

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

TSB-A-13(2)R
Mortgage Recording Tax
July 15, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M120330B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED], a Delaware limited liability corporation (“Petitioner”). Petitioner asks whether the mortgage recording tax credit provided under Real Property Law § 339-ee (“339-ee credit”) applies, when the condominium purchase occurred more than two years after the Original Sponsor’s recording of the Declaration of Condominium but not more than two years after the recording of a post-foreclosure Amended and Restated Declaration of Condominium by a new sponsor. We conclude that, in the post-foreclosure condominium purchase situation here, the 339-ee credit will be allowed.

Facts

Petitioner submits the following facts as the basis for the requested advisory opinion.

On February 23, 2005, a deed for the subject premises was accepted by the Original Sponsor (“Original Sponsor”), and recorded in Richmond County, New York for consideration of \$7,300,000 (numbers to be redacted in final if in bold). Also on February 23, 2005, a mortgage of \$5,600,000 from the Original Sponsor to Bank A was recorded and mortgage tax of \$154,000 paid.

On September 20, 2005, a gap building mortgage of \$14,440,623 from the Original Sponsor to Bank B was recorded and mortgage tax of \$404,337 paid. Also on September 20, 2005, an assignment of mortgage from Bank A to Bank B was recorded for the principal balance of \$5,559,377. Also on September 20, 2005, a Building Mortgage Consolidation, Modification and Security Agreement between the Original Sponsor and Bank B was recorded and the above two mortgages consolidated into a single lien of \$20,000,000.

On May 8, 2008, the Original Sponsor recorded the Declaration of Condominium for the said condominium development for 60 condo units.

On June 28, 2008, a deed from the Original Sponsor to the buyer of the first condominium unit to close was recorded. On December 24, 2008, a deed from the Original Sponsor to the buyer of the fifth condominium unit to close was recorded. Sometime thereafter, the Original Sponsor defaulted on its mortgages and condominium obligations and mortgage foreclosure proceedings commenced.

On June 6, 2010, an Assignment of Mortgage from Bank B to the new sponsor (“Petitioner”) was recorded. The Assignment assigned the consolidated mortgage which remained

against the unsold 55 condo units. The Petitioner, thereafter, continued with the mortgage foreclosure proceeding in its capacity of assignee of the mortgage debt.

On September 28, 2011, a Referee's Deed in Foreclosure to the Petitioner was recorded, in the action foreclosing the Original Sponsor's consolidated mortgage of September 20, 2005. Also on September 28, 2011, a Land and Construction Mortgage from the Petitioner to Bank C in the amount of \$6,210,015 was recorded and mortgage tax of \$173,880 paid by the Petitioner. This loan was made to partially reimburse the Petitioner \$4,029,712 for its previously funded acquisition of the property and \$2,180,303 to finance hard costs to complete the property. Also on September 28, 2011, a Project Loan Mortgage from the Petitioner to Bank C in the amount of \$3,789,985 was recorded and mortgage tax of \$106,120 paid by the Petitioner. This loan was made to finance certain soft costs, taxes, insurance and other operating expenses with respect to the property.

On February 16, 2012, an Amended and Restated Declaration of Condominium was recorded by the Petitioner, covering all 60 units, of which the Petitioner has 55 unsold units. The Amended and Restated Declaration of Condominium provided, among other things, that the revised first year of condominium operation would begin on April 1, 2012.

In a supplement to the facts above, the Petitioner's representative stated: "According to my clients, the building was 85% complete when purchased from the foreclosure referee. My client further advises that it has budgeted \$2,180,303 to complete the building (not including acquisition and soft costs) of which \$1,198,833 has been expended since it purchased the building. The 15% consists mostly of completion of the 55 unsold units and completion of common areas unfinished by the original sponsor." The first conveyance of a condominium by the Petitioner to a purchaser occurred on July 11, 2012.

Analysis

Article 11 of the Tax Law imposes a tax on the recording of mortgages of real property situated within New York State. Where mortgage recording taxes are paid upon the recording of a construction or blanket mortgage (see Tax Law § 253), if the construction cost and condominium sale conditions provided for in Real Property Law § 339-ee (2) are met, then, as each condominium unit is first conveyed, a credit is allowed, which may be applied against the recording taxes that would otherwise be payable upon the recording of a purchase money mortgage. The credit is equal to the product of the purchaser's pro rata percentage of interest in the Condominium's common elements and the mortgage recording tax already paid on the construction or blanket mortgage. No credit is allowed against the special additional mortgage recording tax.

To qualify for the 339-33 credit, Real Property Law § 339-ee (2) requires that the proceeds of a construction mortgage be applied to the construction of the condominium and the proceeds of a blanket mortgage be applied exclusively (1) to the payment of a construction mortgage whose proceeds were applied to the construction of the condominium, or (2) to capital expenditures or expenses for the development or operation of the condominium, or (3) to the

purchase of land or buildings for the condominium, provided that the purchase of the land or buildings must not have occurred more than two years prior to the recording of Declaration of Condominium. In addition, no credit is allowed under this provision if the first condominium unit of the condominium plan is sold more than two years after the construction or blanket mortgage was recorded, *See* 20 NYCRR §651.1. In this case, these conditions above have been met. The mortgage proceeds were appropriately used. The land and buildings were acquired by Petitioner through the Referee's Deed on September 28, 2011 and the Amended and Restated Declaration of Condominium was recorded by Petitioner on February 16, 2012. In addition, since the first conveyance of a condominium unit by the Petitioner occurred on July 11, 2012, that first sale occurred less than two years after the mortgage was recorded.

Based upon this analysis, we conclude that § 339-ee credit may be applied against the mortgage recording taxes due upon the recording of purchase money mortgages, the proceeds of which are used for the initial purchases of condominium units in this development.

DATED: July 15, 2013

/S/

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Deputy Counsel

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.