

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(3)R
Real Estate Transfer Tax
April 18, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M000525A

On May 25, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Columbus Centre LLC and its Members (collectively "Petitioner"), c/o The Related Companies, L.P., 625 Madison Avenue, New York, NY 10022. Further information was submitted by Petitioner on October 6, 2000.

The issue raised by Petitioner is whether the transfers of condominium units 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. Columbus Centre LLC ("LLC") is made up of six members (each a "Member" and, collectively, the "Members"), referred to herein as the "TWI Member," the "Hotel Member," the "Residential Member," the "Office Member," the "Retail Member" and the "Garage Member."

Petitioner is developing a multi-use real estate project (the "Project") on property (the "Land") located adjacent to Columbus Circle in New York City. When constructed, it is intended that the Project will comprise seven condominium units, as follows:

1. The TWI Unit;
2. The Hotel Unit;
3. The Residential Unit;
4. The Office Unit;
5. The Retail Unit;
6. The Garage Unit; and
7. The J@LC Unit.

Appurtenant to each condominium unit is an interest in the condominium's common elements. The common elements will consist of the Land and the common facilities identified in the declaration of condominium to be finalized by the Members following the Land acquisition at or prior to substantial completion of the improvements for the Project (the "Condominium

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Declaration"). Each of the seven units in the condominium, together with its appurtenant common elements interest, is referred to herein as a "Unit," and collectively these constitute the "Units." Units 1-6 are referred to individually as a "Member's Unit," and collectively as the "Members' Units."

The Members' Units will vary in both form and function. The TWI Unit will include corporate offices and broadcast studio space for AOL Time Warner ("TWI")¹ and its affiliates. Each of Units 2-6 will be used primarily for the purposes described in its name. The J@LC Unit will consist of an auditorium and related facilities and will be used by Jazz at Lincoln Center Inc. ("J@LC"), a not-for-profit organization affiliated with Lincoln Center.

During the development of the Project, title to the Land and the building under construction will be held by LLC. The LLC Operating Agreement will clearly provide, however, that from the inception of the Project each Member is considered to be the beneficial owner (the "Owner") of such Member's Unit. The LLC Operating Agreement will further require that record title to each Member's Unit be transferred to its owner upon completion of the Unit.

The Members have agreed that, upon completion of the J@LC Unit, the LLC will convey the J@LC Unit to J@LC free and clear of all debts, liens and encumbrances, and for no consideration. The Members will thus donate the J@LC Unit to J@LC.

The design, use and functions of the various Units in the Project are all quite different, and the Members would have preferred to hold title to their respective Units outright from the beginning, without interposing the LLC structure. However, for the reasons described herein, the Members have determined that the LLC should hold title to the Project, and should develop the Project as a single project, until the "core and shell" of the building are completed, the Project is submitted to a condominium regime, and title to the Units is transferred to the Owners as required in the LLC Operating Agreement.

There are four reasons for using the LLC structure to hold title to the Units during construction. First, this facilitates the contractual arrangements with the construction manager and various trade contractors performing the physical work on the Project, which is a single, physically integrated structure. Second, it makes it possible to obtain single surety bonds for each of the major trades that will be performing work on the Project. Third, it makes it possible to obtain a single

¹TWI will employ off-balance sheet financing in the form of a "synthetic lease" to finance the development and ownership of the TWI Unit (Unit 1). TWI has submitted a separate advisory opinion request in respect of the synthetic lease arrangement, and as a result, the application of the real estate transfer tax to the conveyance of the TWI Unit is not addressed by this advisory opinion.

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construction loan and mortgage (obtaining separate mortgages on the Units, while they are under construction, would not be practical). Finally, historically it has not been possible to file a Declaration of Condominium and convey title to individual condominium units prior to the substantial completion of construction. The Members therefore chose the LLC structure as the only practical alternative for holding legal title to their Units during the construction process. It is nonetheless their explicit intent that each Member be the beneficial owner of such Member's Unit from inception.

The Members do not have co-ownership interests in the Project as a whole. Instead, the LLC Operating Agreement specifies that each Member's Unit is beneficially owned by its respective Owner (*e.g.*, the Retail Unit is beneficially owned by the Retail Member). The LLC Operating Agreement further provides that each Member shall receive and be entitled to all benefits, and shall bear and be subject to all obligations, attributable to the Unit beneficially owned by such Member. The LLC Operating Agreement also states that no Member shall have any beneficial interest in any other Member's Unit. The LLC Operating Agreement recites the parties' agreement that the LLC is being used to hold title to the Project during construction, to facilitate the Members' construction of their Units.

For federal, state and local tax purposes, the LLC Operating Agreement treats each Unit as if it is owned by its Owner, and not as an asset owned by LLC. The Agreement allocates to each Member 100% of every item of income, gain, loss, deduction and credit attributable to such Member's Unit. The Members do not share in the profits or losses of other Members' Units. The LLC Operating Agreement further provides that each Member has the sole authority to make (or direct the LLC to make) tax elections affecting such Member's Unit. Books of account are to be maintained to separately identify the specific assets and liabilities attributable to each Member. Any cash flow attributable to a particular Unit will be distributed only to the Owner of such Unit, and will not be divided among the Members.

The Project will be funded by investments each Member will make out of its own funds or separate borrowings ("Member Equity"), and an acquisition loan, a construction loan and a mezzanine loan under one or more blanket note(s) and mortgage(s) entered into by the LLC encumbering the Land and the entire Project (the "Acquisition/Construction Financing"). As explained above, the Acquisition/Construction Financing will be entered into by LLC, but under the LLC Operating Agreement and the Acquisition/Construction Financing, the TWI Member and the Hotel Member are each allocated a separate "Allocable Share" of the entire loan, and the Residential, Retail, Garage and Office Members (collectively, the "Affiliated Members") are allocated a single combined Allocable Share of the entire loan, as described below.

The recorded mortgage securing the portion of the Acquisition/Construction Financing advanced for the acquisition of the Land was executed not only by the LLC as record owner, but also by all of the Members as owners of their respective Units, to evidence their consent to the mortgage.

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The construction loan portion of the Acquisition/Construction Financing will be determined by calculating loan amounts for each Unit separately, based upon either the value of such Member's Unit, the debt service coverage of such Member's Unit, or the total costs attributable to such Member's Unit (including such Unit's percentage share of the costs of the Land, the other common elements and the J@LC Unit). The Acquisition/Construction lender will consider the financial viability of each Unit and the credit of each Member separately, and may require different percentages of Member Equity from the various Unit Owners, or guaranties or other forms of credit support, depending upon the lender's assessment of the level of risk associated with each Unit.

The Acquisition/Construction Financing will provide that, after the filing of the Condominium Declaration, and upon the conveyance of each of the TWI Unit and the Hotel Unit to its respective Member Owner, the mortgage will be severed into separate mortgages reflecting each Unit's Allocable Share of the proceeds advanced under the Acquisition/Construction Financing, and each Owner will replace its Allocable Share of the Acquisition/Construction Financing with its own permanent mortgage financing. Following the conveyance of the TWI and Hotel Units as described above, the Affiliated Members' Units, which have the same beneficial owners, will continue to be subject to a single loan and blanket mortgage.

The Members are working cooperatively to design the overall Project, but each Member is closely involved in the design and development of its particular Member's Unit. In addition to the LLC Operating Agreement, each Member will enter into a Development Agreement with an entity formed by The Related Companies, L.P. ("Related"), Apollo Real Estate Investment Fund III, L.P. and Apollo Real Estate Investment Fund IV, L.P. (collectively "Apollo") (such entity being the "Developer"). Each Development Agreement will require the Developer to provide all development and related services necessary to complete construction of such Member's Unit. Related and Apollo, as the principals of the Developer, will provide a completion guaranty to the Acquisition/Construction lender. Each Development Agreement sets forth the plans and budget for construction of the Unit, and provides that the Member Owner will monitor and inspect the work. Once the Project plans are finalized and approved by all the Members, there can be no design change affecting any Member's Unit without such Member's consent. The cost of any changes requested by a Member will be allocated to that Member's Unit.

Subject to compliance with the terms of the Condominium Declaration, each Member will have the sole and absolute authority to manage, lease, operate, fit-out and equip such Member's Unit. Each Member will bear the costs of fitting-out its own Unit.

Upon substantial completion of each Unit, as defined in each Development Agreement, the LLC Operating Agreement requires that title to the Unit be transferred to its Owner. When title to all of the Member's Units have been transferred to their respective Owners and the J@LC Unit has been donated to J@LC, LLC is to be dissolved and its legal existence will terminate.

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As set forth in the J@LC Development Agreement entered into between LLC and the Developer, and in the Restrictions Instrument which will be executed and delivered by the LLC as required by and in favor of the City of New York, upon completion of construction of the J@LC Unit, such Unit will be donated to J@LC, free and clear of all debt, and with no payment from J@LC.

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. . . .

Subdivision (b) of section 1405 of the Tax Law provides, in part:

(b) The tax shall not apply to the following conveyances:

* * *

4. Conveyances of real property without consideration, and otherwise than in connection with a sale, including conveyances conveying realty as bona fide gifts;

* * *

6. Conveyances to 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

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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 a homeowners association 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 Armory Place LLC, Adv Op Comm T&F, May 19, 1999, TSB-A-99(3)-R, where each member of an LLC held a beneficial interest in its own unit and held no interest in the units of the other members, it was recognized that the beneficial ownership of each unit had continuously vested with each unit owner, without regard to the unit owners being members of an LLC. 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 of form of ownership or organization, since there was no change in the beneficial ownership of each unit.

In the instant case, each Member, pursuant to the LLC Operating Agreement, holds a beneficial interest in its own Unit and holds no interest in the Units of the other Members. Under the proposed plan, upon completion of the project, Petitioner will convert the property to a condominium form of ownership and will then convey each of the Units to its respective Owner. Accordingly, it is recognized that the beneficial ownership of Units 2-6 will continuously vest with such Unit's respective Unit Owner, without regard to the Owners being Members of Petitioner.

Therefore, pursuant to the rationale set forth in 115 Spring Street Company, Vacation Village Homeowners Association, Inc., and Armory Place LLC, *supra*, the conversion of the Property by Petitioner into condominium units and the resulting conveyance of legal title to Units 2-6 to their respective members will not effectuate a change in the beneficial ownership interest as held by the Members prior to the conversion. Accordingly, pursuant to Section 1405(b)(6) of the Tax Law, the conversion of the Project to a condominium and the conveyance of each of Units 2-6 to its respective Member Owner 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.

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Finally, pursuant to sections 1402 and 1405(b)(4) of the Tax Law, because Petitioner will donate the J@LC Unit (Unit 7) to J@LC for no consideration, the conveyance of the J@LC Unit will not be subject to the Real Estate Transfer Tax.

DATED: April 18, 2001

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