

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

TSB-A-12(1)R  
Real Estate Transfer Tax  
March 6, 2012

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M111020C

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether the distribution of condominium units by the Company to its members will be exempt from the real estate transfer tax ("RETT") imposed pursuant to Article 31 of the Tax Law. We conclude that the distribution is exempt from RETT.

**Facts**

Petitioner, acting as the agent for Petitioner's members, [REDACTED] (Member 1) a New York limited liability corporation, and [REDACTED] (Member 2), [REDACTED] acquired title to a parcel of real property ("the Site"). The parties intend to have Member 2 enter into a site development agreement with [REDACTED] (developer), a New York limited liability company as developer. This agreement will set forth the commercial development plan for the Site.

Petitioner is developing a shopping center (the "Project") on the Property. Pursuant to the plans to develop the Project, the members plan to have the developer demolish the industrial building on the Site and construct the shopping center. When constructed, the Project is intended to consist of two condominium units (the "Units"), each including undivided interests in the appurtenant common elements identified in the declaration of condominium. It is further intended that the declaration of condominium be finalized at or prior to substantial completion of the improvements for the Project (the "Condominium Declaration"). One Unit will be owned by Member 2 and one Unit will be owned by Member 1. The Units will vary in form and function. Member 2 is intended to be a single 165,000 square foot brand retail store, and Member 1 is intended to be approximately 120,000 square feet of retail space and storage, in the aggregate, in more than one building that Member 1 intends to lease to various tenants, consistent with an overall shopping center development.

Sections 1.5 and 5.1 of the Operating Agreement provide that Petitioner acquired title to the Property as a nominee on behalf of Member 1 and Member 2. Member 1 and Member 2 funded the acquisition with their own funds, with Member 1 reimbursing Member 2 for Member 1's costs attributable to Member 1 upon distribution in liquidation by the Petitioner of Member 1. The interest of each member in the Site is limited to its interest in its respective condominium unit or units as well as the common areas of the condominium regime. Neither has an interest in the other's unit, nor does either have any co-ownership interests in the property as a whole. All benefits and obligations regarding a particular member's unit will be attributable to that member, and all tax attributes attributable to a member's unit or units will be allocated to that member. Member 2 and Member 1 are responsible for the development and all related services of building out their respective units (other than that which is considered part of common elements in the condominium regime). The Petitioner is designed to last for a limited period of time, just long enough to complete the construction (the core and shell) and condominium process, which is presently estimated to be less than three years.

The parties intend to have the Petitioner convert its ownership in the Site to a condominium form of ownership pursuant to Article 9-B of the Real Property Law by entering into a commercial condominium declaration and by-laws and having the condominium documents recorded in the Office of the Register of the City of New York.

Upon substantial completion of construction of certain improvements on the Site and recording of the condominium documents, subject to and pursuant to the terms and conditions of the Site Development Agreement, the parties intend to have the Petitioner convey or distribute to Member 1, that certain condominium unit designated in the Site Development Agreement as created for Member 1 and an undivided percentage interest in the "common elements" of the condominium. The parties also intend to have the Petitioner convey or distribute to Member 2 that certain condominium unit designated in the Site Development Agreement as created for Member 2, together with an undivided percentage interest in the common elements of the condominium. At the closing of the conveyance or distribution of Member 1's condominium unit to Member 1, Member 1 shall pay to Member 2 a repayment amount. Such closing is referred to in the parties' operating agreement as the "Distribution."

### **Analysis**

Section 1402(a) of Article 31 of the Tax Law imposes the real estate transfer tax on each conveyance of real property or interest therein. However, section 1405 (b)(6) of the Tax Law provides an exemption from the real estate transfer tax for conveyances that effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership.

We have previously provided advice concerning the scope of the section 1405(b)(6) RETT exemption. In TSB-A-94(6)R, where each participant in the conversion of a homeowners association into condominium units held a beneficial interest solely in the lot and home he or she occupied as his or her residence and held no interest in the other homeowner's lots or homes, it was recognized that the beneficial ownership of each lot and home had continuously vested with each individual homeowner, without regard to the homeowner being a member of a homeowners association. Thus, the conversion of the lots and homes within a homeowners association into condominium units and the resulting exchange by the homeowners of their lot deeds for condominium deeds constituted a mere change of identity or form of ownership or organization, since there was no change in the beneficial ownership of each lot and home.

In TSB-A-07(4)R, the owner of a condominium unit transferred the property to the Trust for Cultural Resources ("the Trust") for a four year period to obtain certain property tax and other benefits under the New York State Cultural Resources Act. At the end of the term, the condominium was to be re-conveyed back to the original owners. The owner remained responsible for all obligations incurred prior to transfer to the Trust, including financing and leasing of the property. The cost of maintaining the condominium was to be borne by the original owner, and it was to remain as beneficial owner for federal, state and local income tax purposes. We advised that based on the facts, the conveyance from the Trust back to the owner is exempt from the RETT as a conveyance that constitutes a mere change of identity or form of ownership," within the meaning of section 1405(b)(6) of the Tax Law.

In TSB-A-01(3)R, each member, pursuant to an LLC operating agreement, held a beneficial interest in its own unit and held no interest in the units of the other members. Under the proposed plan, upon completion of the project, the petitioner was to convert the property to a condominium form of ownership and would then convey each of the units to its respective owner. We recognized that the beneficial ownership of the respective units continuously vested with such unit's respective unit owner, without regard to the owners being members of the petitioner. Thus the conversion of the property by the petitioner into condominium units and the resulting conveyance of legal title to the respective units to their respective members would not effectuate a change in the beneficial ownership interest as held by the members prior to the conversion.

In TSB-A-99(3)R, and in TSB-A-01(8)R, where each member of an LLC held a beneficial interest in its own unit of the real property and held no interest in the units of the other members, we recognized that the beneficial ownership of each unit had continuously vested with each unit owner. Thus, the conversion of the units within the LLC into condominium units and the resulting conveyance to each unit owner of its respective unit constituted a mere change of identity or form of ownership or organization, because there was no change in the beneficial ownership of each unit.

Thus, consistent with the rationale set forth in the above referenced five Advisory Opinions, we conclude that the distribution of the Site by the Company into condominium units and the resulting conveyances of legal title of the units to the respective members will constitute a mere change of identity or form of ownership or organization, and such conveyances will be exempt from the real estate transfer tax.

DATED: March 6, 2012

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DEBORAH R. LIEBMAN  
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.