

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-08(3)R
Real Estate Transfer Tax
June 17, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M080313A

On March 13, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from Lillian Wohl, 401 First Avenue, Apt. 15G, New York, New York 10010. Petitioner, Lillian Wohl, provided additional information pertaining to the Petition on March 21, 2008, and March 28, 2008.

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 submitted the following facts as the basis for this Advisory Opinion.

East Midtown Plaza Housing Company, Inc. (“EMP”) is currently the owner of certain real property located in New York City (the “Property”). EMP is a limited-profit housing company organized under Article II of the Private Housing Finance Law (“PHFL”). EMP operates the Property under the supervision of the New York City Department of Housing Preservation and Development (“HPD”) as a residential cooperative apartment building on a not-for-profit basis for persons who meet income eligibility requirements set by HPD. EMP currently has 184,033.09 issued and outstanding shares. There are 746 residential units and several commercial spaces in the Property.

Having been formed under the PHFL, EMP is subject to the rules and regulations of the Mitchell-Lama Program, which prevent shareholders of EMP from realizing the market value of their interest in EMP upon the sale of their interest. Also EMP is provided certain advantageous tax and financing benefits.

The Mitchell-Lama Program allows withdrawal from the program through the voluntary dissolution of the limited-profit housing company. In conjunction with a dissolution of the limited-profit housing company, the title to the property may then be conveyed to the owner of the limited-profit housing company’s capital stock or to a corporation designated for that purpose, or the limited-profit housing company may be reconstituted pursuant to the appropriate laws relating to the formation and conduct of corporations. On December 14, 2004, in furtherance of their intention to withdraw from participation in the Mitchell-Lama Program and pursuant to the Mitchell-Lama rules of the HPD, the shareholders of EMP voted to adopt a Withdrawal Resolution.

Upon withdrawal from the Mitchell-Lama Program, the existing mortgages encumbering the land and building will be required to be satisfied. Additionally upon withdrawal, all surplus funds remaining in the treasury of EMP prior to the voluntary dissolution are required to be surrendered to New York City.

A voluntary dissolution and reconstitution and conversion plan (the Cooperative Offering Plan or hereinafter the “Offering Plan”) to convert EMP to private cooperative ownership has been accepted for filing by the Office of the New York State Attorney General. Under the Offering Plan, in lieu of transferring the Property to a new corporation, EMP contemplates dissolution of the limited-profit housing company and reconstitution as a corporation subject to the provisions of the New York State Business Corporation Law (“BCL”) by means of amending EMP’s existing certificate of incorporation, as further described in the pertinent parts of the section of the Offering Plan entitled *Nature of the Transaction*, included below.

As reconstituted, EMP would be operated on a for-profit basis, would cease to be governed by the PHFL, and would have all the powers and authority of a BCL corporation.

The dissolution of the limited-profit housing company and the reconstitution of EMP under the BCL would mean that shareholders of EMP would be free to sell the shares appurtenant to their apartments for current market value. The shareholders would no longer be limited to selling their shares only to a specified list of purchasers at a price limited to equity paid plus amortization.

The corporation while it is a PHFL corporation operates under the supervision and direction of HPD. When EMP reconstitutes to become organized under the BCL, the supervision and direction exercised by HPD would cease, waiting lists of income-eligible applicants would be eliminated, HPD supervision of who can live in the building and of maintenance charges and assessments would end, and EMP would have complete control over these matters.

There would be no reallocation of shares, but there would be a reallocation of maintenance charges based on the relative value of the apartments. The voting arrangement would change from one vote per apartment to one vote per share. As provided for in the section of the Offering Plan, entitled *Rights of Existing Shareholders*, included below, shareholders of the Sponsor immediately prior to privatization would automatically remain shareholders of the Apartment Corporation immediately following privatization. Further, current tenant stockholders’ occupancy agreements appurtenant to their units would become proprietary leases appurtenant to the shares issued in the private cooperative housing corporation that have been allocated to their respective units. Tenant shareholders participating in the private cooperative housing corporation would be required to agree to the terms and conditions of the proprietary lease.

The Offering Plan provides two options for current shareholders who do not wish to participate in ownership of the private cooperative housing corporation (Non-Participants). As provided in both options the Non-Participants transfer their shares to EMP; these shares may be offered for sale by EMP with proprietary leases for vacant units or the shares may be sold or held by EMP for other units, subject to special leases. These options are described in the pertinent parts of the section of the Offering Plan entitled *Rights of Existing Shareholders*, included below.

The Offering Plan was approved by the Office of the New York State Attorney General in February 2008. The following are pertinent excerpts:

Introduction

The Offering Plan

The purpose of this Plan is to set forth all of the material terms of this offer to reconstitute the Sponsor and convert to private cooperative ownership the Land, Building and improvements thereon known as 319 East 24th Street, 320 East 25th Street, 311 East 23rd Street, 333 East 23rd Street, 400 Second Avenue, and 401 First Avenue, New York, New York 10010. Such property to be converted to a private cooperative pursuant to this Plan has been defined above in the Section entitled "Definitions" as the "Property".

This Plan may be amended from time to time when an amendment is filed with the New York State Department of Law. . . .

This Plan constitutes an offering statement for conversion of the Property and/or reconstitution of the Sponsor pursuant to Article II of the Private Housing Finance Law

. . .

Nature of Transaction

[Note: The correct names of the taxes being discussed are New York State Real Estate Transfer Tax and New York City Real Property Transfer Tax.]

The Property is presently owned by East Midtown Plaza Housing Company, Inc. (the "Sponsor"), . . .

* * *

The Sponsor had previously contemplated accomplishing the dissolution and/or reconstitution of East Midtown Plaza Housing Company, Inc. by transfer of its property (including the Property) to a new corporation to be organized under the New York State Business Corporation Law. In view of a concern that such a transfer of the Property could result in significant New York City Real Property Tax and/or New York State Real Estate Transfer Tax, in May 2006 the Sponsor requested private letter rulings from both the New York State Department of Taxation and Finance and the New York City Department of Finance in order to determine the respective tax departments' position upon such matter. Although the Sponsor had requested that the two tax departments determine that the transfer of the Property in the context of the Sponsor's dissolution and/or reconstitution would be exempt or, at least, partially exempt, from the applicable transfer taxes, the New York State Department of Taxation and Finance and New York

City Department of Finance issued separate private letter rulings, dated February 5, 2007 and November 30, 2006, respectively, stating that New York State Real Property Transfer Tax and the New York City Real Estate Transfer Tax, respectively would be due upon the transfer of the Property from the Sponsor to such a new corporation. The aggregate tax rate (i.e., New York City Real Estate Transfer Tax @2.625% and New York State Transfer Tax @0.4%) is currently 3.025%, which would likely have been applied in case of such transaction to the market value of the Property or similar basis, and the Sponsor had estimated an aggregate transfer tax of approximately \$14,000,000.

Although the Sponsor reserves the right to challenge such determinations, this Plan currently contemplates effecting the dissolution and/or reconstitution by means of amending and restating the Sponsor's existing certificate of incorporation in lieu of the transfer of the Property to a new corporation. Although the Private Housing Finance Law did not provide for any particular mechanism for the amendment and restatement from a Private Housing Finance Law corporation to a Business Corporation Law corporation, it is the understanding of the Sponsor and its counsel that at least three Mitchell-Lama cooperatives have similarly effected the dissolution and/or reconstitution by amending and/or restating their certificates of incorporation and without the imposition of the New York City Real Property Tax or New York State Real Estate Transfer Tax upon such amendment and/or restatement. Furthermore, counsel for the New York State Department of State has indicated to Sponsor's counsel that an amendment and/or restatement of the Sponsor's certificate would be accepted for filing by the New York State Department of State, subject to compliance with applicable statutory requirements. It is the position of the Sponsor that no New York State Transfer Tax and New York City Real Property Tax will be imposed solely by reason of amending and/or restating the Sponsor's certificate of incorporation as contemplated by this Plan. There can be no assurance, however, that such transfer taxes do not apply, or that the New York State Department of Taxation and Finance and the New York City Department of Finance will not contend that such transfer taxes apply, to the amendment and/or restatement of the Sponsor's certificate of incorporation as contemplated by this Plan. If such transfer taxes are imposed, it is estimated that the aggregate amount of such transfer taxes would be approximately \$14,000,000 calculated as set forth at the end of the immediately preceding paragraph.

* * *

Rights of Existing Shareholders

Subject to the terms of this Plan, Shareholder-Offerees of the Sponsor who do not want to remain shareholders will have two (2) options as enumerated in the remainder of this Section entitled "Rights of Existing Shareholders" and otherwise in this Plan if the shareholders vote for Withdrawal as described herein and Withdrawal occurs.

As set forth in this section and otherwise in this Plan, shareholders of the Sponsor immediately prior to privatization will automatically remain shareholders of the Apartment Corporation immediately following privatization. However, all shareholders of the Sponsor may elect to surrender their shares of the Sponsor and (i) remain as tenants under Special Leases renewable annually; or (ii) vacate the apartment for the Cash Payment.

* * *

Cash Payments for Shareholder-Offerees

Those shareholders who do not wish to remain shareholders of the Apartment Corporation may for a period of ninety (90) days from the Certification Date (the "Exclusive Period") exercise their right to obtain a Cash Payment for their shares (as described herein); and in such event may continue to occupy their apartments solely if they agree to, and enter into, the Special Lease (in which case the Cash Payment shall be received by a Credit under the Special Lease as described herein).

For those shareholders electing the Cash Payment, but not electing to enter into a Special Lease, they must execute and deliver to the Sponsor three (3) copies of the Surrender Agreement (a copy of which is attached in part II of the Plan) on or before the expiration of the Exclusive Period, together with their stock certificate and occupancy agreement, which are to be held pending the privatization and returned if privatization does not occur. Additionally, those shareholders electing the Cash Payment must vacate their apartments within ninety (90) days of the Closing.

The Cash Payment is currently based upon the surrendering shareholder's equity in his/her apartment which the Sponsor has determined, and with HPD's approval, to total \$25.00 per share, plus, to the extent not already included, capital assessments and voluntary contributions approved by HPD (including but not limited to those voluntary capital contributions previously paid for the installation of a greenhouse/enclosure), if any, plus the surrendering shareholder's portion of the amortization of the mortgage, less any outstanding balances and restoration charges owed the Sponsor by the surrendering shareholder. . . .

Special Lease for Shareholder-Offerees

As previously mentioned, those shareholders who do not wish to remain shareholders of the Apartment Corporation may for a period of ninety (90) days from the Certification Date (the "Exclusive Period") exercise their right to obtain a Cash Payment for their shares (as described herein); and in such event may continue to occupy their apartments solely if they agree to, and enter into, the Special Lease (in which case the Cash Payment shall be received by a Credit under the Special Lease).

For those shareholders electing to obtain the Cash Payment (by Credit under the Special Lease), they must execute and deliver to the Sponsor three (3) copies of the Non-Participation Election Forms and Special Leases (copies of which are attached in Part II of the Plan) on or before the expiration of the Exclusive Period, together with their stock certificate and occupancy agreement, which are to be held pending the privatization and returned if privatization does not occur.

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 1402-a of the Tax Law provides, in part:

(a) In addition to the tax imposed by section fourteen hundred two of this article, a tax is hereby imposed on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more. For purposes of this section, residential real property shall include any premises that is or may be used in whole or in part as a personal residence, and shall include a one, two, or three-family house, an individual condominium unit, or a cooperative apartment unit. The rate of such tax shall be one percent of the consideration or part thereof attributable to the residential real property. . . .

* * *

(c) Except as otherwise provided in this section all the provisions of this article relating to or applicable to the administration, collection, determination and distribution of the tax imposed by section fourteen hundred two of this article shall apply to the tax imposed under the authority of this section with such modifications as may be necessary to adapt such language to the tax so authorized. Such provisions shall apply with the same force and effect as if those provisions had been set forth in this section except to the extent that any provision is either inconsistent with a provision of this section or not relevant to the tax authorized by this section.

Section 1401 of the Tax Law provides, in part:

When used in this article, unless otherwise expressly stated:

* * *

(b) "Controlling interest" means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, . . .

* * *

(d) "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.

* * *

(v) In the case of (i) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative corporation or cooperative plan sponsor and (ii) the subsequent conveyance by the owner thereof of such stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold for a cooperative unit other than an individual residential unit, consideration shall include a proportionate share of the unpaid principal of any mortgage on the real property of the cooperative housing corporation comprising the cooperative dwelling or dwellings. Such share shall be determined by multiplying the total unpaid principal of the mortgage by a fraction, the numerator of which shall be the number of shares of stock being conveyed in the cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold and the denominator of which shall be the total number of shares of stock in the cooperative housing corporation.

(e) "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. . . .

(f) "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:

* * *

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 1405-B (a) of the tax Law provides, in part:

Notwithstanding the definition of "controlling interest" contained in subdivision (b) of section fourteen hundred one of this article or anything to the contrary contained in subdivision (e) of section fourteen hundred one of this article, the tax imposed by this article shall apply to (1) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative corporation or cooperative plan sponsor, and (2) the subsequent conveyance of such stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the owner thereof. . . . In determining the tax on a conveyance described in paragraph one of this subdivision, a credit shall be allowed for a proportionate part of the amount of any tax paid upon the conveyance to the cooperative housing corporation of the real property comprising the cooperating dwelling or dwellings to the extent that such conveyance effectuated a mere change of identity or form of ownership of such property and not a change in the beneficial ownership of such property. The amount of the credit shall be determined by multiplying the amount of tax paid upon the conveyance to the cooperative housing corporation by a percentage representing the extent to which such conveyance effectuated a mere change of identity or form of ownership and not a change in the beneficial ownership of such property, and then multiplying the resulting product by a fraction, the numerator of which shall be the number of shares of stock conveyed in a transaction described in paragraph one of this subdivision and the denominator of which shall be the total number of shares of stock of the cooperative housing corporation (including any stock held by the corporation). In no event, however, shall such credit reduce the tax, on a conveyance described in paragraph one of this subdivision, below zero, nor shall any such credit be allowed for a tax paid more than twenty-four months prior to the date on which occurs the first in a series of conveyances of shares of stock in an offering of cooperative housing corporation shares described in paragraph one of this subdivision.

Section 575.1(d)(1) of the Real Estate Transfer Tax Regulations 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 includes the cancellation or discharge of an indebtedness or obligation. It also includes the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to. . . . With respect to any conveyance of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the owner thereof, other than the original conveyance of stock by the cooperative housing corporation or the cooperative plan sponsor, where the property is an individual residential unit, the consideration for the interest conveyed will exclude the amount of any liens on certificates of stock or other evidences of an ownership interest in and a proprietary lease from a corporation or partnership, formed for the purpose of cooperative ownership of residential interest in real estate remaining thereon at the time of conveyance. No exclusion is made on account of any lien or encumbrance placed upon the property in connection with the conveyance, or by reason of deferred payments of the purchase price whether represented by notes or otherwise.

Section 575.8 of the Real Estate Transfer Tax Regulations provides, in part:

(a) Notwithstanding the definition of controlling interest contained in section 575.1(b) of this Part or anything to the contrary contained in section 575.1(e)(1) of this Part, the real estate transfer tax applies to:

(1) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative housing corporation or cooperative plan sponsor; and

(2) the subsequent conveyance of such stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the owner thereof.

* * *

(c) Credit for tax previously paid.

(1) In the case of conveyances described in paragraph (a)(1) of this section, a credit shall be allowed for a proportionate part of the amount of any tax paid upon the conveyance to the cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings to the extent that such conveyance effectuated a mere change of identity [or] form of ownership of such property and not a change in the beneficial ownership of such property.

(2) The amount of the credit is determined by multiplying the amount of tax paid upon the conveyance to the cooperative housing corporation by a percentage representing the extent to which such conveyance effectuated a mere change of identity or form of ownership and not a change in the beneficial ownership of such property, and then multiplying the result by a fraction, the numerator of which is the number of shares of stock conveyed in a transaction described in paragraph (a) (1) of this section and the denominator of which is the total number of shares of stock of by cooperative housing corporation (including any stock held by the corporation).

(3) The credit will not reduce the tax below zero. The credit will not be allowed for a tax paid more than 24 months prior to the date on which occurs the first in a series of conveyances of shares of stock in an offering of cooperative housing corporation shares as described in paragraph (a)(1) of this section.

Section 575.11(a) of the Real Estate Transfer Tax Regulations provides, in part:

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.)

Section 35 of Article II of the New York State Private Housing Finance Law provides, in part:

Voluntary dissolution. 1. A company aided by a loan made prior to May first, nineteen hundred fifty-nine, may voluntarily be dissolved, with the consent of the commissioner or of the supervising agency, as the case may be, not less than thirty-five years after the occupancy date upon the payment in full of the remaining balance of principal and interest due and unpaid upon the mortgage held by the state or a municipality pursuant to this article and payment to the municipality of a sum equal to the total of all accrued taxes for which tax exemption was granted and received pursuant to section thirty-three of this article, provided however that such payment of accrued taxes shall be waived if a company is voluntarily dissolved subsequent to the original maturity date of any mortgage held by the state or a municipality pursuant to this article.

* * *

3. Upon such dissolution, title to the project may be conveyed in fee to the owner or owners of its capital stock or to any corporation designated by it or them for the purpose, or the company may be reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations, provided, however, that prior to any such dissolution and conveyance or reconstitution, payment shall be made of all current operating expenses, taxes, indebtedness and all accrued interest thereon and the par value of and accrued dividends on the outstanding stock of such company. If after making such payments, and after conveyance of the project, a surplus remains in the treasury of the company, such surplus, except in the case of a project aided by a state loan made after May first, nineteen hundred fifty-nine, shall upon dissolution, be paid into the general fund of the municipality which granted tax exemption. After such dissolution and conveyance, or such reconstitution, the provisions of this article shall become and be inapplicable to any such project and its owner or owners and any tax exemption granted with respect to such project pursuant to section thirty-three hereof shall cease and terminate.

Opinion

EMP is the owner of a Mitchell-Lama residential cooperative apartment property located in Manhattan. EMP is a limited-profit housing company organized under Article II of the Private Housing Finance Law (PHFL). EMP's operation of this residential property is under the supervision of the New York City Department of Housing Preservation and Development (HDP).

Under the PHFL, a limited-profit housing company may withdraw from the Mitchell-Lama Program through voluntary dissolution. After the statutorily required dissolution (see section 35(3) of the PHFL), the property may be conveyed to the owners of the capital stock, or to another corporation, or the limited-profit housing company may be reconstituted pursuant to the appropriate laws relating to the formation and conduct of corporations (Section 35 of the PHFL).

On December 14, 2004, in support of their intention to withdraw from the Mitchell-Lama Program, the shareholders of EMP voted to adopt a Withdrawal Resolution. Initially EMP contemplated that upon dissolution, the property would be transferred to a newly formed corporation organized under the New York State Business Corporation Law (BCL).

Subsequently, EMP proposed that instead of conveying fee title to the property to a new corporation designated for such purpose, the limited-profit housing company (subject to the provisions of the PHFL) would be reconstituted into a private cooperative housing corporation subject to the provisions of the BCL (hereinafter the "private cooperative housing corporation" or the "private cooperative housing corporation under the BCL"). This reconstitution is proposed to be effected by amending EMP's existing certificate of incorporation filed pursuant to the requirements of the PHFL so that the resulting certificate of incorporation complies with

the provisions of the BCL and eliminates provisions in the existing certificate mandated and governed by the PHFL. Other than for purposes of making a determination as to the applicability of real estate transfer tax imposed under Article 31 of the Tax Law, this Opinion makes no determination as to the legal propriety and effect of such amendments to EMP's articles of incorporation.

The Cooperative Offering Plan (Offering Plan) approved by the Office of the New York State Attorney General in February 2008 described the above plan as its method of conversion. Pursuant to the plan, if approved by the shareholders, the shareholders in the limited-profit housing company have a choice of whether to participate in ownership of the private cooperative housing corporation or to not participate and accept a cash payment. Those shareholders in EMP opting not to participate in the ownership of the private cooperative would receive a cash payment or credit for such cash payment in consideration of transferring their shares in EMP (the limited-profit housing company) to EMP (the limited-profit housing company) to be held as unsold shares by EMP as the Sponsor of the Offering Plan.

In the originally proposed conversion plan, upon dissolution as a limited-profit housing company, EMP, as the sponsor, would transfer the property to a newly formed private cooperative housing corporation. The current Offering Plan, as presented for purposes of this Opinion, does not provide for the transfer of the property to a newly formed corporation, but rather provides that the articles of incorporation for EMP as a limited-profit housing company under the PHFL are amended to create EMP as a private cooperative housing corporation under the BCL.

The current Offering Plan continues to establish EMP (the limited-profit housing company formed under the PHFL) as a *sponsor* of a private cooperative housing corporation (i.e., EMP the BCL entity). Structuring the transaction in this manner may be necessary for the following reasons.

First, EMP will be recognized as the sponsor of a private cooperative housing corporation offering since its dissolution plan allows those shareholders in the limited-profit housing company who do not wish to participate in ownership of the private cooperative housing corporation (Non-Participants) to turn in their shares in the limited-profit housing company (together with the appurtenant occupancy agreements) in exchange for a cash payment. Upon the creation of the private cooperative housing corporation under the BCL, EMP, as the sponsor, holds the Non-Participant's shares, which shares are deemed to be unsold shares in the private cooperative housing corporation. These shares may be offered for sale by EMP with proprietary leases for vacant units or the shares may be sold or held by EMP for other units subject to special leases.

Further, prior to its dissolution as an entity created pursuant to the PHFL, EMP also is required to satisfy existing mortgages encumbering the land and buildings, and then surrender any surplus funds in its treasury to New York City. (See section 35(3) of the PHFL.)

There will be a substantive change in the nature of the reconstituted entity as represented in the Offering Plan. Pursuant to the PHFL statutory scheme, EMP shareholders' economic interest in the property prior to dissolution is restricted by HPD. In exchange for the restrictions on the shareholders' rights in the property, EMP is allowed certain advantageous tax and financing benefits. Upon reconstitution, EMP shareholders' ability to sell their cooperative interest will no longer be restricted by HPD. In addition, EMP will no longer enjoy many of the tax and financing benefits it is allowed under the PHFL statutory scheme.

As represented in the *Nature of the Transaction* section of the Offering Plan, the Tax Department advised that the transfer of the property from EMP to a newly formed cooperative housing corporation as contemplated in the original conversion plan is a conveyance that would be subject to real estate transfer tax under Article 31 of the Tax Law. The current Offering Plan provides that EMP will no longer exist as a PHFL company but as a BCL corporation with the rights and benefits of a private cooperative housing corporation.

While the ownership of the Property, as contemplated in the current Offering Plan, would not be conveyed in the conventional sense to a newly formed corporation, pursuant to section 35(3) of the PHFL there must be a dissolution of EMP in order to remove the restrictions of the Mitchell-Lama Program. As a result, there is a substantive change in the nature of the entity that owns the Property. The dissolution and reconstitution will result in changes in the financial benefits and restrictions appurtenant to the shares in EMP prior to the conversion and the shares in EMP after the conversion.

The shareholders opting to participate in the conversion will receive an unrestricted ownership interest in EMP as a private cooperative housing corporation. Moreover, the shareholders' interest in the cooperative real property will no longer be regulated by HPD and could be freely conveyed without restriction to purchasers of a shareholder's choosing.

This substantive change in the ownership of the Property is further evidenced by the fact that EMP is required to develop a cooperative offering plan to be filed with the Office of the New York State Attorney General. The Offering Plan includes a provision allowing shareholders to opt out of ownership in EMP prior to it becoming a private cooperative housing corporation.

Accordingly, for the purposes of Article 31 of the Tax Law, the conversion of EMP from a limited-profit housing company to a private cooperative housing corporation with EMP as the plan sponsor of a cooperative housing corporation constitutes a conveyance by the plan sponsor to a cooperative housing corporation of the real property comprising the cooperative dwelling, which transaction is subject to real estate transfer tax under section 1402(a) of the Tax Law. The consideration for the conveyance is the amount of cash received by EMP as 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 after reconstitution. See section 575.11(a)(12) of the Real Estate Transfer Tax Regulations. In general the transaction described

above would be deemed to constitute a mere change of identity or form of ownership or organization. However, the exemption provided under section 1405(b)(6) of the Tax Law for conveyances that effectuate a mere change of identity or form of ownership or organization does not apply to conveyances to a cooperative housing corporation of real property comprising the cooperative dwellings.

In addition to the conveyance from the sponsor to the private cooperative housing corporation, upon conversion from a PHFL cooperative to the BCL cooperative, the shares in EMP, as a private cooperative housing corporation, will be deemed to have been conveyed to the shareholders of the limited-profit housing company (those who have not opted to become Non-Participants) as an original conveyance of shares representing each shareholder's ownership interest in the private cooperative housing corporation, with a proprietary lease for each shareholder's respective unit. This conveyance is also subject to real estate transfer tax. See section 575.8(a)(1) of the Real Estate Transfer Tax Regulations. Consideration for each original conveyance of shares of stock in the private cooperative housing corporation by EMP is deemed to be the fair market value of the shares apportioned to each unit. See section 1401(d) of the Tax Law. However, to the extent that the conveyance of the shares in the private cooperative housing corporation to the participating shareholders of the limited-profit housing company effects a mere change in the identity or form of ownership or organization where there is no change in beneficial ownership, the mere change exemption under section 1405(b)(6) of the Tax Law may apply.

As previously noted the real estate transfer tax applies to transfers by a sponsor to a cooperative housing corporation of the property comprising the cooperative dwellings notwithstanding that there may have been no change in beneficial ownership. Pursuant to section 1405-B(a) of the Tax Law and section 575.8(c) of the Real Estate Transfer Tax Regulations a credit is allowed for a proportionate part of the amount of any tax paid upon the conveyance by the sponsor to the cooperative housing corporation of the property against the tax imposed on the original conveyance of shares of stock in the cooperative housing corporation in connection with the grant or transfer of a proprietary lease. Thus, to the extent the mere change rule is not otherwise applicable, any real estate transfer tax on the conveyance of shares in the private cooperative housing corporation to the participating shareholders may be offset by a credit for a proportionate part of the amount of any real estate transfer tax paid upon the conveyance by EMP (the limited-profit finance housing company) to EMP (the private cooperative housing corporation) of the interest in the real property comprising the cooperative dwellings.

It should be noted that pursuant to section 1402-a(a) of the Tax Law if the consideration for the conveyance of shares related to an individual cooperative apartment unit is \$1 million or more, the conveyance will be subject to an additional 1% tax at the time of conveyance. However, as stated above, the mere change exemption may apply if the conveyance effectuates a mere change of identity or form of ownership or organization.

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The conveyance to EMP (the limited-profit housing company) by Non-Participants of their shares in EMP prior to its conversion, along with their occupancy agreements that the non-participating shareholder agrees to terminate, is considered to be a subsequent conveyance of stock in a cooperative housing corporation, which conveyance is subject to real estate transfer tax. See section 575.8(a)(2) of the Real Estate Transfer Tax Regulations. The consideration for such subsequent transfers will be the cash payment received by the non-participating shareholder. See section 575.1(d)(1) of the Real Estate Transfer Tax Regulations.

DATED: June 17, 2008

/s/

Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

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.