

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

TSB-A-15(2)R
Real Estate
Transfer Tax
May 12, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M140218B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] “Petitioner”. Petitioner, a limited liability company with two members (Members), purchased real property in New York City and is constructing a 40-story building. When the core and shell of the building are completed, Petitioner will convert ownership of the property to a condominium with two units and distribute the condominium units to its Members. Petitioner asks whether this distribution will be exempt from the New York State real estate transfer tax.

We conclude that the conveyances of the units to the respective Members are exempt from the New York State real estate transfer tax, because the conveyances effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, provided that each Member’s ownership percentage in the Condominium after the conveyances are completed equates to each Member’s respective original ownership allocation in Petitioner’s Operating Agreement.

Facts

Petitioner is a limited liability company with two Members. It was formed to acquire real property in New York City, remove an existing structure, construct a 40-story building, and, upon substantial completion of the core and shell, convert the building into the Condominium containing two units (the “Master Units”), each to be solely owned by a Member. One Member, a special-purpose LLC formed by a developer and seller of residential homes and condominiums, will own floors 23 – 40 on which for-sale condominiums will be built. The other Member, a REIT, will own floors 2 – 22 which will house residential apartments for rent. Each Member’s interest includes designated lobby areas on the first floor and storage facilities below ground. Petitioner was created to allow a single administrator to manage the construction of the building, negotiate one primary construction contract, arrange financing, obtain the required permits, and communicate with third parties and government agencies. To that end, the Members entered into a purchase agreement with a seller to acquire the property, and then assigned the agreement to Petitioner. When Petitioner acquired the property, the New York State real estate transfer tax was paid.

The business model for the project from the inception envisioned that the Members would each pay for, design, and own their respective floors and public space in the building. Development costs, as well as the profits and losses and other economics attributable to each Master Unit, would be earmarked to the respective Member. Although one Member was designated the Administrative Member of Petitioner with authority to provide day-to-day

management and oversight in accord with the business plan, major decisions require unanimous approval by all non-defaulting members.¹

Under the Operating Agreement, the initial membership interests in Petitioner were allocated 63% and 37% respectively for the shared development costs, such as due diligence for acquisition of the real property and certain soft costs,² but each Member is obligated to pay for 100% of the work done and costs incurred for construction of its respective curtain wall, concrete floors and lobby, as well as other costs for work done solely for the benefit of that Member, including interior construction, fixtures, furnishings and equipment.³ A separate capital account was established and maintained for each Member under which the income, deductions, losses, or other expenditures related solely to that Member's Master Unit are credited or debited to that Member's account respectively.⁴ Distributable cash, to the extent realized and specifically related to the sale of a condominium or rental of an apartment, will be distributed to the respective Members.⁵ Losses and profits that are not related solely to a Master Unit are to be allocated to the Members pro rata in accordance with each Member's membership interest.⁶

Once substantial completion of the core and shell and the bifurcated condominium ownership are accomplished, Petitioner will be liquidated, and title to the Master Units will be assigned to the respective Members.

Analysis

Under Tax Law § 1402(a), a tax is imposed on each conveyance of real property or interest therein. A "conveyance" means the transfer or transfers of any interest in real property by any method. *See* Tax Law §1401(e). A conveyance occurred when Petitioner acquired the property and the New York State real estate transfer tax was paid on that conveyance. An additional conveyance will occur when the Master Units are conveyed to the respective Members after the building is converted to a Condominium. The issue is whether that conveyance is exempt from the New York State real estate transfer tax.

Petitioner's Operating Agreement made clear from the beginning of the project that the sole purpose of Petitioner was to acquire the property, construct the building and file the Condominium Declaration. Although Petitioner negotiated the construction contract, procured financing, obtained the necessary governmental permits, and prepared the Master Condominium documents, each Member was entitled to all the benefits and burdens of ownership and obligations attributable to each Member's respective space. Under the Operating Agreement, the initial membership interests in the Petitioner were allocated 63% and 37% to the two Members. As the project got underway, these percentages were used to allocate work done and costs incurred for the shared development costs, such as for the due diligence investigation prior to closing under the Purchase Agreement, hard and soft costs for design, obtaining governmental

¹ Op. Agreement § 7.3.2 and § 7.4.

² Op. Agreement § 1.1.64.

³ Op. Agreement § 6.2.1.

⁴ Op. Agreement § 4.1.

⁵ Op. Agreement § 8.2.5.

⁶ Op. Agreement § 8.5.1 and § 8.5.2.

permits, and the costs of creating the Master Condominium documents.⁷ A separate capital account was established and maintained for each Member, and, although the expenditures for construction of the respective curtain walls, concrete floors, and lobbies for the Master Units were considered shared development items, each Member is responsible for capital contributions amounting to 100% of the work done and costs associated with the construction of its respective Master Unit.⁸ The income, losses, deductions, appreciation, depreciation and related expenditures attributable to each unit are allocated to the respective Member. Neither Member has an economic interest in the unit of the other.

In TSB-A-01(8)R, in which an LLC beneficially owned the land and building during the project's construction and subsequently conveyed the individual condominium units to the beneficial owners, we opined that the conversion of the building by the LLC into condominium units, and the resulting conveyances of legal title of the units to the respective members of the LLC, constituted a mere change of identity or form of ownership or organization. As such, the conveyances were exempt from the New York State real estate transfer tax under Tax Law § 1405(b)(6). *Also see* TSB-A-12(1)R. In this case, the beneficial ownership of each Master Unit of the building was established at the outset of the project and will continue unchanged until title is conveyed to the Members that had designed and funded their respective Master Units. Thus, we conclude that the conversion of the building by Petitioner into a condominium and the resulting conveyances of legal title of the Master Units to the respective Members of Petitioner will constitute a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, provided that each Member's ownership percentage in the Condominium after the conveyances are completed equates to each Member's respective original ownership allocation in Petitioner's Operating Agreement. If such is the case, the conveyances are exempt from the New York State real estate transfer tax.

DATED: May 12, 2015

/S/

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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.

⁷ Op. Agreement §6.2.3.

⁸ Op. Agreement §6.2.1.