

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

TSB-A-11(1)R
Real Estate Transfer Tax
February 22, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M100617A

A petition received by the Department asks whether [REDACTED] (the Petitioners), two legally separate residential private housing cooperative corporations, will be subject to New York State Real Estate Transfer Taxes (RETT) if the Petitioners legally merge.

We conclude that the legal merger of the Petitioners is a transfer or acquisition of a controlling interest in an entity with an interest in real property subject to the RETT, and that the conveyance of the original shares in Survivor to the former shareholders in the dissolving Petitioner after the merger is also subject to the RETT. A credit will be allowed for a proportional part of the amount of any tax paid upon the conveyance of the real property to Survivor to the extent that such conveyance of shares to the former shareholders in the dissolving Petitioner effectuated a mere change of identity or form of ownership of such property and not a change in the beneficial ownership of such property.

Facts

Petitioners are two residential housing cooperative corporations, each owning one of two towers constructed over a six-story office building that serves as a common base. Although each tower is separately owned and has a separate street address, from an operational point of view, the Petitioners are interdependent. They constitute and operate as separate portions of the same structure, sharing a common entrance, lobby, heating plant and other facilities. They also share building employees and management. By necessity, all significant decisions regarding Petitioners' physical plant and operational matters must be made jointly. However, there is no legal vehicle for joint decision-making. Each of the Petitioners has an independently elected board, and each may amend its governing corporate document without the other's consent. Petitioners believe that if this structure continues, there is a substantial probability that there will be dysfunction at a future critical junction with time-sensitive decisions delayed to the detriment of the cooperative apartment owners. Thus, Petitioners wish to merge legally in accord with the New York Business Corporation Law (BCL). Under the merger plan, one Petitioner (the dissolving Petitioner) would merge into the other Petitioner (Survivor) and go out of existence. One Petitioner has slightly more apartments and more shares of stock allocated to its apartments than the other Petitioner, but we do not know which Petitioner will become Survivor – the larger or the smaller. Former shareholders of the dissolving Petitioner will receive newly issued stock in Survivor. After the merger, the shareholders of Survivor will be identical to the shareholders of Petitioners prior to the merger. Each shareholder will continue to own the same number of shares as he or she owned prior to the merger, and each shareholder will continue to occupy his or her apartment pursuant to his or her respective existing proprietary lease. For the shareholders of the dissolving Petitioner, Survivor will become the successor lessor.

The buildings owned by the Petitioners were each constructed by the same developer and are virtually identical in size and layout. Each tower was originally designed with 167 apartments and a total

of 967 rooms.¹ In the course of their cooperative organization, the same methodology was used to allocate shares to apartments in each tower, with 107,350 shares allocated to apartments in one tower and 110,950 shares to apartments in the other tower.

Analysis

New York State imposes a tax (known as the real estate transfer tax or RETT) on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars or a fractional part thereof.² An additional tax is imposed on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more.³ A conveyance of real property or interest therein is not limited to a conventional deed transfer, but also includes the transfer or acquisition of a controlling interest in any entity with an interest in real property.⁴ “Controlling interest” means, 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.⁵ The transfer or acquisition of a controlling interest in a corporation occurs when a person, or group of persons acting in concert, transfers or acquires a total of 50% or more of the voting stock in such corporation.⁶ In this case, the merger of one Petitioner into the other Petitioner is a transfer of a controlling interest in a corporation that owns an interest in real property, and as such, the RETT applies. Generally, in a merger, the RETT is applied only once. The conveyance of shares in the surviving corporation to the shareholders in the dissolving corporation is not taxed, either because a controlling interest in the survivor is not being conveyed or because the tax is imposed only once when there is a transfer and an acquisition of a controlling interest in the same transaction.⁷ However, the law contains specific rules regarding transactions involving cooperative housing corporations.

The Tax Law provides that (1) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of the proprietary leasehold by a cooperative corporation or cooperative plan sponsor, and (2) 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 are also subject to the RETT.⁸ This tax is due notwithstanding the definition of “controlling interest in §1401(b) of the Tax Law or anything to the contrary contained in §1401(e).”⁹ Thus, the conveyance of the original issue of stock in Survivor, in connection with the grant of a proprietary lease to the former shareholders in the dissolving Petitioner, is also subject to the RETT.

You have asked whether the conveyances pursuant to the merger constitute a mere change of identity or form of ownership or organization where there is no change in beneficial ownership. After the merger, each Petitioner will own shares representing approximately 50% of both towers rather than 100% of one tower. This conveyance will constitute a mere change of form of ownership or organization

¹ During construction, two of the apartments in one of the towers owned by a Petitioner were divided into two separate apartments, so that tower now contains 169 apartments.

² Tax Law §1402(a).

³ Tax Law §1402-a(a) .

⁴ Tax Law §1401(e).

⁵ Tax Law §1401(b).

⁶ 20 NYCRR §575.6.

⁷ 20 NYCRR § 575.6(e)

⁸ Tax Law § 1405-B(a) and 20 NYCRR §575.8.

⁹ Tax Law § 1405-B(a) and 20 NYCRR §575.8.

where there is no change in beneficial ownership for the prorated percentage of the total amount of Survivor's stock attributable to the tower previously owned by the dissolving Petitioner.

Section 1405(b)(6) of the Tax Law provides a RETT exemption for conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership. However, that exemption does not apply in the case of conveyances of real property comprising the cooperative dwellings to a cooperative housing corporation.¹⁰ Because the merger of Petitioners entails the conveyance of a 100% interest in real property comprising the cooperative dwellings owned by the dissolving corporation to Survivor, and in fact results in the real property being owned by Survivor, it is the equivalent of a conveyance to a cooperative housing corporation of the real property comprising the cooperative dwellings. As such, it does not qualify for the mere-change exemption. A credit, however, may be allowed for the proportionate part of the amount of any tax paid upon the conveyance of the controlling interest in the dissolving Petitioner to the Survivor, to the extent that the conveyance effectuated a mere change of identity or form of ownership of such property and not a change in the beneficial ownership of the property.¹¹ This credit is allowed against the tax due for the conveyance of the original issue of stock of the Survivor to the shareholders of the dissolving Petitioner.

DATED: February 22, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and 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.

¹⁰ Tax Law §1405(b)(6).

¹¹ §1405-B(a) of the Tax Law and 20 NYCRR §575.8(c).