

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-99(3)R  
Real Estate Transfer Tax  
May 19, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M990319A

On March 19, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Armory Place LLC, c/o Orda Management Corporation, 225 Park Avenue South, New York, NY 10003.

The issue raised by Petitioner, Armory Place LLC, is whether the transfers of condominium units located on 14<sup>th</sup> Street, New York, NY, from Petitioner to its respective members are exempt from the Real Estate Transfer Tax imposed pursuant to Article 31 of the Tax Law.

Petitioner presents the following facts. Petitioner is a limited liability company ("LLC") composed of three separate members: MKT Associates LLC ("Orda"); Chancellor of the Armory, Inc. ("Chancellor"); and Armory Retail Associates LLP ("Armory Retail"). Petitioner, in accordance with a Request for Proposal of the Empire State Development Corporation (the "ESDC"), recently was designated by the ESDC to develop the 14<sup>th</sup> Street Armory site (the "Property"), which is located on 14<sup>th</sup> Street between 6<sup>th</sup> Avenue and 7<sup>th</sup> Avenue, New York, NY, Block 790, Lot 19. The development plan for the Property requires that the present structure located on the Property be demolished, the site remediated, and a mixed-use project be financed and developed on the Property. The project will be comprised of three components: one commercial/retail space (the "Retail Unit"); one senior housing facility (the "South Unit"); and one university faculty residence (the "North Unit;" the Retail Unit, the South Unit and the North Unit are hereinafter individually referred to as a "Unit" and collectively as the "Units"). As outlined below, each Unit will be ultimately be owned by a member of Petitioner as a "Unit Owner."

The preferred ownership structure for the project to succeed and financing to be obtained for construction would be for each member of Petitioner to directly acquire, own, develop and manage its Unit. For two reasons, however, it is necessary that the Property initially be owned through Petitioner. First, although the three Units will be functionally distinct, they will be physically and structurally integrated. Therefore, it is necessary that the development of the project be accomplished through a conversion to a condominium structure of ownership. However, ownership of the Property cannot be severed and each Unit transferred to a member of Petitioner prior to the substantial completion of all improvements because the New York City Condominium Act provides that a first conveyance of a condominium unit cannot occur until floor plans have been certified "as built." It has been the practice of the New York City Real Property Assessment Bureau ("RPAB") not to accept condominium declarations for recording until such plans can be certified "as built." Second, the alliance of developmental and managerial experience of the members of Petitioner is

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essential to meeting the needs of both the ESDC and the surrounding community. The ESDC's Request For Proposal acknowledged the benefits of having the property developed by a joint venture, specifically allowing for team submissions.

In view of the position of the RPAB, Petitioner intends to take title to the Property. Upon completion of the project and acceptance of the condominium declaration by the RPAB, Petitioner will be converted to a condominium association. Petitioner will then convey each of the three Units to its members as Unit Owners, so that Armory Retail will own the Retail Unit, Chancellor will own the South Unit, and Orda will own the North Unit.

Prior to the conversion to condominium, each member of Petitioner will separately fund the construction, development and improvement of its respective Unit. Petitioner's operating agreement (the "LLC Operating Agreement") clearly and consistently separates the benefits and obligations regarding the Property such that, from the outset, each Unit Owner receives all benefits and bears all obligations of its own Unit, and has no beneficial interest in those of the other Unit Owners. Prior to conversion, all federal, state and local taxes, all allocations of profit and loss, all cash distributions and all capital contributions attributable to each Unit will be allocated to its respective Unit Owner, and each Unit Owner will have sole design discretion with respect to its Unit.

Further, the Condominium Declaration as drafted specifically provides that the Petitioner, as Declarant thereunder, is making the submission for the benefit of its three members. Consequently, Petitioner, in effect, will be acting in the capacity of a nominee, holding the property on behalf of its three members.

### **Applicable Law**

Section 1402 of the Tax Law imposes the real estate transfer tax on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars. The term "conveyance" is defined in section 1401(e) of the Tax Law. Included in the definition of conveyance is the transfer or transfers of any interest in real property by any method.

Subdivision (f) of section 1401 of the Tax Law provides:

(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. . . .

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Finally, section 1405(b)(6) of the Tax Law sets forth that conveyances are exempt from the real estate transfer tax to the extent that they "effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership. . . ."

### **Conclusions**

In 115 Spring Street Company, Adv Op Comm T&F, March 30, 1994, TSB-A-94(3)-R, where each partner pursuant to a partnership agreement held a beneficial interest solely in the unit he occupied and had no interest in the other partners' units, it was recognized that the beneficial ownership of each unit vested with each individual partner without regard to ownership of the property being held by the petitioner. Thus, the transfer of the shares allocated to the units from the cooperative housing corporation to each partner whereby each partner received shares allocated to the unit he occupied constituted a mere change of identity or form of ownership or organization, since there was no change in the beneficial ownership of each unit.

In Vacation Village Homeowners Association, Inc., Adv Op Comm T&F, May 24, 1994, 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 and 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 Petitioner into condominium units and the resulting exchange by the homeowners of their lot deeds for condominium unit 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 the instant case, each Unit Owner, pursuant to the LLC Operating Agreement, holds a beneficial interest in its own Unit and holds no interest in the Units of the other Unit Owners. Under the proposed plan, upon completion of the project, Petitioner will convert to a condominium association and will then convey the three Units to the respective Unit Owners, so that Armory Retail will own the Retail Unit, Chancellor will own the South Unit and Orda will own the North Unit. Accordingly, it is recognized that the beneficial ownership of each individual Unit will continuously vest with such Unit's respective Unit Owner, without regard to the Unit Owners being members in Petitioner.

Therefore, pursuant to the rationale set forth in 115 Spring Street Company, and Vacation Village Homeowners Association, Inc., *supra*, the conversion of the Property by Petitioner into condominium units and the resulting conveyance to each Unit Owner of its respective Unit will not effectuate a change in the beneficial ownership interest as held by the Unit Owners prior to the conversion. Accordingly, pursuant to Section 1405(b)(6) of the Tax Law, the conversion of the

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Units within Petitioner into condominium units and the conveyance of such Units to their respective Unit Owners will constitute a total mere change of identity or form of ownership or organization, and such conveyances will be exempt from the real estate transfer tax.

DATED: May 19, 1999

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.