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

TSB-A-05(1)R
Real Estate Transfer Tax
September 27, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M040315A

On March 15, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Harter, Secrest & Emery, LLP, c/o Christopher M. Potash, Esq., 1600 Bausch & Lomb Place, Rochester, NY 14604-2711. Petitioner, Harter, Secrest & Emery LLP, submitted additional information for consideration on October 14, 2004 and May 11, 2005.

The issue raised by Petitioner is whether the transactions described below are subject to the real estate transfer tax imposed by Article 31 of the Tax Law.

Petitioner represents a business ("Tenant") that leases and operates a chain of stores throughout the United States, and has been and will be leasing real property in New York State for operating its stores. Petitioner submits the following eight scenarios as the basis for this Advisory Opinion:

Scenario 1

Tenant will enter into a lease agreement (the "Lease Agreement") with the owner ("Landlord") of certain real property (the "Property") under which Tenant, at Tenant's expense, will build a new store in an existing shopping center owned by Landlord. The term of the Lease Agreement (including all renewal options) will be for more than 49 years. The Lease Agreement will not grant Tenant an option to purchase the Property.

In some instances, existing buildings in the shopping center will be demolished or renovated to allow the new store to be built, while in other instances, the store will be built on property in the shopping center that was formerly vacant or that contained a parking lot or related enhancements. Furthermore, in some instances, the store will be a stand-alone structure, while in other instances, the store will be physically connected to the other buildings in the shopping center.

The shopping center, including the Property, will be located on land at a particular site and may be subdivided into smaller parcels. All such land will be beneficially owned by the landlord, or by entities that are owned directly or indirectly by the Landlord.

The parking areas serving the Property and the entrances and exits to the Property from adjacent public streets will be an integrated part of the parking areas, entrances and exits serving

the shopping center (e.g., the roadways and parking areas serving the proposed store and those serving the shopping center will be integrated and connected so that a customer will be able to travel to and from the proposed store and other areas of the shopping center areas without requiring such customer to travel back onto a public street to do so). Although the Tenant may have certain rights to control the parking areas nearest to its store, Tenant's customers will generally remain free to park in the other parking areas serving the shopping center.

With respect to any local municipal approvals obtained to permit the construction of the store, such local municipal approvals generally will be granted after an examination of not only the proposed store, but also an examination of how the proposed store relates to the shopping center.

Petitioner states that the Property will constitute less than 90% of the total rentable space in the shopping center (excluding common areas).

Scenario 2

Same as Scenario 1, except that the Property will be part of a shopping center to be built by Landlord. When the shopping center is completed in accordance with Landlord's plans, the Property will constitute less than 90% of the total rentable space in the completed shopping center (excluding common areas).

Scenario 3

Same as Scenario 1, except that under the Lease Agreement, the store on the Property will be built by Landlord, at Landlord's expense.

Scenario 4

Tenant executed a Lease Agreement with Landlord. After the execution of the Lease Agreement, Tenant filed a memorandum of lease with the county clerk of the county in which the Property is located. The term of the Lease Agreement is for more than 49 years and the Property constitutes substantially all of the real estate parcel owned by Landlord. The Lease Agreement does not grant Tenant an option to purchase the Property. The Lease Agreement provides that Tenant's obligations under the lease are contingent upon the occurrence of certain events (each a "Contingency" and collectively the "Contingencies"), including Tenant obtaining reasonably acceptable results from its due diligence investigations of the Property and Tenant obtaining the necessary local approvals to operate the intended store on the Property. During the

period from the execution of the Lease Agreement until the Contingencies are satisfied (the "Interim Period"), Tenant's rights of access to the Property are limited to the access needed for Tenant to conduct an environmental review of the Property and engineering and feasibility studies for the purpose of obtaining the necessary permits and approvals to satisfy the Contingencies.

If the Contingencies are not satisfied, then Tenant has the right to terminate the Lease Agreement. If the Contingencies are satisfied, then Tenant is obligated to proceed with the lease in accordance with the terms of the Lease Agreement and a new store will be built on the Property during the l80-day period (the "Construction Period") following the end of the Interim Period. The Lease Agreement provides for monthly lease payments to commence on the date on which the Tenant first commences business on the Property (the "Business Commencement Date"). No payments are required to be made prior to the Business Commencement Date.

Six months after executing the Lease Agreement, the Contingencies are satisfied and Tenant becomes obligated to proceed with the lease in accordance with the terms of the Lease Agreement.

Scenario 5

Same as Scenario 4, except that under the Lease Agreement, Tenant is required to pay Landlord a nominal non-refundable fee (e.g., $100 to $5,000) for the entire Interim Period and the Construction Period.

Scenario 6

Same as Scenario 4, except that 6 months after executing the Lease Agreement, it becomes known that a Contingency cannot be satisfied (e.g., zoning for the operation of a store on the Property is denied). Tenant notifies Landlord that Tenant terminates the Lease Agreement as a result of the failure of the Contingency.

Scenario 7

Tenant presently leases the Property pursuant to an existing lease agreement (the "Original Lease Agreement") with Landlord. The Original Lease Agreement has a term (including all renewal options) of less than 49 years and does not grant Tenant an option to

purchase the Property. No real estate transfer tax was paid with respect to the Original Lease Agreement.

Tenant and Landlord are negotiating an amendment of the Original Lease Agreement that will extend the term of the Original Lease Agreement. The proposed lease agreement, as amended (the "Amended Lease Agreement"), would have a remaining term (i.e., the period from the date of amendment through the amended date of termination, including all renewal options) of less than 49 years. However, the expired term (i.e., the period from the date of execution of the Original Lease Agreement through the date of amendment of the Original Lease Agreement) and the remaining term together will exceed 49 years. The Amended Lease Agreement will not grant Tenant an option to purchase the Property.

Scenario 8

Tenant will enter into a Lease Agreement with Landlord for the Property. The Property will constitute substantially all of the real estate parcel owned by Landlord, but the term of the Lease Agreement (including all renewal options) will be for less than 49 years. The Lease Agreement will not grant Tenant an option to purchase the Property, but will grant Tenant a right-of-first refusal to purchase the Property at the same price that has been offered to Landlord by a third party if Landlord accepts or proposes to accept the third-party offer.

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(c) of the Tax Law provides:

> "Real property" means every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon, which are located in whole or in part within the state of New York. It shall not include rights to sepulture.

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.

(1) 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:

* * *

9. Conveyances of real property which consist of the execution of a contract to sell real property without the use or occupancy of such property or the granting of an option to purchase real property without the use or occupancy of such property.

Section 575.7(a) of the Real Estate Transfer Tax Regulations (the "Regulations") provides, in part:

Creation of a taxable lease or sublease not coupled with an option to purchase. The creation of a lease or sublease is a conveyance subject to tax only where:

(1) the sum of the term of the lease or sublease and any options for renewal exceeds 49 years; and

(2) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee; and

(3) the lease or sublease is for substantially all of the premises constituting the real property. *Substantially all* means ninety percent or more of the total rentable space of the premises, exclusive of common areas. For the purpose of determining whether a lease or sublease is for substantially all of the premises

constituting the real property, premises shall include, but not be limited to the following:

(i) an individual building, except for space which constitutes an individual condominium or cooperative unit;

(ii) an individual condominium or cooperative unit; or

(iii) where a lease or sublease is of vacant land only, any portion of such vacant land.

Section 575.7(b) of the Regulations provides, in part:

Consideration in the case of the creation of a taxable lease or sublease.

(1) In the case of the creation of a lease which constitutes a conveyance subject to tax, the consideration used to compute the tax is the present value of the right to receive rental payments or other payments attributable to the use and occupancy of the real property. Such consideration also includes the present value of rental or other payments attributable to any renewal term. In the case of the creation of a taxable sublease, the consideration is computed in the same manner as in the creation of a taxable lease except that the value of the remaining prime lease rental payments must be subtracted.

(2) A discount rate equal to 110 percent of the federal long-term rate compounded semiannually, which is determined pursuant to section 1274(d) of the United States Internal Revenue Code, is required to be used in determining the present value of such payments which constitute consideration in the case of the creation of a taxable lease or sublease. Such federal long-term rate in effect 30 days prior to the date of transfer shall be used when computing such discount rate. If the taxpayer establishes:

(i) that a discount rate which is greater than 110 percent of the federal long-term rate is appropriate in his or her particular circumstances; and

(ii) that using a discount rate equal to 110 percent of the federal long-term rate results in the computation of consideration which exceeds the fair market value of the real property subject to the lease or sublease, the department will allow the use of a discount rate that results in a computation of consideration that

is equal to the fair market value of such real property. The discount rate is applied to net rents. *Net rents* means the amount by which gross rents exceed the lessor's or sublessor's operating costs. Such operating costs include amounts paid for heat and gas, electricity, furnishings, insurance, maintenance, management and real estate taxes.

Section 575.7(c) of the Regulations provides, in part:

Creation of a lease for less than 49 years coupled with the granting of an option to purchase

(1) An option to purchase real property is an interest in real property. Where an option to purchase real property is coupled with the granting of the right to use and occupancy of the real property, a conveyance subject to the transfer tax has occurred. Therefore, the creation of a lease coupled with the granting of an option to purchase the real property, regardless of the term of the lease, is a conveyance subject to the transfer tax.

Opinion

Scenarios 1-3

In scenario 1, Tenant is responsible for building a new store in an existing shopping center owned by Landlord. In scenario 2, Tenant is again responsible for building the new store, which will be part of a shopping center to be built by Landlord. In scenario 3, Landlord is responsible for building the new store in an existing shopping center owned by Landlord.

As provided by section 1401(e) of the Tax Law and section 575.7(a) of the Regulations, the creation of the lease in each scenario will constitute a taxable conveyance if all three of the following conditions are met: 1) the sum of the term of the lease including any options for renewal exceeds 49 years, 2) substantial capital improvements are or may be made for the benefit of the lessee, and 3) the lease is for substantially all of the premises constituting the real property. The facts indicate that the first two conditions are met in each of scenarios 1-3. Thus, to determine whether each lease is subject to tax, the issue at hand is whether the lease described in each scenario is for substantially all of the premises constituting the real property.

To make this determination, it is necessary to analyze what are the premises constituting the real property under the facts presented. As detailed in scenario 1, the analysis may be complicated by the fact that the nature of the premises constituting the real property in a shopping center can vary dramatically in each particular case. Section 575.7(a)(3) of the Regulations provides that the term premises includes, *but is not limited to*, an individual building, condominium or cooperative unit, or any portion of vacant land. It is important to view the matter with an eye on the unique nature of the shopping center enterprise from a business and legal perspective, and look beyond the examples given in the regulation. Recognizing that a shopping center is operated by the landlord and the tenants as a closely integrated retail enterprise, the relevant premises must include all of the real property constituting the shopping center.

From a business perspective, shopping center leases generally contain provisions that distinguish them from standard commercial real estate leases. These include provisions such as percentage rent clauses (based on a percentage of a tenant's store sales), radius clauses (limiting a tenant's operation of another store within a certain geographic radius of the shopping center), and provisions related to products to be sold (tenant mix), use and control of parking and common areas, hours of operation, merchandise displays and show windows, signage, advertising, use of trade name and name changes. These types of lease provisions demonstrate that landlords generally have an interest not only in the real estate aspects of the shopping center, but also in the tenants' retail operations in relation to the entire shopping center.

From a legal perspective, it is significant that shopping center landlords have special protections under Title 11 of the United States Code ("the Code") with respect to executory contracts and unexpired leases of tenants in bankruptcy (11 U.S.C. § 365). Among other requirements, the Code provides that an unexpired lease that is in default may not be assumed by the bankruptcy trustee and that any unexpired lease may not be assigned unless certain assurances are given to the landlord by the tenant (11 U.S.C. § 365(b)(1) and (f)(2)). Section 365(b)(3) of the Code requires that adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance:

> **(A)** of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
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> **(B)** that any percentage rent due under such lease will not decline substantially;

> **(C)** that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
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> **(D)** that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

In a recent decision by the United States Court of Appeals, *In re Trak Auto Corporation v West Town Center, LLC*, 367 F3d 237 (4th Cir 2004), the court nullified the assignment of a shopping center lease pursuant to the provisions of 11 U.S.C. § 365(b)(3) and (f)(1). In its analysis, the court stated:

> We begin our inquiry with a look at the interesting history of Congress's efforts to protect shopping center landlords in § 365(b)(3) of the Bankruptcy Code. Congress has been interested in the financial well-being of shopping centers since at least the late 1970s. Specifics, such as the importance of a carefully selected tenant mix, have not escaped Congress's attention. The House Judiciary Committee discussed the tenant mix subject in a 1977 report:
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> > A shopping center is often a carefully planned enterprise, and though it consists of nuemrous [sic] individual tenants, the center is planned as a single unit, often subject to a master lease or financing agreement. Under these agreements, the tenant mix in a shopping center may be as important to the lessor as the actual promised rental payments, because certain mixes will attract higher patronage of the stores in the center.

Taken as a whole, the relevant provisions of the Code and the Fourth Circuit's analysis clearly illustrate the unique nature of shopping center lease arrangements. A landlord in a shopping center retains strong legal and economic control in the operation and use of the entire shopping center property, including each store that is leased within it.

Although there is a lack of established precedent regarding these issues under the real estate transfer tax, this conclusion is consistent with Tax Department policy expressed under the former real property transfer gains tax ("Gains Tax"). In 1985, the Department issued Technical Services Bureau Memorandum entitled *Summary of Opinion Letters with Regard to the Real Property Transfer Gains Tax*, TSB-M-85(2)R, which stated, in part:

> In determining whether a lease constitutes "substantially all" of the premises constituting the real property, the amount of area covered by the lease is compared to the total area available for use by other tenants, whether previously rented or not. Thus, in a shopping center situation in which no one lease to a tenant is for more than 90% of the space, the creation of such lease is not taxable. An option to purchase with use and occupancy of the real property is taxable regardless of the amount of space leased.

Accordingly, in scenarios 1 and 3, for the purpose of determining whether the leased Property constitutes substantially all of the premises, it is appropriate to compare the total area leased under the store lease to the total rentable area within the existing shopping center, exclusive of common areas. In scenario 2, provided the plans for the shopping center and related representations are made in good faith, it is appropriate to compare the total area leased under the store lease to the total rentable area for the planned shopping center, exclusive of common areas. These conclusions do not apply to a lease for real property not located in a shopping center or where there is an option to purchase contained in the lease. In addition, since the analysis is highly dependent on the particular facts in each instance, the determination of taxability must be made on a case by case basis.

Scenario 4

In this scenario, Tenant and Landlord execute a taxable Lease Agreement and file a memorandum of lease with the County Clerk of the county where the property is located. The Lease Agreement is contingent upon certain events, including due diligence efforts to be conducted during an interim period until the contingencies are satisfied.

In *Waldbaum, Inc*., Adv Op Comm T&F, March 1, 1999, TSB-A-99(1)R, it was concluded that the "interim term" of a lease, during which the tenant is conducting due diligence investigations of the property, is not deemed to be part of the lease term for purposes of determining whether or not the lease term is more than 49 years. The advisory opinion stated:

> The interim term of the ground lease can be characterized, pursuant to section 1405(a)(9) of the Tax Law, as a contract to sell real property without the granting of the use or occupancy of such property. The fact that Petitioner [the tenant] has access to the property during the interim period, in order to conduct engineering and feasibility studies for the purpose of securing building permits and approvals, does not rise to the level of having the "use or occupancy" of the property.

> At the time Petitioner is able to obtain all the requisite permits and approvals for the construction of the initial improvements on the Premises, the interim term would end. Petitioner would then be able to begin construction on the Premises. If Petitioner were to begin such construction, it would then be deemed to have the "use and occupancy" of the property and the time period during which construction was taking place would be deemed to be part of the lease term for purposes of determining whether or not the term of the lease is 49 years or more.

The Interim Period in Scenario 4 is comparable to the interim term presented in *Waldbaum, Inc*., *supra*, since Tenant only has access to the Property to conduct an environmental review and engineering and feasibility studies for the purpose of obtaining the necessary permits. Accordingly, Tenant's limited access to the Property during the Interim Period does not rise to the level of having "use or occupancy." Thus, in this scenario, the execution of the Lease Agreement and the filing of the memorandum of lease are exempt from real estate transfer tax pursuant to section 1405(b)(9) of the Tax Law.

Upon satisfaction of the Contingencies, Tenant is bound by the terms of the Lease Agreement. Accordingly, the leasehold conveyance becomes taxable when Tenant receives the use or occupancy of the Property, as the exemption set forth in section 1405(b)(9) of the Tax Law no longer applies. As explained in *Waldbaum, Inc*., *supra*, if Tenant is responsible for the construction of the new store, then Tenant’s use or occupancy would begin upon the commencement of the Construction Period. However, if Landlord is responsible for such construction, Tenant’s use or occupancy would begin when the store is completed and Tenant occupies the property in accordance with the terms of the Lease Agreement. In this scenario, that would appear to be the Business Commencement Date.

The consideration paid will equal the present value of the net rental and other payments due under the Lease Agreement, in accordance with section 575.7(b) of the Regulations.

Scenario 5

This scenario follows the same facts and analysis as in Scenario 4, except that under the Lease Agreement, Tenant is required to pay Landlord a nominal non-refundable fee (e.g., $100 to $5,000) for the entire Interim Period and the Construction Period.

Based on the facts presented, no real estate transfer tax is due upon the execution of the Lease Agreement or upon the filing of the memorandum of lease with the county clerk of the county in which the Property is located. The fact that Tenant must make a nominal payment

upon the execution of the Lease Agreement does not affect the taxability of the lease with respect to the Interim Period. Any payments made to Landlord as compensation for Tenant's limited rights of access necessary to conduct its due diligence efforts during the Interim Period, which rights do not rise to the level of use or occupancy of the Property, would not be included in consideration.

Also similar to Scenario 4, the leasehold conveyance becomes taxable when Tenant receives the use or occupancy of the Property, as the exemption set forth in section 1405(b)(9) of the Tax Law no longer applies. If Tenant is responsible for the construction of the new store, the lease term would begin with the Tenant's use or occupancy upon the commencement of the Construction Period. Any payments made to Landlord for the use and occupancy of the Property during such Construction Period would be included in the consideration subject to tax, along with the present value of rent payments, as described in section 575.7(b) of the Regulations.

If Landlord is responsible for such construction, Tenant's use or occupancy would begin in this scenario on the Business Commencement Date. The consideration paid will equal the present value of the net rental and other payments due under the Lease Agreement, in accordance with section 575.7(b) of the Regulations.

Accordingly, since the nominal fee in this scenario relates to both the Interim Period and the Construction Period, if Tenant is responsible for construction of the new store, the amount of the fee related to Tenant's use and occupancy during the Construction period should be included in taxable consideration.

Scenario 6

This scenario follows the same facts and analysis as in Scenario 4. However, since the Contingencies are not satisfied, the proposed Lease Agreement is terminated at the conclusion of the Interim Period. As in Scenario 4, based on the facts presented, no real estate transfer tax is due upon the execution of the Lease Agreement or upon the filing of the memorandum of lease with the county clerk of the county in which the Property is located. Since the contingencies are not met, the Lease Agreement never becomes binding, and the leasehold conveyance is not completed. Thus, the proposed lease is not subject to tax.

Scenario 7

In this scenario, Tenant and Landlord are negotiating an amendment to an existing lease. The Amended Lease Agreement would have a remaining term (i.e., the period from the date of the amendment through the amended termination date including renewal options) of less than 49 years. It is also assumed that the lease is for substantially all of the premises constituting the real property and substantial capital improvements are or may be made for the benefit of the lessee.

Resnick Water St. Development Co., Adv Op Comm T&F, January 12, 1993, TSB-A-93(2)R, dealt with certain leasehold issues with respect to the real estate transfer tax and the former Gains Tax. The issues concerned a modification of an existing leasehold and the taxability of a lease coupled with a right of first refusal. The advisory opinion stated:

> Where an existing lease is modified, such modifications will result in the creation of a new lease for Gains Tax purposes if the modifications are determined to be substantial in nature. *Beakman* [sic] *C. Cannon* Adv Op Comm T & F, May 29, 1990, TSB-A-88(1)-R [sic, correct citation is TSB-A-90(5)R]; *Syosset Shopping Center Associates* Adv Op, Comm T & F, September 14, 1987, TSB-A-87(8)-R. The determination of what is a substantial modification in an existing lease must he made on a case by case basis. If the modifications made to an existing lease are determined to be substantial in nature, a new lease is deemed to be created for gains tax purposes, the term of which would start on the effective date of such modifications.
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> …pursuant to Section 590.5 of the Gains Tax Regulations and Section 575.7 of the Transfer Tax Regulations the creation of a lease for a term of less than 49 years, including renewal periods and not coupled with an option to purchase is not a transfer or a conveyance of real property and, therefore, is not subject to gains tax and transfer tax respectively. In addition, pursuant to Section 590.30 of the Gains Tax Regulations a lease for a term of less than 49 years containing a right of first refusal is not a transfer of real property and therefore, is not subject to gains tax. While the Transfer Tax Regulations are silent as to the taxability of a lease coupled with a right to first refusal, the same policy adopted for gains tax purposes would apply for transfer tax and, as such, a lease coupled with a right to first refusal is not subject to transfer tax.
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> Moreover, pursuant to *Beakman* [sic] *C. Cannon, supra*, and *Syosset Shopping Center Associates*, *supra*, where an existing lease is modified, such modifications will

result in the creation of a new lease for gains tax purposes if the modifications are determined to be substantial in nature. The same principle would hold true to determine the transfer tax consequences where an existing lease is modified.

In this scenario, assuming the amendments extending the term of the Original Lease Agreement are substantial in nature, the result will be the creation of a new Lease Agreement which would begin on the effective date of the modifications. However, since the Amended Lease Agreement will have a remaining term (including all renewal options) of less than 49 years, the lease is not subject to real estate transfer tax.

Scenario 8

As found in *Resnick Water St. Development Co.*, *supra*, the creation of a lease for a term of less than 49 years containing a right of first refusal is not subject to real estate transfer tax.

DATED: September 27, 2005

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