance Memorandum 00-6 (June 2, 2000).

⁴ NYC Finance Memorandum 00-6REV (September 8, 2011).

⁵ *In the Matter of David Gruber*, TAT (E) 2003-7 (RP), TAT (E) 2003-8 (RP), TAT (E) 2003-9 (RP), Sept. 12, 2006.

regard to the intent to combine apartments, we will treat the units as a single apartment for purposes of calculating the RPTT.”

Analogizing these RPTT matters to assessments under the NYC MRT, we conclude that Petitioners’ facts and circumstances, as stated in the Petition, evince Petitioners’ clear intent to combine the two adjacent units into one primary residence. We further conclude that, under these facts and circumstances, the NYC MRT rate imposed on the recording of Petitioners’ mortgage executed at the closing on unit B is the rate applicable to one, two or three-family houses and individual residential condominium units securing a principal debt or obligation of five hundred thousand dollars or more.

DATED: July 15, 2013

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.