

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

TSB-A-14(1)R
Mortgage Recording Tax
July 2, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M131115B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioners ask whether the recording of their purchase money mortgage securing more than \$500,000 of principal debt for the purchase of three separate but adjacent condominium units will be subject to the mortgage recording tax residential rate or the higher commercial rate.

We conclude that the combined New York City and New York State residential rate of 2.175% will apply.

Facts

Petitioners have entered into a Purchase Agreement (the “Agreement”) for the purchase of three adjacent condominium units (the “Property”) which they intend to combine into a single apartment. Once the construction is completed, Petitioners plan to occupy the Property as their primary residence and live there with their children. The combined purchase price for the Property is set forth in the Agreement and no portion of the purchase price or the down payment is specifically attributable to a single unit. The anticipated purchase money mortgage for the Property is expected to be in excess of \$500,000.

Although combination of the units will not be permitted to take place until after the closing, the seller will perform work at its expense prior to the closing for the sole purpose of inducing the New York City Department of Buildings to issue at least a temporary certificate of occupancy covering the three units.

Architectural prints for combining the units after the closing and the contractor’s estimate of the cost for making the renovations were prepared prior to closing and submitted with this Petition. Petitioners will bear the sole cost of combining the units after they take ownership of the Property. They intend to obtain a new Certificate of Occupancy for the Property as one apartment prior to moving into the residence, and they also intend to cause the seller and the developer to amend the Condominium Declaration to provide for an apportionment of common elements consistent with having all three units combined as one unit.

Analysis

New York City is authorized to impose a NYC MRT under Tax Law § 253-a, and did so under the New York City Administrative Code (the Code) § 11-2601.d. This tax is in addition to

the State MRT imposed under Tax Law § 253. The New York State Department of Taxation and Finance administers both of the NYC MRT and the State MRT, as well as numerous local MRTs under Article 11 of the Tax Law. *See* Tax Law § 263.

The NYC MRT provides for different rates, depending on the use of the property mortgaged and the amount of debt secured, and provides as follows.

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 any time 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.¹

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-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.

The issue is whether the recording of Petitioner's mortgage, covering the purchase of three individual units when the mortgage was executed, should be taxed at the higher commercial rate.

The New York City Real Property Transfer Tax (RPTT) is similar to the NYC MRT in that it imposes tax rates based on the amount of consideration and the type of use. *See* Code § 11-2101.a(9). The highest rate is imposed on "bulk sales," which generally include transactions where a single grantor transfers more than one cooperative apartment or residential condominium unit to a single grantee for consideration over \$500,000. *See* New York City

¹ These words track Tax Law § 1402, which imposes the real estate transfer tax (RETT).

Department of Finance letter ruling 00-06REV, September 8, 2011. In order to determine whether a transfer constitutes a bulk sale subject to the higher commercial RPTT, the Department will look to the facts and circumstances of the specific case.

Three September 12, 2006 New York City Tax Appeals Tribunal RPPT decisions provide guidance on what constitutes a bulk sale. In *The Matter of Cambridge Leasing*, TAT (E) 03-11, Petitioner sold three condominium units pursuant to a single contract. Two of the units had been combined prior to the sale; the third unit was a maid's room, less than 200 square feet, with no kitchen facilities and located on a separate floor. The maid's room could be purchased only in conjunction with the purchase or ownership of a residential unit and its use was restricted as well. The Tribunal found that, under these particular facts, the transfer of the combined apartments and the maid's room was not the sale of multiple residential condominium units. In *The Matter of Rosenblum*, TAT (E) 2001-31 (RP), the taxpayer purchased a condominium unit along with a "Suite Unit", a wine cellar unit and a storage unit. Even though the Suite Unit was equipped with a kitchenette and bathroom, the Tribunal ruled that the transfer did not result in a bulk sale. A factor in the decision was that none of the additional units could be purchased by anyone other than a condominium owner. Lastly, in *The Matter of Gruber*, TAT (E) 2003-7 (RP); TAT (E) 2003-8 (RP); TAT (E) 2003-09 (RP), the taxpayer purchased all three units on an unfinished floor of a condominium building for the purpose of combining them into one residence. However, in order to get a Certificate of Occupancy, the sponsor had to put up temporary walls and meet certain minimum requirements for the kitchen and bathroom. The Tribunal reasoned that the taxpayer clearly intended to combine the units into one residence immediately after obtaining title, and, thus, it ruled that there was no bulk sale and the lower RPTT rate applied.

A recent Advisory Opinion, TSB-A-13(3)R, addressed the issue of which NYC MRT rate applied when the Petitioners bought a condominium adjacent to the condominium they owned and used as their primary residence. The Condominium's governing documents did not permit a prospective purchaser to make any alterations prior to closing. In preparation for combining the units, architectural plans were completed prior to closing and various documents were signed with the Condominium Board regarding the conditions under which the construction could proceed. Among the requirements, construction had to begin within 30 days from the signing of the Agreement and be completed within 120 days from the time construction was begun. We concluded that the Petitioners evidenced, prior to closing, a clear intent to combine the two adjacent units in order to increase their living space. Thus, the NYC MRT rate imposed on the recording of Petitioners' mortgage executed at the closing on the adjacent condominium was 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.

Drawing on the facts and circumstances in the above RPTT cases and our recent TSB-A-13(3)R, we conclude that Petitioners have evidenced a clear intent, prior to the closing, to combine the three 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 is the rate applicable to one, two or three-family houses and individual residential

