

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(3)R
Real Estate Transfer Tax
November 30, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M060622A

On June 22, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from 360 Brooklyn Investors, LLC, c/o RAL Development Services, LLC, 86 Chambers Street, Suite 704, New York, NY 10007.

The issue raised by Petitioner, 360 Brooklyn Investors, LLC, is whether a sale-leaseback transaction and a repurchase transaction related to property located at 360 Furman Street, Brooklyn, New York, are subject to the real estate transfer tax imposed by Article 31 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is the owner of the property known as 360 Furman Street, Brooklyn, New York (the "Property"). Petitioner recently entered into an *Amended and Restated Memorandum of Understanding*, dated February 24, 2006, and amended by letter dated June 13, 2006, (collectively, the "MOU") with the Brooklyn Bridge Park Development Corporation ("BBPDC"). BBPDC is a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development Corporation.

Pursuant to the terms of the MOU, the parties contemplate the redevelopment of the Property as a mixed-use condominium project containing residential apartments, commercial space, and a parking garage consistent with the objectives of the BBPDC in accordance with the General Project Plan ("GPP") adopted for the Brooklyn Bridge Park (the "Park").

Under the terms of the MOU, upon satisfaction of certain conditions, Petitioner will sell and convey fee title to the Property to BBPDC for \$1.00 (the "Sale"). Simultaneously, Petitioner will enter into a ground lease ("Lease") of the Property with the BBPDC. Together, the Sale and Lease constitute the "Sale-Leaseback Transaction." Upon the expiration or termination of the Lease, Petitioner or its successor-in-interest will have an option to repurchase fee title to the Property for \$1.00 (the "Reconveyance Transaction").

The Sale

In connection with the Sale, current mortgage liens against the fee interest in the Property will be released from the fee interest and Petitioner may (1) spread such existing mortgage liens to Petitioner's leasehold interest under the Lease, including Petitioner's option to repurchase the Property pursuant to the Lease, and (2) encumber Petitioner's leasehold interest under the Lease

with additional leasehold mortgages, in each case, in accordance with the MOU and transaction documents. Petitioner has also agreed to pay the New York State and New York City transfer taxes in connection with the Sale-Leaseback Transaction and the Reconveyance Transaction, if any are determined to be due.

The Lease

Under the terms of the Lease, BBPDC will be landlord and Petitioner, or another entity owned and controlled by Robert A. Levine (“Levine”) or AIG Global Real Estate Corp. (“AIG”) or an affiliate of Levine or AIG, will be the developer of the Property (“Developer”) and initial tenant (“Tenant”) under the Lease. The term of the Lease will not exceed 99 years and Tenant will have the option to repurchase the Property upon (1) expiration of the Lease or (2) termination of the Lease under certain conditions throughout the life of the Lease.

In addition to the Lease, the parties will execute a declaration of covenants, conditions and restrictions (“CCR Declaration”). BBPDC and Developer will be the initial parties to the CCR Declaration. Developer or any of its successors is referred to as “Owner” with respect to the CCR Declaration. The term of the CCR Declaration is 99 years.

Tenant or Owner (as the case may be) may assign its interest in the Lease or the CCR Declaration to a “Permitted Assignee” in the event of default by Developer under the financing for the acquisition and/or construction of the Property. In addition, the parties intend that, upon submission of the Property to condominium ownership, (1) Tenant’s interest in the Lease will be assigned to the condominium board of managers (“Condo Board”) and (2) the Condo Board will assume the obligations of Tenant set forth in the Lease and the obligations of Owner set forth in the CCR Declaration.

Payments under the Lease will be in the form of payments in lieu of taxes (“PILOT”) to BBPDC in an amount equivalent to the real property taxes and assessments that the City of New York would levy on the Property if it were not owned by BBPDC or a tax-exempt entity. The parties intend that, after the Property is subdivided into condominium units, the owner of each condominium unit, rather than Tenant, will be responsible for the payment of each owner’s proportionate share of the PILOT payment. Neither Tenant nor the owner of any condominium unit will be obliged to make PILOT payments under the Lease during any period for which the Property or any condominium unit is subject to real estate taxes or assessments payable to the City of New York. Tenant (or after expiration or termination of the Lease, Owner) will be responsible for payment of all water, sewer, and other charges that the City of New York levies against the Property, which amounts will be paid directly to the City when due.

The CCR Declaration will provide that Owner will pay to BBPDC a “Park Contribution.” The initial amount of the Park Contribution is \$1,250,000 per year and will be increased by 3%

on the third anniversary of the contribution commencement date and on each anniversary thereafter. The Park Contribution will be used to pay for park maintenance, repair, and replacements. Owner's obligation to make Park Contributions will cease upon the expiration of the CCR Declaration.

The Lease and CCR Declaration will provide certain remedies in the event of default. If Tenant or Owner (as the case may be) fails to pay amounts due or perform any obligations under the Lease or CCR Declaration, the lenders will be given a reasonable time to cure. If not cured timely, BBPDC will have the right to pursue remedies to enforce payment and performance of any obligations under the Lease or CCR Declaration and have the right to terminate the Lease.

The Reconveyance

Upon expiration or termination of the Lease, Tenant will have the option to purchase BBPDC's fee interest in the Property for the sum of \$1.00 plus the amount of any unpaid payments under the Lease for the period through the date of purchase.

Development Agreement

The MOU indicates that the parties will enter into a "Development Agreement." Among other provisions, the Development Agreement provides that Petitioner, or another entity owned and controlled by Levine or AIG or an affiliate of AIG, will be the Developer.

Developer will make payments in lieu of sales tax ("PILOST") to BBPDC on materials, goods, fixtures, equipment, and other items that Developer, its contractors, and subcontractors do not pay as a result of the Property being owned by BBPDC or a tax-exempt entity.

Developer will pay to BBPDC an amount equal to the New York State and New York City mortgage recording taxes ("MRT") that would be due on any mortgage financing or refinancing secured by the Property or the Lease if the landlord was not a corporate governmental entity of New York State. BBPDC agrees to be a party to any mortgage financing or refinancing secured by the Property or the Lease, provided BBPDC will have no obligations under such mortgage. Amounts due for MRT payments will be due on the date of closing of the mortgage financing or refinancing. Petitioner will be entitled to any credits available from the payment of MRT in connection with mortgages on the Property or the Lease for which Petitioner has paid MRT. The amount of any credit due to Petitioner will be credited against any future payments due under the Lease, the CCR Declaration, or the Development Agreement.

Developer has agreed to make a significant fixed payment upon the earlier of (1) the lease, sale, or refinancing of the construction loan for the condominium unit(s) situated at the

rear of the second floor of the Development or (2) the second anniversary of the date of issuance of the first certificate of occupancy for residential condominium units. Developer will also make other payments based on a percentage of the gross revenues generated by the sale of condominium units.

When the condominium declaration is recorded, the CCR Declaration will be assumed by the Condo Board. Upon such assumption, Developer will guaranty all payments due under the CCR Declaration (the "Guaranty") until (a) 75% of the residential condominium units are sold to bona fide purchasers, and (b) Developer has paid the PILOST and MRT payments referred to above. Once the conditions under (a) and (b) are satisfied, Developer will be released from any further liability under the Guaranty except to the extent Developer is the owner of unsold condominium units.

Developer's obligation to make all payments required under the Guaranty and the Development Agreement will be secured by a mortgage on all unsold condominium units (the "Developer Mortgage"). BBPDC will enter into an intercreditor agreement with respect to the Developer Mortgage. The intercreditor agreement will provide that BBPDC will be prohibited from foreclosing on such mortgage or otherwise exercising any remedies thereunder during the period that any senior financing is outstanding provided the senior lender will have adequate notice and cure periods upon a default by Developer. The intercreditor agreement will contain other customary intercreditor provisions.

Developer will obtain and maintain during construction (or will cause Developer's contractor or construction manager to obtain and maintain) a payment and performance bond naming BBPDC as obligee, or a letter of credit naming BBPDC as beneficiary.

Applicable law and regulations

Section 1402(a) of the Tax Law imposes the real estate transfer tax on each conveyance of real property or interest therein and provides, in part:

A tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof;...

Section 1401(d) of the Tax Law provides, in part:

"Consideration" means the price actually paid or required to be paid for the real property or interest therein, including payment for an option or contract to purchase real property, whether or not expressed in the deed and whether paid or required to be paid by

money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to.

(i) In the case of a creation of a leasehold interest or the granting of an option with use and occupancy of real property, consideration shall include but not be limited to the value of the rental and other payments attributable to the use and occupancy of the real property or interest therein, the value of any amount paid for an option to purchase or renew and the value of rental or other payments attributable to the exercise of any option to renew.

Section 1401(e) of the Tax Law provides:

"Conveyance" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the real property. Notwithstanding the foregoing, conveyance of real property shall not include a conveyance pursuant to devise, bequest or inheritance; the creation, modification, extension, spreading, severance, consolidation, assignment, transfer, release or satisfaction of a mortgage; a mortgage subordination agreement, a mortgage severance agreement, an instrument given to perfect or correct a recorded mortgage; or a release of lien of tax pursuant to this chapter or the internal revenue code.

Section 1401(f) of the Tax Law provides:

"Interest in the real property" includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. It shall also include an option or contract to purchase real property. It shall not include a right of first refusal to purchase real property.

Section 1405(b) of the Tax Law provides, in part:

The tax shall not apply to the following conveyances:

* * *

2. Conveyances which are or were used to secure a debt or other obligation;

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings;

Section 575.7(d)(1) of the Real Estate Transfer Tax Regulations (“Regulations”) provides:

An interest in real property includes a leasehold interest and an option or contract to purchase real property. Therefore, the transfer of a leasehold interest, regardless of the term, or the transfer of an option or contract to purchase real property, by assignment or surrender, is a conveyance subject to tax.

Section 575.10 of the Regulations provides, in part:

To the extent that a conveyance effectuates a mere change of identity or form of ownership or organization and there is no change in beneficial ownership, the real estate transfer tax does not apply....

Section 575.11 of the Regulations provides, in part:

(a) The following are examples of conveyances which are subject to the real estate transfer tax.

* * *

(12) A conveyance by a sponsor to a cooperative housing corporation is subject to tax. (Consideration in such case includes the amount of cash received by the sponsor, the amount of any mortgages, liens or encumbrances on the real property and the fair market value of the shares in the cooperative housing corporation which are transferred to the sponsor.)

(13) A conveyance of real property to an industrial development agency (IDA) by a person who is not the beneficiary of the IDA financing, at the direction of such beneficiary, with such beneficiary subsequently leasing the property from the IDA, is subject to tax. In such a conveyance, the beneficiary of the IDA financing and not the

IDA is deemed to be the grantee, and therefore the exemption described at section 575.9(c)(1) of this Part does not apply.

(14) A conveyance of real property by an IDA to a person who is not the beneficiary of the IDA financing where such conveyance is made at the direction of such beneficiary is subject to tax. In such a conveyance, the beneficiary of the IDA financing is deemed to be the grantor of the conveyance.

Opinion

When the intent of the parties to a sale-leaseback transaction is to secure a debt or obligation and there is no change in the beneficial ownership, the transaction is not a conveyance subject to the real estate transfer tax. In such case, the reconveyance of the fee interest at the end of the lease represents the satisfaction of the instrument securing the debt or obligation. See *Matter of Atlantic Cement Company, Inc. v Murphy*, 30 AD2d 456 (1968), aff'd 28 NY2d 502 (1971); *Beth Israel Medical Center*, Adv Op T&F, October 7, 1998, TSB-A-98(69)S, (3)R; *Time Warner, Inc.*, Adv Op T&F, July 26, 2001, TSB-A-01(7)R.

The provisions outlined in the MOU make it clear that Petitioner does not intend to relinquish its control of the Property and will continue to enjoy the benefits and responsibilities of ownership. Rather, the parties are entering into the Sale-Leaseback Transaction as a means of securing Petitioner's payments and obligations under the Lease, CCR Declaration, and Development Agreement. Upon expiration or termination of the Lease, BBPDC will convey fee title back to Petitioner or its successor-in-interest in release or satisfaction of its security interest. Accordingly, viewed as a single financing transaction, the conveyance of fee title by Petitioner to BBPDC, the creation of the Lease, and the reconveyance of fee title by BBPDC to Petitioner upon expiration or termination of the Lease are not subject to real estate transfer tax. See sections 1401(e) and 1405(b)(2) of the Tax Law and *Urban Development Corporation (d/b/a Empire State Development Corporation) and Milstein Brothers 42nd Street LLC*, Adv Op T&F, October 9, 2003, TSB-A-03(1)(R).

However, this conclusion is based upon the assumption that Petitioner is the initial Tenant or the entities that may assume the obligations of Tenant have the same ownership as Petitioner in the same proportionate share with no change in beneficial interest. To the extent there is a change in beneficial interest in connection with the Lease or Reconveyance, the real estate transfer tax will apply. Similar to the IDA transaction discussed in section 575.11(a)(14) of the Regulations, in such a conveyance, Petitioner, as beneficial owner of the property, would be considered to be the grantor and not BBPDC. Consideration would be computed in accordance with the applicable provisions of section 1401(d) of the Tax Law.

It should also be noted that a subsequent assignment of the Lease to a Permitted Assignee would be subject to tax to the extent there is a change in beneficial interest. (See sections

TSB-A-06(3)R
Real Estate Transfer Tax
November 30, 2006

575.7(d)(1) and 575.10 of the Regulations.) Furthermore, the assignment of the Lease by Tenant to the Condo Board is subject to tax as provided by section 575.11(a)(12) of the Regulations.

DATED: November 30, 2006

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.