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

TSB-A-96 (5) R
Real Estate
Transfer Tax
Real Property
Transfer Gains Tax
Mortgage Recording Taxes
June 25, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M960613A

On June 13, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from National Broadcasting Company, Inc. ("NBC"), 30 Rockefeller Plaza, New York, New York 10112 and General Electric Company ("GE"), 3135 Easton Turnpike, Fairfield, Connecticut 06431.

The issues raised by Petitioners, NBC and GE, with respect to the transactions described below, are as follows:

1) Whether Petitioners' assignment to a trust (the "Trust") of their rights under the April Agreement to acquire the Condominium Interests will be subject to the New York State Real Estate Transfer Tax (the "transfer tax"), or the New York State Real Property Transfer Gains Tax (the "gains tax") and whether the recording of the instruments effecting the transfer of the Condominium Interests from the RCP Partnerships to the Trust will be subject to the New York State and New York City Mortgage Recording Taxes (the "mortgage recording taxes").

2) Whether the RCP Partnerships' transfers of the Condominium Interests to the Trust will be subject to the transfer tax or the gains tax, and whether the transfers of beneficial ownership of the Condominium Interests to the Petitioners will be subject to the transfer tax or the gains tax.

3) Whether the granting by the Trust of leases to Petitioners with options to purchase the Condominium Interests or the subsequent transfer of the Condominium Interests to Petitioners upon the exercise of the options to acquire the Condominium Interests will be subject to the transfer tax or the gains tax.

4) Whether (i) the amount required to finance the acquisition of the Condominium Interests, in the form of Notes and Certificates, either collectively or individually; (ii) the assignment of perfected (through a UCC filing only) and first-priority security interests in all of the non-real property interests of the Trust in the Condominium Interests to secure payment of the Notes; (iii) the assignments of Trust Leases granted to the Certificateholders and the Noteholders; and, (iv) the execution of the Memoranda of Trust Leases and the granting of mortgages executed at the time the Notes are issued are subject to the mortgage recording taxes.

Petitioner submits the following facts as the basis for this Advisory Opinion. (Petitioners also included various documents purporting to effect the proposed transactions. It is not the function of the Advisory Opinion process to examine the documents to determine their effect. Rather, the advisory opinion is based upon the facts as presented by Petitioners. To the extent the actual facts may differ from those presented, the advisory opinion will not have a binding effect.) At the present time, NBC, which is wholly owned indirectly by GE, occupies certain premises located at 30 Rockefeller Plaza in the City of New York known as the General Electric Building and the adjacent Studio and West Buildings. These premises are in the form of condominium units, legal title to which is held by the New York City Industrial Development Agency ("IDA"). These condominium units are leased by IDA to Rockefeller Center Properties ("RCP"). The reversionary interest is held by RCP's affiliate, RCP Associates. Both are New York partnerships (the "RCP Partnerships"). At the present time, RCP subleases these units, and leases three additional units (comprised of floors 22, 23 and 53), to Petitioners (collectively, the "RCP Leases"). The reversionary and leasehold interests (i.e., the leasehold interests of RCP under the lease from IDA and the leasehold interests of RCP under the leases to NBC, including the lease of the three additional units (the "Leasehold Interests")) and fee title to the three additional units (collectively, the "Condominium Interests") are the subject of the proposed transfers which give rise to the tax issues to which this petition for advisory opinion is addressed.

The RCP Partnerships are currently undergoing reorganization pursuant to Chapter 11 of the United States Bankruptcy Code in the Southern District of New York. Pursuant to the Second Amended Plan of Reorganization for the RCP Partnerships (the "Plan of Reorganization"), the Condominium Interests will be transferred by the RCP Partnerships to GE, NBC or a nominee or designee of NBC. The Plan of Reorganization also provides for reorganization of the ownership of the Center where the Condominium Interests are located by transfers to other parties which are not relevant to this petition. The transfer of the Condominium Interests to a Delaware business trust established for the purposes of this transaction (the "Trust") will be made in consideration of a payment of a specified sum of money, to be made on behalf of Petitioners to Rockefeller Center Properties, Inc. ("RCPI"), a creditor of the RCP Partnerships. The rights of the parties with respect to that transfer are contained in an agreement dated April 23, 1996, to which the parties denominated the "Investor Group", and GE and NBC are parties (the "April Agreement"). The closing under the Plan of Reorganization was expected to occur within 23 days after May 29, 1996 (the "Closing").

Prior to the Closing, Petitioners will assign to the Trust, for no consideration, the right to acquire the Condominium Interests. The instrument which effects that assignment will not be recorded. At the Closing, the Trust will pay to RCPI the specified sum, and instruments effecting the transfer of the Condominium Interests will be delivered to the Trust under the Plan of Reorganization and recorded. The instruments effecting the transfer of the Condominium Interests will state that they are solely for the purpose of transferring nominal ownership to the Condominium Interests and are not intended as mortgages or security interests.

In connection with the Closing under the Plan of Reorganization, a restated condominium declaration, a reciprocal easement agreement and a unit owners agreement will be made applicable to the premises covered by the Condominium Interests (the "Operation Agreements"). Petitioners also will be responsible for managing and maintaining insurance on the Condominium Interests and for all obligations concerning the property and operation imposed by the Operation Agreements. Additionally, Petitioners must indemnify all parties from any liabilities associated with the purchase, ownership, possession, occupancy, leasing or use of the Condominium Interests. Also, the consent of Petitioners is necessary for the Trust to encumber the Condominium Interests.

Upon transfer of the Condominium Interests to the Trust, the Trust will lease the condominium units to Petitioners (the "Trust Leases") for an initial period of up to ten years. GE will lease floors 22, 23, and 53 and NBC will lease the balance of the space. As a result of these transactions, the Trust will be the nominal owner of the Condominium Interests and will be entitled to the amounts payable by Petitioners under the Leases which will be equal to a LIBOR based yield on the specified sum plus other costs associated with the financing.

The Trust will obtain financing for the Condominium Interests from a third party (the "Certificateholder"), and a commercial paper funding vehicle or similar source (the "Noteholder"). Initially, a certain percentage of the specified sum required to finance the acquisition of the Condominium Interests will be in the form of a loan from a third party or GE (or an affiliate thereof) and, as soon as practicable thereafter, will be refinanced in the form of debt (the "Notes") issued to the Noteholder in the principal amount of the loan. The remaining financing will be in the form of Certificates issued to the Certificateholder.

In order to ensure that the Trust will not be considered a "single purpose entity" for certain accounting purposes, the Certificateholder will also invest an amount in the Trust, which will be reinvested by the Trust in investment grade securities. The Certificateholder will be entitled to the return earned on the amount and a return of the principal.

Payments made to the Trust by Petitioners under the Trust Leases will equal all costs associated with the Notes (including interest, fees and related expenses) plus a LIBOR based return to the Certificateholder on the Certificates.

The Trust Leases will provide that in the event Petitioners elect not to purchase the Condominium Interests at the end of the term of the Trust Leases, the Condominium Interests will be sold, and any amounts owing under the Notes and the Certificates will be repaid from the proceeds and Petitioners' payment of the Residual Value Guarantee (as defined below).

The following is a summary of the principal terms of the Trust Leases:

> The Trust Leases will be triple net leases in which the lease payments will be equal to the sum of the interest on the outstanding Notes plus all fees and expenses related thereto, plus a LIBOR based yield on the Certificates (the Notes plus the Certificates are referred to herein collectively as the "Trust Financing").
>
> NBC's obligations under the Trust Leases will be guaranteed by GE (the "Guarantor"). Thus, in the event of a default by NBC, all payments required to be made under the Trust Leases will be paid by the Guarantor.
>
> In conjunction with the Trust Leases, Petitioners will acquire options to purchase the Condominium Interests at any time for an amount equal to the Termination Value. The Termination Value for an interest is an amount equal to the relevant portion of the remaining unpaid principal of the Trust Financing outstanding plus any accrued return thereon and related fees and expenses to the date of payment.
>
> At the end of the lease term, Petitioners will have options to (i) acquire some or all of the Condominium Interests from the Trust by paying an amount equal to the Termination Value; (ii) cause the sale of the Condominium Interests not acquired pursuant to (i) subject to a Residual Value Guarantee (defined below); or (iii) extend the term of the relevant Trust Lease for an additional period on terms which are anticipated to be substantially similar to those which pertain to the initial Trust Lease term. If Petitioners choose the sale option in clause (ii) above and any portion of the Condominium Interests cannot be sold, then Petitioners will pay the Residual Value Guarantee and the Certificateholder will have the option to take the unsold portion in satisfaction of the unpaid Certificate amounts or cause Petitioners to continue to market such unsold portion and to pay fair market rent for such unsold portion until sold. In the event of a sale of the Condominium Interests, Petitioners will make a payment to the Trust equal to a percentage of the Termination Value (the "Residual Value Guarantee") and give to the Trust the sales proceeds up to a percentage of the Termination Value with Petitioners retaining the remainder, if any.

In addition to the amounts described above in respect of a yield on the Trust Financing amount, Petitioners will be required to pay all real and personal property taxes, as well as any assessments, levies or fees associated with the ownership, use or financing of the Condominium Interests. The Trust Leases give Petitioners the right to, at their own expense, contest the amount of the taxes assessed on the Condominium Interests. Petitioners also will be responsible for managing and maintaining insurance on the Condominium Interests and for all obligations concerning the property and operation imposed by the Operation Agreements. Additionally, Petitioners must indemnify all parties from any liabilities associated with the purchase, ownership, possession, occupancy, leasing or use of the Condominium Interests. Also, the consent of Petitioners is necessary for the Trust to encumber the Condominium Interests.

The Trust Leases will require that the parties treat Petitioners as the owners of the Condominium Interests for all tax purposes. However, for financial accounting purposes it is expected that the Condominium Interests will not be reflected on Petitioners' balance sheets.

The Notes will be secured by an assignment of perfected (through a UCC filing only) and first-priority security interests in, and liens on, all of the non-real property interests of the Trust (other than customary excepted rights and payments) in the Condominium Interests. In any event, there will be no mortgages filed in connection with the UCC filing. It is anticipated that the memoranda of Trust Leases, assignment of Trust Leases and mortgages will be executed at the time the Notes are issued, but in any event they will not be recorded or indexed in the real estate records at that time; however, if the credit rating of the Guarantor is downgraded to less than AA-/Aa3, then the memoranda of Trust Leases, assignment of Trust Leases and mortgages will be recorded.

The Notes will have first payment priority under the Residual Value Guarantee and the other payments under the Trust Leases. The Residual Value Guarantee will be a guarantee by Petitioners, on a first loss basis, of a percentage of the Termination Value in the event that Petitioners elect not to purchase the Condominium Interests upon termination of the Trust Leases. The Notes will also have first payment priority in the proceeds of a sale of the Condominium Interests for an estimated percentage of the Notes not covered by the Residual Value Guarantee.

The Certificateholder will have second payment priority (after the Notes) in sale proceeds from the Condominium Interests and in all payments under the Trust Leases, other than the Residual Value Guarantee, as to which the Certificateholder shall have no interest.

Any proceeds of sale of the Condominium Interests remaining after payment of the Notes and the Certificates will be paid to Petitioners where such proceeds will be commingled with Petitioners' general funds and available to all creditors of Petitioners.

In the event of condemnation of a Condominium Interest, or casualty that renders a Condominium Interest unsuitable for use, Petitioners are required to purchase the affected Condominium Interest by paying the Termination Value attributable to such interest or by substituting property of equal or greater value and useful life. Upon such payment, the affected Condominium Interest will be transferred to Petitioners from the Trust. Any award, compensation or insurance payment to which Petitioners become entitled will be for the benefit of Petitioners. In the event of a casualty that does not render the Condominium Interests unsuitable for use, Petitioners will be required to rebuild, replace or repair any damage to restore the Condominium Interests to the value and operating condition immediately prior to the casualty or condemnation. In this case, the Trust Lease with respect to the affected interest will continue and the amounts payable under that Trust Lease will not be reduced. In any case, excess insurance proceeds or condemnation awards (after payment of Termination Value) will be paid to Petitioners unless a default under a Lease has occurred and is continuing.

In conjunction with the Trust Leases, Petitioners will acquire options to acquire the Condominium Interests from the Trust. The option price will equal the Termination Value. Petitioners will have the right to exercise the options at any time during the term of the Trust Leases and upon termination of the Trust Leases.

The terms of the Trust Leases require that Petitioners assume the responsibilities of an owner by burdening Petitioners with the duty to pay the tax, maintenance, repair, insurance expense and other costs associated with ownership of the Condominium Interests as well as all obligations concerning the property and its operation imposed by the Operation Agreements. Furthermore, Petitioners are entitled to the full benefit from any appreciation in the value of the Condominium Interests. This is true because if the Condominium Interests have appreciated in value, Petitioners are entitled to either (i)exercise their purchase option pursuant to which they will pay the Termination Value and receive the appreciated property or (ii) pay the Residual Value Guarantee and sell the Condominium Interests to a third party.

Conversely, if the value of the Condominium Interests depreciates, Petitioners nevertheless will be required to service the Trust Financing for the full term of the Trust Leases through the payment of the specified amounts under the Trust Leases. Petitioners will also be obligated to repay the principal amount through exercise of a purchase option or through the Residual Value

Guarantee payment by Petitioners (or the Guarantor on Petitioners' behalf under the Guarantee Obligation) and proceeds from the sale of the Condominium Interests. In the unlikely event that the value of the Condominium Interests falls to less than a certain percentage of the Purchase Price and Petitioners fail to exercise their purchase option when the Trust Leases terminate, however, the Trust Financing may not be fully repaid.

By using the structure described herein to finance the Condominium Interests, the Condominium Interests and the financing used to acquire the Condominium Interests will not appear on Petitioners' balance sheets. Thus, for financial reporting purposes, each Petitioner will be treated as a lessee of its respective Condominium Interests. However, for all tax purposes, Petitioners will be treated as the owners of the Condominium Interests and will take all depreciation and deductions associated with the ownership of the Condominium Interests. Also, Petitioners will deduct as interest all costs associated with the financing arrangement and will take no deduction for "rent."

Applicable Law and Regulations

Subdivisions 1, 1-a and 2 of Section 253 of the Tax Law impose taxes on the recording of a mortgage of real property in the State measured by the principal debt or obligation, which is, or under any contingency, may be secured at the date of execution thereof or at any time thereafter. The tax imposed pursuant to the authority of Section 253-a of the Tax Law in New York City is not different for purposes of the opinion.

Section 250.2 of the Tax Law defines the term "mortgage" as follows:

> The term "mortgage" as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby. An assignment of rents to accrue from tenancies, subtenancies, leases or subleases of real property, within any city in the state having a population of one million or more, given as security for an indebtedness, shall be deemed a mortgage of real property for purposes of this article. Executory contracts for the sale of real property under which the vendee has or is entitled to possession shall be deemed to be mortgages for purposes of this article and shall be taxable at the amount unpaid on such contracts. A contract or agreement by which the indebtedness secured by any mortgage is increased or added to, shall be deemed a mortgage of real property for purposes of this article, and shall be taxable as such upon the amount of such increase or addition ....

Section 1402 of the Tax Law imposes the transfer tax on each conveyance of real property or interest therein when the consideration for the conveyance exceeds $500.00.

Section 1401(e) of the Tax Law defines the term "Conveyance", in part, as follows:

> "Conveyance" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (I) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the real property ....

Section 1401(f) of the Tax Law sets forth that the phrase "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. It shall also include an option or contract to purchase real property. It shall not include a right of first refusal to purchase real property.

Section 1405(b)(6) and Section 1405(b)(8) of the Tax Law respectively provide that the transfer tax shall not apply to the extent that a conveyance results in a mere change of identity or form of ownership or organization where there is no change in beneficial ownership of the real property (the "mere change exemption") and a conveyance given pursuant to the federal bankruptcy act.

Section 1441 of the Tax Law imposes the gains tax on the gain derived from the transfer of real property within this state at the rate of ten percent of the gain. Section 590.1 of Part 590 of 20 NYCRR (the "gains tax regulations") provides in part that the gains tax is imposed on the transfer of real property where the consideration for the transfer is $1 million or more.

Section 1440.4 of the Tax Law provides, in pertinent part, as follows:

> "Interest" when used in connection with real property includes, but is not limited to, title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development 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. Interest shall also include an option or contract to purchase real property.

Section 1440.7 of the Tax Law provides, in pertinent part, as follows:

> "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the real property.

Section 1443.5 of the Tax Law provides an exemption from the gains tax to the extent that a transfer of real property consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest (the "mere change exemption").

Analysis and Conclusion

Regarding issue #2, the transfers of the Condominium Interests by the RCP Partnerships to the Trust and the transfers of the beneficial ownership of the Condominium Interests to Petitioners would be viewed as a single transfer for transfer tax purposes. Since the transfers are made pursuant to the Plan of Bankruptcy Reorganization they are not subject to the transfer tax based on the exemption provided in Section 1405(b)(8). Also, for purposes of the gains tax, the RCP Partnerships' transfers of the Condominium Interests to the Trust and the transfers of beneficial ownership of the Condominium Interests to Petitioners would be viewed as a single transfer subject to the gains tax in the event of a gain resulting from the transfers.

Regarding issue #3 and the transfer tax and the gains tax elements of issue #l, as set forth in the above cited Tax Law and regulations, the granting of an option to purchase real property with right to use or occupancy of real property is a conveyance and transfer of real property generally subject to the transfer tax and the gains tax. In addition, the subsequent conveyance or transfer of real property in connection with the exercise of the option to purchase real property is a conveyance and transfer of real property generally subject to the transfer tax and the gains tax.

In this case, the RCP Partnerships will transfer ownership of the Condominium Interests to the Trust. Simultaneously with this transfer, the Trust will enter into agreements, which are termed "leases", with Petitioners. Under those agreements, Petitioners will have options to acquire the Condominium Interests. For financial reporting purposes Petitioners will be treated as lessees, and not the owners of the Condominium Interests. However, for all tax purposes Petitioners will be treated as the owners of, and will take all depreciation and deductions associated with the ownership of, the Condominium Interests. Also, Petitioners will deduct as interest expense, the payments of current return and associated fees and expenses on the Trust Financing, and will take no deductions as "rent" for any payments made. In addition, under the Trust Leases Petitioners assume all burdens of ownership of the Condominium Interests, including the duty to pay the tax, maintenance, repair, insurance expense and other costs associated with ownership of the Condominium Interests as well as all obligations concerning the property and its operation normally associated with ownership which are imposed by the Operation Agreements. All of Petitioners' obligations under the Trust Leases are fully guaranteed by the Guarantor. Furthermore, in the event of condemnation or casualty that renders the Condominium Interests unsuitable for use, any award, compensation or insurance payment to which Petitioners become entitled will be assigned to the Trust for the benefit of Petitioners. Also, Petitioners are entitled to the benefit from any appreciation in the value of the Condominium Interests, and will bear the economic burden of all expected depreciation in value of the Condominium Interests.

Accordingly, it is recognized that for tax purposes at all times from the conveyance of ownership from the RCP Partnerships to the Trust that Petitioners are the beneficial owners of the Condominium Interests. Thus, the granting of the lease by the Trust to Petitioners coupled with the granting of the options to purchase and the subsequent transfer of the Condominium Interests by the Trust to Petitioners upon exercise of the options will not be subject to the transfer tax and the gains tax based on the mere change of identity exemptions provided in Sections 1405(b)(6) and 1443.5 of the Tax Law, respectively.

Furthermore, the assignment by Petitioners to the Trust of the Petitioners' rights under the April Agreement to acquire the Condominium Interests is also exempt from the transfer tax and gains tax as a conveyance and transfer which results in a total mere change of identity.

With respect to issue #4 and the mortgage recording tax element of issue #1, pursuant to Sections 253 and 253-a of the Tax Law, respectively, mortgage recording taxes are imposed on the recording of any mortgage of real property situated within New York State and New York City. The memoranda of Trust Leases, assignment of Trust Leases and mortgages, the Notes and Certificates, the assignment of the April Agreement and the assignment of perfected and first priority security interests will not be recorded at the time the transaction is consummated. However, the memoranda of Trust Leases, assignment of Trust Leases and mortgages are to be recorded if there is a deterioration in the credit rating of the Guarantor. Accordingly, since the memoranda of Trust Leases, assignment of Trust Leases and mortgages, the Notes and Certificates, the assignment of the April Agreement and the assignment of perfected and first priority security interests will not be recorded or indexed in the real estate records (there will only be the UCC filing against the non-real property interests), there will be no Mortgage Recording Taxes imposed at the time the financing and/or refinancing is obtained, or when Petitioners enter into the Trust Leases. However, if the memoranda of Trust Leases, assignment of Trust Leases or mortgages, the notes and certificates, the assignment of the April Agreement and the assignment of perfected and first priority security interests are recorded or indexed in the real estate records at a subsequent time, the recording or indexing in the real estate records of those instruments will be subject to the Mortgage Recording Taxes measured by the principal debt or obligation which may be secured at the date of execution or at any time thereafter.

Pursuant to section 250.2 of the Tax Law, the term "mortgage" is defined to be a mortgage or deed of trust which imposes a lien on or affects the title to real property, notwithstanding that the property may form a part of the security for the debt or debts secured thereby. The instruments effecting the transfer of the Condominium Interests by the RCP Partnerships to the Trust will state that they are solely for the purposes of transferring nominal ownership to the Condominium Interests and are not intended as mortgages or security interests. Therefore, since these instruments effecting the transfer of the nominal ownership to the Condominium Interests are not intended to secure the payment of money or the performance of an obligation, these instruments are not mortgages and their recording is not subject to the Mortgage Recording Taxes.

DATED: June 25, 1996

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

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