

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

TSB-A-10(5)R
Real Estate Transfer Tax
November 24, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M101013D

On October 13, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] ("Petitioner"), [REDACTED]. Petitioner asks whether the transactions described in the petition are conveyances subject to the real estate transfer tax (RETT) imposed by Article 31 of the Tax Law and, if so, whether any of the exemptions provided under Article 31 would apply to these transactions. We conclude that the transactions are conveyances subject to RETT and that no exemptions apply.

Facts

Petitioner and Entity C ("Realty Company") are contemplating three interrelated transactions whereby Petitioner, in the first transaction, will acquire approximately 66 gas stations from Entity B ("Seller"), and, in second and third transactions immediately following the first, convey to Realty Company and then leaseback from Realty Company the real estate associated with approximately 60 of such gas stations (collectively, the "Real Property"), with the Petitioner having a right under the lease, exercisable in fifteen years, to repurchase some of the Real Property, and additional rights, potentially exercisable at later dates, to repurchase the balance of the Real Property, in each case at prices not less than fair market value of the properties so purchased.

According to the petition, the specifics of the transactions are as follows: Petitioner will purchase approximately 66 gas stations from Entity B pursuant to a Sale and Purchase Agreement between Petitioner and Seller (the "Purchase Agreement"). The purchase of these gas stations will consist of the acquisition by Petitioner of the Real Property (both fee and leasehold), and also equipment, inventory and other assets (e.g., gasoline, foodstuffs, etc.) that comprise the gas stations. Under the Purchase Agreement, Seller will assign to Petitioner at closing the supply contracts that Seller currently has with each of the independent operators of the approximately 66 gas stations. Seller and Petitioner have not allocated any of the purchase price to those contracts.

Petitioner cannot self-finance the transactions described under the Purchase Agreement. Thus, as part of a separate agreement (the "Separate Agreement") between Petitioner and Realty Company, Petitioner and Realty Company have agreed to enter into a sale and leaseback of the Real Property (fee and leasehold). Under the Separate Agreement, Petitioner will agree to sell the Real Property to Realty Company. Realty Company will then immediately lease (or sublease) such Real Property back to Petitioner. For contractual and regulatory reasons, Seller will not issue direct deeds for the Real Property to Realty Company. Petitioner will retain any portion of the gas stations transferred by Seller to Petitioner but not conveyed by Petitioner to Realty Company (e.g., inventory, equipment and certain personal property including, but not limited to, underground storage tanks, supply contracts).

The lease between Petitioner and Realty Company (the "Lease") will have an initial term of 15 years, with three 10 year extension options. The Lease will be fully "triple-net," meaning that as between Petitioner and Realty Company, Petitioner will be fully responsible during the term of the Lease for the maintenance, repair and operation of the gas stations, including utilities, real estate taxes, and property,

casualty and premises liability insurance. The annual fixed rent payable under the Lease is subject to escalation, based on the regional CPI, such adjustment to be made on each third anniversary of the commencement date of the Lease, for the term of the Lease (inclusive of all extensions). The parties intend that, for accounting, state law, regulatory, and federal income tax purposes: (i) the Lease will be treated as a "true lease"; (ii) Realty Company will be treated as the owner of, and landlord with respect to, the Real Property; and (iii) Petitioner will be treated as the tenant with respect to the Real Property.

The Lease will contain a right to purchase, exercisable in the future provided there is no default under the Lease, under which Petitioner has the right, at the expiration of the initial term of the Lease, or at the expiration of either of the first two 10 year extension terms, to purchase from Realty Company up to one-third (by number) of the fee properties comprising the Real Property. If Petitioner exercises this first right to purchase, then Petitioner is given a second right to purchase the remaining two-thirds of the fee properties upon the expiration of the immediately succeeding extension term (e.g. after the first extension term if Petitioner purchases one-third of the fee properties after the initial term, after the second extension term if Petitioner purchases one-third of the fee properties after the first extension term). The purchase price for each fee property will be an amount equal to the greater of the fair market value for the highest and best use of such property (as determined by appraisal), or a percentage of Realty Company's acquisition cost allocated to such property (such percentage ranging from 110% to 130% of Realty Company's acquisition cost, depending on when the purchase right is exercised by Petitioner). After the sale of a fee property pursuant to any exercise of the rights to purchase described above, the annual fixed rent payable by Petitioner under the Lease will be reduced by a scheduled amount allocated to such property.

The Petitioner states that only Realty Company will benefit from appreciation in the real property, be able to sell the real property, and treat the real property as its own for income tax and financial reporting purposes.

Distinct from the Petitioner's right to purchase in the future, if Realty Company elects to sell one or more of the gas station properties under the Lease to a third party (other than as a result of an unsolicited offer) at any time during the term of the Lease, it will be required to first offer to sell such properties to Petitioner at a price determined by Realty Company. If Petitioner elects not to purchase the properties at the price offered by Realty Company, then Realty Company may sell such properties as desired, except that if Realty Company is willing to accept an offer for less than 90% of the price that was first offered to Petitioner, then Realty Company will be obligated to re-offer the subject properties to Petitioner for the lesser amount that it is willing to accept from the third party. Upon the sale of any gas station property to Petitioner pursuant to this right of first offer, the annual fixed rent payable by Petitioner under the Lease will be reduced by a scheduled amount allocated to such property.

It is contemplated that the transactions between Petitioner and Realty Company will close on the same day as and immediately following the first transaction between Petitioner and Seller. Thus, Realty Company will not acquire the Real Property, or lease the Real Property back to Petitioner, unless and until closing occurs with respect to the transactions described in the Purchase Agreement. As such, Petitioner will hold legal title to the Real Property for only a moment in time (because the deeds from Seller to Petitioner with respect to the Real Property and the deeds from Petitioner to Realty Company with respect to the Real Property will be dated the same day). The closings are intended to occur simultaneously, although closing of the transactions described in the Purchase Agreement between Seller and Petitioner is not contractually contingent upon closing of the transactions described in the Separate Agreement between Petitioner and Realty Company.

Analysis

Transaction one: In transaction one, Petitioner will purchase 66 gas stations from Seller. The purchase of these gas stations will consist of the acquisition by Petitioner of the real property (both fee and leasehold) and also non real estate assets that comprise the gas stations. This opinion does not address the tax liability associated with the purchase of the non real estate assets.

RETT is “imposed on each conveyance of real property or interest therein” (Tax Law §1402[a]). All conveyances are presumed subject to the tax (Tax Law §1404[b]). “Conveyance” means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, option, trust indenture, conveyance or transfer or acquisition of a controlling interest in any entity with an interest in real property (Tax Law §1401(e)). In this case, “interest in the real property” includes both title in fee and leasehold interests (Tax Law §1401(f)). Therefore, in transaction one, RETT will be imposed on the conveyances of the interests in real property (i.e., the fee and leasehold interests in the gas station real property).

RETT is paid by the grantor, in this case the Seller. If the grantor fails to pay the tax within 15 days after delivery of the deed, the grantee (in this case, the Petitioner) has the duty to pay the tax, although the tax becomes the joint and several liability of the grantor and grantee (see Tax Law, §1404(a)).

Transactions two and three: According to Petitioner, on the same day as and immediately following the first transaction between Petitioner and Seller, Petitioner will convey to Realty Company (transaction two) and leaseback from Realty Company (transaction three) the real estate associated with approximately 60 of the 66 gas stations conveyed in transaction one.

The Lease between Petitioner and Realty Company will have an initial term of 15 years, with three 10 year extension options. The Lease will be fully “triple-net” with the Petitioner obligated to pay all expenses associated with the use and operation of the Property. The lease will include a purchase option and a right of first refusal for the Petitioner. The parties intend that, for accounting, state law, regulatory and federal income tax purposes, the Lease will be treated as a “true lease.”

Transactions two and three are conveyances distinct from transaction one. This is shown by the fact that Petitioner did not convey to Realty Company all the property it received from seller in transaction one. In addition, Realty Company is treated as the owner of the property for income tax and financial reporting purposes. Therefore, Transactions two and three are not exempt from RETT under Tax Law §1405(b)(6), which excludes from the real estate transfer tax “[c]onveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership.”

Transactions Two and Three are also not exempt under Tax Law §1405(b)(2), which provides that the tax “shall not apply to conveyances which are or were used to secure a debt or other obligation.” While the Realty Company will provide funding to finance the acquisition of the Real Property, and in many respects the transaction serves to protect the Realty Company’s investment in the transaction, review of the lease terms does not support the conclusion that the conveyance will be used to secure the obligation. Provisions relating to rent, rent escalations tied to a cost of living adjustment, fair market value purchase price for the purchase option, purchase price for the right of first refusal set by the Realty Company, and variances between the premises demised in transaction one and transaction two lead to the

conclusion that the conveyance to Realty Company will not be primarily used to secure a debt or other obligation.

Because there has been a conveyance of an interest or interests in real property, and the conveyance is not exempt from taxation, RETT will be imposed in transaction two, "when the consideration exceeds five hundred dollars..." (Tax Law §1402(a)). Consideration is governed by §575(d)(1) of the RETT Regulations: "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" (20 NYCRR §575(d)(i)). According to the Petition, there was no consideration given by the Realty Company to the Petitioner for the second transaction. Based on this assumption, there is no RETT tax liability for the conveyance of real property from Petitioner to Realty Company.

Transaction Three (The Lease with Purchase Option): In general, the creation of a lease for a term that does not exceed 49 years, including renewals, without a purchase option, would not constitute a taxable conveyance (Tax Law §1401(e); §575.7(a)). However, the option to purchase real property contained in a lease is an interest in real property. The purchase option need not be presently exercisable in order to be subject to RETT. 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. The creation of a lease coupled with the granting of an option to purchase the real property is a conveyance subject to the transfer tax, regardless of the term of the lease (see 20 NYCRR §575.7(c)).

In this case, the Petitioner at the time of conveyance will reserve the option to purchase, exercisable after the initial 15 year term and provided there is no default under the Lease, up to one-third (by number) of the fee properties comprising the Real Property. If Petitioner exercises this purchase option, then Petitioner is given a second right to purchase the remaining two-thirds of the fee properties upon the expiration of the immediately succeeding extension term. The purchase option is granted as part of the agreement for the use and occupancy of the real property. The purchase price for each fee property will be an amount equal to the greater of the fair market value for the highest and best use of such property (as determined by appraisal), or a percentage of Realty Company's acquisition cost allocated to such property (such percentage ranging from 110% to 130% of Realty Company's acquisition cost, depending on when the purchase right is exercised by Petitioner). Accordingly, the Lease, which includes the purchase option, will be a conveyance of an interest in real property that is subject to RETT.

Pursuant to 20 NYCRR §575.1(d)(2), "[i]n the case of a creation of a leasehold interest or the granting of an option with use and occupancy of real property, consideration includes, but is not limited to: (i) the present value of the rental and other payments attributable to the use and occupancy of the real property or interest therein; (ii) the amount paid for an option to purchase or renew; and (iii) the present value of rental or other payments attributable to the exercise of any option to renew." Thus, Transaction three is a taxable conveyance but no opinion is expressed herein regarding the amount of consideration for the Lease transaction.

Right of First Refusal: The lease will contain a provision that if the Realty Company elects to sell one or more of the gas station properties under the Lease to a third party during the term of the Lease, it will be required to first offer to sell such properties to Petitioner at a price determined by Realty

