

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

TSB-A-01(7)R
Real Estate Transfer Tax
July 26, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M010110B

On January 4, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Time Warner Inc., 75 Rockefeller Plaza, New York, New York 10019 (herein referred to as "Petitioner" or, from time to time, "TWI"). Further information was received from Petitioner on January 11, 2001, disclosing the merger of Petitioner with America OnLine. As of January 11, 2001, Petitioner and America OnLine became wholly-owned subsidiaries of a new parent company known as AOL Time Warner. Additional information related to the Petition was received on January 19 and February 12, 2001.

The issues raised by Petitioner, based on the facts described in this petition are:

- (1) Whether the conveyance of fee title to the TWI Unit by Columbus Centre LLC ("LLC") to State Street Bank and Trust Company, as Trustee ("SSBTT") (the "SSBTT Deed") shall be treated as the transfer of title to the TWI Unit by LLC to Petitioner, followed by the grant of a mortgage encumbering the TWI Unit by Petitioner, as mortgagor, to SSBTT, as mortgagee.
- (2) Whether the SSBTT Deed is exempt from the real estate transfer tax as a change in form of ownership with no change in beneficial ownership.
- (3) Whether the "Lease" of the TWI Unit by SSBTT to Petitioner pursuant to the Synthetic Lease financing shall be considered a financing arrangement, and not subject to the real estate transfer tax.
- (4) Whether the conveyance of fee title to the TWI Unit to Petitioner upon termination of the Synthetic Lease is subject to the real estate transfer tax.
- (5) Whether the recordation of the SSBTT Deed shall be considered the recordation of a mortgage encumbering the TWI Unit for the purposes of the mortgage recording tax.
- (6) Whether all of the instruments that are included within the definition of "mortgages" for the purposes of mortgage recording tax and that are recorded in connection with the Synthetic Lease transaction, specifically the consolidation of the A/C mortgages, the severance of the A/C mortgages, the Assignment of the Participants' Mortgage, the A/R Participants' Mortgage, the SSBTT Deed, the Memorandum of Lease, and the Assignment of Lease, will be considered as securing the same principal indebtedness. Provided that mortgage recording tax has been paid with respect to the full amount of the indebtedness

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secured by a mortgage on real property, whether the recordation of the additional instruments referred to above in respect of such indebtedness are exempt from mortgage recording tax pursuant to Tax Law § 255.

Petitioner presented the following facts as the basis for this advisory opinion.

Petitioner expects to locate its world headquarters in a condominium unit (the "TWI Unit") being constructed on property (the "Land") adjacent to Columbus Circle in New York City. The financing for the acquisition of the TWI Unit's "Allocable Share" of the Land, and the intended permanent financing for the TWI Unit, are in the form of a synthetic lease arrangement, described below (the "Synthetic Lease"). In addition, for the reasons set forth below, Columbus Centre LLC, a limited liability company ("LLC") will hold title to the entire condominium project (the "Project"), including the TWI Unit, until the "core and shell" of the building are complete and the Project is submitted to a condominium regime.

1. The Synthetic Lease

The Synthetic Lease is a financing structure that confers tax ownership of the TWI Unit on Petitioner, but is treated for financial statement purposes as an "operating lease." This financial statement classification is desirable and important to Petitioner, because it does not require Petitioner to report the amounts owed under the Synthetic Lease as a balance sheet liability; for that reason Synthetic Leases are sometimes referred to as "off-balance-sheet-financing."

The Synthetic Lease essentially involves four persons or groups of persons: Petitioner, a Trust, Lenders, and Certificate Holders. The Trust was established between State Street Bank and Trust Company, as Certificate Trustee, and the Certificate Holders, and is governed by an Amended and Restated TWC Trust Agreement dated as of July 31, 2000. State Street Bank and Trust Company, not in its individual capacity but as Certificate Trustee, acts on behalf of the Trust. The Trust and State Street Bank and Trust Company, acting in such trustee capacity, are collectively referred to herein as "SSBTT." SSBTT is a single-purpose entity formed solely to function under the synthetic lease.

The "Lenders" lend money to SSBTT under secured "Loans." The "Certificate Holders" make equity investments in SSBTT, which investments (the "Equity Investments") are evidenced by "Certificates." The Loans and the Equity Investments are governed by an "Amended and Restated Participation Agreement" dated as of July 31, 2000, to which Petitioner also is a party. (The Participation Agreement is sometimes referred to herein as the "P.A.") The Certificate Holders and Lenders are at times collectively referred to as the "Participants," and the funds they provide are at times collectively referred to as the "Advances or TWC Advances." Neither SSBTT nor any of the Participants is related to or affiliated with Petitioner.

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Some of the Advances were used in July, 2000 to fund the TWI Unit's "Allocable Share" of the acquisition costs of the Land. Further Advances will be used to refinance the TWI Unit's "Allocable Share of the Acquisition/Construction Financing" as described below, and possibly to fund the acquisition and construction of improvements and equipment Petitioner will use in connection with the TWI Unit (the "Build-Out").

As more fully described below, during the initial construction of the Project LLC will hold title to the Project. Once the requisite level of completion is attained, a declaration of condominium will be filed, and LLC will convey fee title to the TWI Unit. To effect the Synthetic Lease financing, SSBTT is nominally a Member of LLC, and holds title to Petitioner's membership interest in LLC (the "TWC Membership Interest"); and SSBTT will acquire legal title to the TWI Unit when such Unit is conveyed by LLC. The conveyance of fee title to the TWI Unit by LLC to SSBTT is sometimes referred to herein as the "SSBTT Deed."

While SSBTT is the nominal member of LLC, SSBTT and Petitioner have entered into a "Construction Agency Agreement" under which SSBTT has made Petitioner its exclusive agent for purposes of the construction, design and conveyance of the TWI Unit. Under the Construction Agency Agreement, described more fully below, Petitioner effectively controls all aspects of the TWC Membership Interest in LLC.

Upon the conveyance of legal title to the TWI Unit by the SSBTT Deed, SSBTT will acquire fee title to the TWI Unit, and will immediately lease the TWI Unit to Petitioner under the "Lease." Petitioner will make payments under the Lease, denominated "Rent", which payments will be applied to pay the Interest or Yield on the Advances, and to repay the Advances.

The Lease and the Participation Agreement contain a series of options and payment obligations (collectively, the "Options"). As described below, the Options are intended to satisfy generally accepted accounting principles ("GAAP") that govern the classification of a transaction as an "operating lease." As a practical and economic matter, however, the effect of the Options is to make it highly likely that Petitioner will acquire fee title to the TWI Unit, and the Advances will be repaid, at the expiration of the Lease. At this point in time it appears highly likely that Petitioner will exercise its Purchase Option, thereby repaying the Advances and acquiring title to the TWI Unit, at the termination of the Synthetic Lease.

1. Parties' Intent

The Lease provides that "for purposes of all Taxes and for purposes of bankruptcy and receivership law . . . the Transactions [i.e., all elements of the Synthetic Lease] constitute a financing by the Participants to [TWI] and preserves beneficial ownership in the TWI Unit in TWI."

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The Participation Agreement recites that the purpose of the Synthetic Lease is "providing financing for . . . the acquisition of the TWI Unit and the Construction of the TWI Unit Tenant Improvements." The Participation Agreement also provides that "for purposes of all Taxes, and for purposes of bankruptcy and receivership law (including any substantive law upon which bankruptcy and receivership proceedings are based):

- (i) the Transactions . . . constitute a financing by the Participants to [TWI] and preserve beneficial ownership in the Leased Property in [TWI];
- (ii) [the Lease] grants a security interest or Lien . . . in the [TWI Unit] . . . in favor of [SSBTT] and for the benefit of the Participants, to secure [TWI's] payment and performance of the Obligations"

The Participation Agreement also states that "the parties . . . intend and agree that in the event of [insolvency, receivership or bankruptcy], the transactions evidenced by the Operative Documents (including, without limitation, the Lease) constitute a financing made directly to [TWI] by the Participants, and that [SSBTT] holds title to [the TWI Unit] for the benefit of the Participants to secure Obligors' obligations to repay such financing to the Participants"

In the Amended and Restated Operating Agreement of the LLC, executed by SSBTT and the other Members on July 31, 2000 (the "LLC Operating Agreement" or the "O.A."), the other Members of the LLC "acknowledge and agree that [SSBTT] is becoming a Member in the Company solely as an accommodation to TWI. . . and [SSBTT], the Administrative Agent, the Certificate Trustees and the Participants are participating in the Transactions solely to facilitate a lease financing transaction for the benefit of TWI and its Affiliates, and not in any other capacity"

2. Consistent Tax Treatment

For income tax purposes the parties will consistently treat the Synthetic Lease as a financing. During construction Petitioner will capitalize interest and other construction-period costs as required under Internal Revenue Code §263A, as the owner of the Unit under construction. Petitioner, not SSBTT, will claim the depreciation deductions with respect to the TWI Unit. Petitioner will treat its payments under the Lease as payments of debt service, rather than rent. Neither SSBTT nor Petitioner will treat the conveyance of fee title to the TWI Unit by SSBTT to Petitioner at the termination of the Lease as a taxable transfer.

The Participation Agreement obligates the parties to "report the transaction consistently with the tax treatment," set forth in the previous paragraph, i.e., as a financing.

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3. Control and Responsibility - TWC Membership Interest

The Participation Agreement provides that, prior to advancing funds to pay the TWI Unit's Allocable Share of the Land acquisition costs, SSBTT, "which is intended to take title to the TWI Unit," will become a Member of the LLC.

While SSBTT is the nominal Member of LLC, Petitioner will exercise all of the rights, and be obligated to perform all obligations, relating to the TWC Membership Interest. Under the Amended and Restated TWI Construction Agency Agreement ("Construction Agency Agreement" or "C.A.A.") dated as of July 31, 2000 between SSBTT and Petitioner, Petitioner will:

- control the acquisition, design and construction of the TWI Unit;
- request funds from SSBTT to pay costs associated with the TWI Unit;
- negotiate and monitor all agreements relating to the TWI Unit;
- perform or cause the performance of all design and supervisory functions;
- perform or cause the performance of any other act necessary or desirable to cause the completion of the TWI Unit;
- exercise all rights and benefits, and perform all duties, liabilities and obligations of SSBTT under the LLC Operating Agreement and other agreements relating to the acquisition and development of the TWI Unit.

The only limitation on the exercise of the foregoing authority by Petitioner on behalf of the SSBTT is that Petitioner cannot enter into any agreement that would impose any personal liability on SSBTT.

The LLC Operating Agreement specifies that Petitioner will act on behalf of SSBTT, "and that TWI has the authority to vote [SSBTT's] Membership Interest in the Company and to exercise all other rights and privileges of, and on behalf of, the TWC Member hereunder"

The LLC Operating Agreement also specifies that SSBTT shall have no liabilities or obligations under Articles IX or X thereof as a Member of the LLC, except to the extent SSBTT is indemnified against such liability by Petitioner under the "Back-Up Indemnity."

The Back-Up Indemnity given by Petitioner to SSBTT recites that "[SSBTT] has assigned and delegated to TWI, as construction agent for TWC Member under the Operative Documents, any and all rights and obligations of [SSBTT] to participate, monitor, vote, assist, review, inspect,

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supervise, pass judgment upon, inform any other person or take any role in the management, operation, ownership or decision-making of the Company in any manner whatsoever (such rights and/or obligations, collectively, the 'Rights and Obligations'), such that the Rights and Obligations will be exercised and/or performed (or fail to be performed), if at all, only by TWI and never directly by [SSBTT]." The Back-Up Indemnity obligates Petitioner to pay and assume liability for all claims, etc. that may be asserted against SSBTT under the LLC Operating Agreement based on Petitioner's failure to exercise or perform the "Rights and Obligations."

4. Control and Responsibility - TWI Unit

As set forth above, Petitioner is responsible for overseeing the design and construction of the TWI Unit.

The Lease commences on the date title to the TWI Unit is conveyed by LLC to SSBTT. In the Lease, SSBTT authorizes Petitioner to accept delivery of the TWI Unit on SSBTT's behalf, and Petitioner agrees that the conveyance of title to SSBTT "shall, without further act, constitute the irrevocable acceptance by Lessee of the TWI Unit for all purposes of this Lease and the other Operative Documents on the terms set forth therein and herein."

The Lease is a "triple net lease," under which Petitioner has responsibility for, and holds SSBTT harmless from, all costs associated with possession and ownership of the TWI Unit including (but not limited to) property taxes, utility charges, repairs and insurance. The obligation of Petitioner to pay rent is absolute and unconditional, without regard to the condition of the TWI Unit, and the rent is to be paid to SSBTT "absolutely net."

During the term of the Lease, the TWI Unit will be in the possession of Petitioner, not SSBTT.

Petitioner is obligated to maintain the TWI Unit in good condition and operating order and in compliance with applicable law.

Petitioner is entitled under the Lease to make any alterations, renovations, improvements and additions to the TWI Unit, provided only that such "modifications not impair the value or economic useful life of the TWI Unit."

Petitioner is entitled to sublease all or any part of the TWI Unit without SSBTT's consent. An assignment or other transfer of Petitioner's leasehold interest under the Lease does require SSBTT's consent, which is consistent with standard "due on sale" clauses in mortgages.

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5. Lender's Credit

Under the Participation Agreement, TWC Advances made by the Lenders and Certificate Holders are to be applied to pay TWI Unit costs.

The TWC Advances are tied to funding requests made by Petitioner, and the Advances are made directly to the "Administrative Agent" for payment to the person designated by Petitioner as entitled to payments.

The obligation of the Participants to refinance the TWI Unit's Allocable Share of the Acquisition/Construction Financing is conditioned upon, among other things, Petitioner delivering an appraisal of the TWI Unit which establishes that the value of the TWI Unit, both when conveyed to SSBTT and when completed, will not be less than the "Minimum Coverage Amount." This requirement is designed to ensure that the TWI Unit has sufficient value to support the Participants' extension of nonrecourse financing with respect to such Unit.

The Participation Agreement specifies that the Lease grants a security interest in the TWI Unit for the benefit of the Participants, to secure Petitioner's performance, and further specifies that the Mortgage on the TWI Unit, to be given by SSBTT, as mortgagor, secures Petitioner's payment and performance of its "Obligations" under the Synthetic Lease. The mortgagee under the Mortgage will be Banc of America, or an affiliate thereof, as Administrative Agent for the benefit of the Participants.

The Lease has a five-year term. Thereafter Petitioner can renew the lease but only if the Participants have extended the Maturity Date of the Advances under the Participation Agreement, and an appraisal of the TWI Unit shows there remains sufficient "Coverage."

To induce the Participants to make the Advances, Petitioner provided Participants with a "Guarantee" of the obligations of Petitioner and its affiliates under the Synthetic Lease.

Petitioner makes representations and warranties and provides covenants in the Synthetic Lease that are customary in financings. For example, the Participation Agreement obligates Petitioner (rather than SSBTT) to provide periodic financial information and notification of any "Material Event." The Participation Agreement specifically incorporates for the benefit of the Participants various agreements, covenants and obligations of Petitioner set forth in a 1997 "Credit Agreement" between Petitioner and the Chase Manhattan Bank. Petitioner also provides the Participants with indemnities as to any general or tax liabilities arising out of the TWI Unit.

Under the TWC lease any Petitioner Event of Default may trigger a default under, and requires repayment of, the Advances. A Petitioner Event of Default is defined in terms of Petitioner's own financial circumstances.

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SSBTT is acting in the Synthetic Lease solely in its capacity as a Trustee under the Trust Agreement, not in its individual capacity. The Trust is a single-purpose entity with no assets other than its interests in the Synthetic Lease. Repayment of the Loans to the Lenders and the Equity Investments to the Certificate Holders, as well as payment of the Interest and Yield thereon, will be made by SSBTT from the rents paid by Petitioner under the Lease, and from the proceeds payable to SSBTT under the Options, or from the assets of the Trust, and otherwise will be without recourse to SSBTT.

The "rent" payable by Petitioner under the Lease is defined by reference to, and is equal to, the Interest and Yield payable to the Participants on their Advances plus any additional amounts owed under the Synthetic Lease, including any required repayment of the outstanding Loan balance and Certificate amounts. The Participation Agreement specifies that: "Anything else . . . to the contrary notwithstanding it is the intention of [the parties] that the amount and timing of installments of Basic Rent due and payable from time to time from [TWI] under [the Lease] shall be equal to the aggregate payments due as Interest and principal on the Loans and Yield on the Certificate Amounts. . . ."

6. Risk of Loss

Under the Lease Petitioner assumes all risk of loss to the TWI Unit and is obligated to maintain insurance covering any loss or liability to SSBTT.

The Lessor does not make any warranty or representation as to the status or condition of the TWI Unit, with all risk being on Petitioner.

If a casualty occurs to the TWI Unit after it has been conveyed to SSBTT, Petitioner will be obligated to restore the TWI Unit to its original condition, and all amounts of insurance or condemnation proceeds shall be paid to Petitioner, unless a Lease Event of Default shall have occurred. If a Lease Event of Default shall have occurred, such insurance or awards may be applied to payment of the Loans and the Equity Investments, in that order, with any excess being paid to Petitioner.

If a condemnation occurs, Petitioner will (in the absence of an Event of Default) control the negotiations with the relevant governmental authority. Without regard to the sufficiency of the compensation received, Petitioner is obligated to restore the TWI Unit to substantially the same condition and value as existed prior to the condemnation.

If a "Significant Casualty," a "Significant Condemnation," or a "Significant Event" (i.e., an "Environmental Violation"), should occur, both SSBTT and Petitioner have the right to elect to terminate the Lease. Upon such termination Petitioner is obligated to purchase the TWI Unit by paying SSBTT the "Purchase Amount." The "Purchase Amount" is defined as an amount equal to

the outstanding balances of the Advances relating to the TWI Unit (the "TWC Lease Balance"), plus any accrued but unpaid Rent relating to the TWI Unit. The "Purchase Amount" is thus equivalent to the amount of Petitioner's indebtedness to the Participants, including any unpaid interest; and the "TWC Lease Balance" is equivalent to the unpaid principal amount of the Advances.

7. Benefit of Appreciation

Petitioner has an option under the Construction Agency Agreement to purchase the interest of SSBTT in the LLC and the TWI Unit for the Purchase Amount.

Under the Lease, Petitioner has an option (the "Purchase Option") to acquire title to the TWI Unit from the Lessor at any time by paying an amount equal to the Purchase Amount.

As noted above, Petitioner also has the right to sublease all or any part of the TWI Unit without SSBTT's consent, and without having to share any revenues or profits from such transactions.

Both during the term of the Synthetic Lease and upon its termination, therefore, the position of SSBTT and the Participants is identical to a lender. All appreciation and value in excess of the Advances inures to Petitioner.

8. Ultimate Ownership

The Synthetic Lease documentation clearly states that the transaction constitute a financing, and that beneficial ownership be preserved in Petitioner. At this point in time it appears highly likely Petitioner will exercise its Purchase Option and acquire title to the TWI Unit at the termination of the Synthetic Lease. SSBTT does not intend to own the TWI Unit after the Synthetic Lease expires, and the documents contain a variety of Options under which SSBTT will not end up owning the TWI Unit.

As noted above, the lease grants Petitioner a Purchase Option under which Petitioner can purchase the TWI Unit at any time during the Lease for the Purchase Amount. As an economic matter, Petitioner would be expected to exercise this option if the value of the TWI Unit exceeds the Purchase Amount required to be paid under the Purchase Option.

In lieu of exercising the Purchase Option, Petitioner has the right to exercise a "Sale Option." The Sale Option essentially provides a mechanism under which Petitioner can limit its recourse liability to 89.75% of the total Advances, rather than being obligated to repay the debt in full. This limitation is necessary to comply with the GAAP operating lease rules. However, if Petitioner exercises the Sale Option, it will be obligated to pay up to 89.75% of the total indebtedness, and will lose all of its interest in the TWI Unit.

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The specific mechanics of the Sale Option prescribe that Petitioner must market the TWI Unit for sale to the highest bidder upon the expiration of the Basic Term of the Lease. Petitioner also will be obligated to pay a "top-up" amount equal to the excess of the "Sales Recourse Amount" over the net proceeds of the third-party sale.

The "Sales Recourse Amount" is equal to the amount that, if paid on the date of determination of the Sales Recourse Amount, would have a discounted value, as of the commencement of the base term of the Lease, together with fees, basic rent and a fixed expense amount, equal to 89.75% of the outstanding Advances as of such date of determination. If Petitioner exercises the Sale Option it must first pay the full Sales Recourse Amount (i.e., 89.75%) to SSBTT. SSBTT will then add to that amount the net proceeds of a sale of the Unit, and, following the sale and payment of all expenses, will remit to Petitioner any excess of those total net funds over the Purchase Amount.

Thus, in a case where the proceeds of the sale plus the Sales Recourse Amount exceed the Purchase Amount, Petitioner receives the excess. To the extent the net proceeds of sale are less than the Purchase Amount, however, Petitioner bears the cost of such deficiency, up to a maximum recourse amount of 89.75% of the Advances. The effect of the 89.75% limitation is that the synthetic lease financing includes a relatively small (10.25%) nonrecourse component.

If the Sale Option is improperly exercised or the conditions thereto are not fulfilled, SSBTT can compel Petitioner to purchase the TWI Unit for the full Purchase Amount.

If the Sale Option is exercised but the TWI Unit is not sold by the "Expiration Date," then, in addition to paying the Sales Recourse Amount, Petitioner is obligated, until the full TWC Lease Balance is paid or SSBTT elects to terminate the Lease, (thereby terminating Petitioner's right to occupy the TWI Unit) to continue to market the TWI Unit until it is sold, and to continue to pay the Rent.

In addition to Petitioner's Purchase Option and Sale Option, in certain circumstances, the Certificate Holders have the option (the "Put Election Option") to require SSBTT to redeem their Equity Investments. The Put Election Option applies in the event that, prior to SSBTT's acquisition of title to the TWI Unit, there is a default or some other failure to satisfy the conditions for conveyance of the TWI Unit. In such event, the Certificate Holders may require that SSBTT redeem their interests at face.

To provide for SSBTT's potential obligation to redeem the Certificate Holders should the Put Election Option be exercised, at the time that SSBTT became a Member of the LLC, and from time to time thereafter if needed to cover increased costs, Petitioner made and will make loans to SSBTT (the "Liquidity Loan") in an amount sufficient to provide SSBTT with adequate liquidity to repay the Certificate Holders' Equity Investment. The Liquidity Loan will be evidenced by a promissory

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note. The proceeds of this loan will be segregated by SSBTT in an investment account (the "Investment Account") at a specified bank, and invested by SSBTT in specified permitted investments. In the event the Certificate Holders exercise the Put Election Option, SSBTT may use the amounts on deposit in the Investment Account to fund its redemption of the Equity Investments. Petitioner will then be obligated to pay rent under the TWI Lease in an amount sufficient to enable SSBTT to repay the outstanding balance of the Loans made by the Lenders to SSBTT.

The Certificate Holders' Put Election Option, and the related TWI Liquidity Loan effectively provide a mechanism for terminating the Synthetic Lease if the conditions precedent to the permanent financing of the TWI Unit, as imposed by the Participants under the Participation Agreement, are not timely fulfilled. If the Put Election Option were to be exercised, SSBTT would be consolidated with Petitioner for GAAP purposes, and there would no longer be any Synthetic Lease financing. Petitioner would then become obligated to assume the obligations of SSBTT under the LLC Operating Agreement. Petitioner would be obligated to acquire title to the TWI Unit, subject to its Allocable Share of the Acquisition/Construction Financing, and would be responsible for securing permanent financing to refinance such Allocable Share. Thereafter, Petitioner would own both title to and the beneficial interest in the TWI Unit.

If there is a default under the Construction Agency Agreement SSBTT may terminate the Construction Agency Agreement and demand that Petitioner pay the outstanding amount of the TWC Advances. Upon Petitioner making such payment, SSBTT will transfer to Petitioner all of its interest in the LLC and TWI Unit, and the Synthetic Lease will terminate.

The liability of Petitioner to SSBTT under the Construction Agency Agreement in the event of a default is in certain cases limited to 89.9% of the costs of the Project allocable to the TWI Unit. This limitation again is imposed to comply with GAAP requirements. However, notwithstanding this limitation, should such a default occur, the Certificate Holders may exercise their Put Election Option. Moreover, prior to the conveyance of the TWI Unit, the Advances will be used to fund only the TWI Unit's Allocable Share of the Land acquisition costs, plus certain soft costs, but the 89.9% limitation is measured by reference to the entire costs of the TWI Unit, including costs funded by the Construction Loan. As a result, the limitation is unlikely to represent any meaningful limitation on Petitioner's liability to SSBTT.

The Lease Events of Default include non-payment of Rent (i.e., principal and interest), breach of warranty or covenant, an Agency Event of Default and customary insolvency events with respect to Petitioner. Upon the occurrence of a Lease Event of Default, SSBTT may exercise a variety of remedies. Petitioner retains the right to exercise its Purchase Option described above, however, meaning that Petitioner can cure a default by repaying the Synthetic Lease financing.

If there is a Lease Event of Default, SSBTT can require Petitioner to purchase the TWI Unit by paying the Purchase Amount. Under this provision, following completion of construction and

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delivery of the SSBTT Deed, the Synthetic Lease financing is effectively fully recourse to Petitioner should Petitioner default.

Alternatively, SSBTT could remarket the TWI Unit; to the extent that SSBTT remarkets the TWI Unit in lieu of Petitioner purchasing it, SSBTT may obligate Petitioner to pay not just the top-off amount, but the full excess of the outstanding TWC Lease Balance over the net proceeds of sale realized from such remarketing.

The Synthetic Lease transaction is not intended to result in the ownership of the TWI Unit by SSBTT following the termination of the Lease. Whether through exercise of Petitioner's Purchase Option or Sale Option, or the Certificate Holder's exercise of their Put Election Option, or SSBTT's rights in the event of a default, the parties expect that the Participants will be repaid their Advances, and SSBTT will convey the TWI Unit to Petitioner.

On the facts of this particular transaction, moreover, a scenario other than Petitioner's exercise of its Purchase Option is as a practical matter unlikely. The TWI Unit is being built with the expectation it will constitute Petitioner's world headquarters. As specified in the LLC Operating Agreement, the Members intend that Petitioner will occupy the TWI Unit as its world headquarters, and that the entire Project will be named for Petitioner. The TWI Unit is designed to incorporate column-free broadcast studios and other unique features that are important to Petitioner's business. The TWI Unit will contain approximately 800,000 square feet, a block of high-quality space that is extremely rare in New York City. The Unit, and indeed the entire Project, are designed to provide Petitioner with a distinct "branded" presence in a Manhattan hub location, and to project worldwide a distinct corporate image.

As set forth in the parties' "Summary" of the Synthetic Lease, "[t]he TWI Unit will be the site of TWI's world headquarters, a high profile project to which TWI is committed at the highest corporate levels, and in which TWI will have invested significant time and resources."

It is not anticipated that, only a few years into its use of this unique corporate space, Petitioner would abandon the TWI Unit. The costs of securing and reconfiguring new space elsewhere, the logistics of relocating the people who will work in the TWI Unit, and the perception issues associated with abandoning a very new and highly touted world headquarters facility, all weigh in favor of Petitioner acquiring title to the TWI Unit by exercising the Purchase Option at the end of the Lease term.

B. The LLC

The Members of LLC (each a "Member" and collectively the "Members") are the "TWC Member," the "Hotel Member," the "Residential Member," the "Office Member," the "Retail Member" and the "Garage Member." The Members other than the TWC Member are referred to

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herein as the "Other Members." In the case of the TWC Membership Interest, by virtue of the Synthetic Lease Financing described above, the terms "Member" and "TWC Member" encompass both SSBTT and Petitioner; SSBTT holds legal title to the TWC Membership Interest and will acquire legal title to the TWI Unit; Petitioner is the beneficial owner of the TWC Membership Interest and of the TWI Unit. The TWC Membership Interest and the TWI Unit will be beneficially owned by Petitioner.

The Members are developing the multi-use real estate condominium project ("Project") on property (the "Land") adjacent to Columbus Circle in New York City. When constructed it is currently 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. (The LLC Operating Agreement uses the term "JLC Unit" in place of the J@LC Unit referred to herein.)

Appurtenant to each condominium unit is an interest in the condominium's common elements. The common elements, which are defined in the LLC Operating Agreement as including General Common Elements, Limited Common Elements, and Shared Limited Common Elements, will consist of the Land and the common facilities identified in the declaration of condominium to be finalized at or prior to substantial completion of the improvements (the "Condominium Declaration") for the Project. Each of the seven units in the condominium, together with its appurtenant common elements interest, is referred to 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. Each of Units 2-6 will be used primarily for the purposes described in its name. The JLC 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. As described above, the TWI Unit will include corporate offices and broadcast studio space for Petitioner and its affiliates.

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During the development of the Project, title to the Land and the building under construction will be held by LLC. However, from the inception of the Project, the LLC Operating Agreement clearly provides that each Member is considered to be the beneficial owner (the "Owner") of such Member's Unit. In the case of the TWI Unit, the LLC Operating Agreement specifies that the TWC Member is the beneficial owner of the TWI Unit, and the Synthetic Lease provides that Petitioner, rather than SSBTT, is the beneficial owner of the TWC Membership Interest and the TWI Unit.

The design, use, and functions of the various Units in the Project are all quite different. Petitioner would have preferred that SSBTT hold title to the TWI Unit outright from the beginning, without interposing the LLC structure. However, for the reasons set forth below, it was 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 Land and improvements thereon are submitted to a condominium regime, and title to the Units is transferred to SSBTT and the Other Members 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 construction loan and mortgage on the entire project; separate mortgages on each of the Units, while they are under construction, are not practically obtainable. (The "Acquisition/Construction Financing" for the Project is discussed below.) 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 LLC structure therefore was chosen as the only practical alternative for holding legal title to the Units during the construction process. It is nonetheless the explicit intent that each Member be the beneficial owner of such Member's Unit from inception, and in the case of the TWI Unit it is explicitly intended that Petitioner be the beneficial owner of the Unit.

The LLC Operating Agreement makes clear that, as among the LLC and its Members, each Member is the sole beneficial owner of such Member's Unit. The LLC Operating Agreement recites the parties' agreement that each Member is the sole beneficial owner of such Member's Unit, and explains that the LLC is being used to hold title to the Project during construction, to facilitate the Members' construction of their Units.

The Members of LLC 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

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Member. The LLC Operating Agreement also states that no Member shall have any beneficial interest in any other Member's Unit.

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.

In the case of the TWI Unit, the effect of all of the foregoing provisions is to make clear that, as among the TWC Member, the LLC, and the Other Members, it is the TWC Member that is the true owner of the TWI Unit. Overlaying this agreement among the LLC and its Members are the Synthetic Lease agreements, which establish that, as between Petitioner and SSBTT, Petitioner is the beneficial owner of both the TWC Membership Interest and the TWI Unit, and SSBTT merely holds title pursuant to a financing arrangement.

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 note(s) and mortgage(s) entered into by the LLC encumbering the Land and the entire Project. The acquisition loan, the construction loan and the mezzanine loan are referred to collectively herein as the "Acquisition/Construction Financing."

The Acquisition/Construction Financing was 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. SSBTT, as the holder of legal title to the TWC Membership Interest, was the party who executed the mortgage for the TWC Member.

While consenting to such mortgage, however, Petitioner did not borrow under the Acquisition/Construction Financing to fund its Allocable Share of the Land acquisition cost. Instead, Petitioner financed its approximately \$120,000,000 Allocable Share of the Land cost through the

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Synthetic Lease facility. Because title to the Land is currently held by LLC, Petitioner's indebtedness under the Synthetic Lease for such borrowing is currently secured by a security interest in the TWC Membership Interest in the LLC (through SSBTT's ownership of legal title to such Interest), and is not secured by any recorded mortgage.

The other Members of the LLC borrowed approximately \$133,000,000 under the Acquisition/Construction Financing, and used other sources of funding, to finance the acquisition of their respective shares of the Land. The \$133 million indebtedness under the Acquisition/Construction Financing is allocated to Members other than Petitioner, and is secured by the recorded mortgage encumbering the Land.

The Acquisition/Construction Lender will advance additional funds, as described in the Financing Representations, to finance the construction of the Project. 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 of constructing the JLC Unit). The Acquisition/Construction lender will consider the financial viability of each Unit separately, and will require different percentages of Member Equity from the various Members, or guaranties, depending upon the lender's assessment of the level of risk associated with each Unit.

It is estimated the construction loan portion of the Acquisition/Construction Financing will aggregate \$1,300,000,000, of which an estimated \$465,000,000 will be allocated to the TWI Unit. The full amount of the construction loan portion of the Acquisition/Construction Financing, including the construction loan advances made in respect of the TWI Unit, will be secured by one or more recorded mortgages encumbering the Project. The mortgages that secure the indebtedness incurred under the Acquisition/Construction Financing are referred to herein as the "A/C Mortgage."

The Acquisition/Construction Financing will provide that, after the filing of the Condominium Declaration and upon the conveyance of the TWI Unit to SSBTT and the Hotel Unit to the Hotel Member, the A/C Mortgage will be severed into separate mortgages reflecting each such Unit's Allocable Share of the proceeds advanced under the Acquisition/Construction Financing; and the Owner of each such Unit will replace its Allocable Share of the Acquisition/Construction Financing with permanent mortgage financing. In the case of the TWI Unit, the Synthetic Lease financing will replace the TWI Unit's Allocable Share of the Acquisition/Construction Financing.

To effect the replacement of the TWI Unit's Allocable Share of the Acquisition/Construction Financing with permanent mortgage financing, upon the conveyance of the TWI Unit to SSBTT the Administrative Agent, on behalf of the Participants, will purchase the TWI Unit's Allocable Share of the A/C Mortgage debt, and take an assignment of the portion of the A/C Mortgage securing such debt, from the Acquisition/Construction Financing mortgagee; the TWI Unit will be conveyed to

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SSBTT subject to that indebtedness; and SSBTT, as mortgagor, and the Administrative Agent, as mortgagee, will then amend and restate such portion of the A/C Mortgage to reflect the terms of the Synthetic Lease. The portion of the A/C Mortgage that is severed and assigned to the Administrative Agent is referred to as the "Participants' Mortgage"; as amended and restated by SSBTT as mortgagor and the Administrative Agent as mortgagee, this mortgage is referred to herein as the "A/R Participants' Mortgage."

The parties anticipate that the assignment of the Participants' Mortgage from the Acquisition/Construction Financing mortgagee to the Administrative Agent for the benefit of the Participants, the SSBTT Deed, the A/R Participants' Mortgage, a Memorandum of Lease in respect of the Lease, an Assignment of Lease to the Lenders, and possibly other instruments will all be recorded. It is anticipated that these instruments will be recorded in the following sequence:

1. As noted above, a mortgage securing the portion of the Acquisition/Construction Financing that was advanced for the acquisition of the Land was recorded at the time of such acquisition.

2. During the course of construction the LLC and the Acquisition/Construction Lender will record one or more additional construction mortgages securing the additional advances that are made under the Acquisition/Construction Financing.

3. Prior to the conveyances of the Units by the LLC, the separate mortgages granted and recorded under the Acquisition/Construction Financing will be consolidated into a single A/C Mortgage.

4. The A/C Mortgage will then be severed into separate mortgages, one of which will reflect the TWI Unit's Allocable Share of the proceeds advanced under the Acquisition/Construction Financing.

5. That portion of the A/C Mortgage relating to the TWI Unit's Allocable Share of the Acquisition/Construction Financing, i.e., the Participants' Mortgage, will be assigned by the Acquisition/Construction Lender to the Administrative Agent.

6. Fee title to the TWI Unit will be conveyed to SSBTT subject to the Participants' Mortgage.

[It is possible that Step 6, above, will precede Step 5; that has not yet been determined.]

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7. SSBTT as mortgagor and the Administrative Agent as mortgagee will amend and restate the Participants' Mortgage as the A/R Participant's Mortgage, and will record the amended and restated A/R Participant's Mortgage.

8. The Parties will then record a Memorandum of Lease in respect of the Lease, will enter into and record an Assignment of Lease to the Lenders, and may execute and record such other instruments as may be required as supplemental security for TWI's indebtedness to the Participants.

Following the conveyance of the TWI and Hotel Units as described above, Units 3-6, which have the same beneficial owners, will continue to be subject to a single loan and blanket mortgage in respect of their combined Allocable Shares of the Acquisition/Construction Financing.

Petitioner and the Other Members are working cooperatively to design the overall Project, but Petitioner is closely involved in the design and development of the TWI Unit. In addition to the LLC Operating Agreement, Petitioner, as Construction Agent, 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"). The Development Agreement will require the Developer to provide all development and related services necessary to complete construction of the TWI Unit. Related and Apollo, as the principals of the Developer, will provide a completion guaranty to the Acquisition/Construction lender.

The TWI Development Agreement will set forth the plans and budget for construction of the Unit, and will enable Petitioner to monitor and inspect the work. Pursuant to the Construction Agency Agreement, Petitioner, and not SSBTT, is responsible for overseeing the construction of the TWI Unit. Once the Project plans are finalized and approved by all the Members, there can be no material 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. In case of the TWI Unit, as part of the Synthetic Lease, Petitioner has assumed all of the "Rights and Obligations" of the TWC Member in respect of the TWI Unit.

Upon substantial completion of each Unit, as defined in each Development Agreement, the LLC Operating Agreement requires that record title to each Member's Unit be transferred to its Owner. In the case of the TWI Unit, title will be conveyed to SSBTT, which will acquire and hold title to the Unit pursuant to the terms of the Synthetic Lease. When title to all of the Members' Units

has been transferred to SSBTT and the Other Members and the JLC Unit has been donated to J@LC, LLC is to be dissolved and its legal existence will terminate.

Applicable Law and Regulations - Real Estate Transfer Tax

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.

Subdivision (e) of section 1401 of the Tax Law provides, in part:

"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. Notwithstanding the foregoing, conveyance of real property shall not include a conveyance pursuant to devise, bequest or inheritance; the creation, modification, extension, spreading, severance, consolidation, assignment, transfer, release or satisfaction of a mortgage; a mortgage subordination agreement, a mortgage severance agreement, an instrument given to perfect or correct a recorded mortgage; or a release of lien of tax pursuant to this chapter or the internal revenue code.

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

"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:

The tax shall not apply to the following conveyances:

* * *

2. Conveyances which are or were used to secure a debt or other obligation;

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership. . . .

Section 575.11 of the Real Estate Transfer Tax Regulations states in part:

(a) The following are examples of conveyances which are subject to the real estate transfer tax.

* * *

(13) A conveyance of real property to an industrial development agency (IDA) by a person who is not the beneficiary of the IDA financing, at the direction of such beneficiary, with such beneficiary subsequently leasing the property from the IDA, is subject to tax. In such a conveyance, the beneficiary of the IDA financing and not the IDA is deemed to be the grantee, and therefore the exemption described at section 575.9(c)(1) of this Part does not apply.

(14) A conveyance of real property by an IDA to a person who is not the beneficiary of the IDA financing where such conveyance is made at the direction of such beneficiary is subject to tax. In such a conveyance, the beneficiary of the IDA financing is deemed to be the grantor of the conveyance.

* * *

(b) The following are examples of conveyances which are not subject to the real estate transfer tax.

(1) A conveyance of real property by the beneficiary of the industrial development agency (IDA) financing to the IDA, in connection with the receipt of such financing is not subject to tax.

(2) A conveyance of real property by the IDA, as grantor, to the beneficiary of the IDA financing, as grantee is not subject to tax.

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Conclusion - Real Estate Transfer Tax

Taking the LLC Operating Agreement and the Synthetic Lease together, the parties have agreed that (i) Petitioner is the beneficial owner of the TWC Membership Interest in LLC; (ii) Petitioner is the beneficial owner of the TWI Unit; (iii) until such time as the condominium declaration has been filed, title to the Units comprising the Project shall be held by the LLC for the benefit of their respective beneficial owners; and (iv) upon filing the condominium declaration, LLC will convey title to the TWI Unit to SSBTT, which thereupon shall hold title to the TWI Unit as security for the loan made by the Participants to Petitioner.

In substance, the conveyance of title to the TWI Unit by LLC to SSBTT effects two transfers: the deemed conveyance of title by LLC to Petitioner, followed by the deemed conveyance of title by Petitioner to SSBTT. The first such transfer, by LLC to Petitioner, is exempt from real estate transfer tax as a conveyance that is a change in form with no change in beneficial ownership under Section 1405(b)(6) of the Tax Law. Petitioner is the beneficial owner of the TWI Unit from the inception of the Project. Petitioner also is the beneficial owner of the TWC Membership Interest from the inception of the Project. SSBTT holds title to the TWC Membership Interest, and will acquire title to the TWI Unit, pursuant to a financing arrangement with Petitioner, and not as the beneficial owner of such Membership Interest or of the TWI Unit. The conveyance of the TWI Unit by LLC to Petitioner that is in substance the first conveyance effected by the SSBTT Deed therefore constitutes a change in form or identity of ownership with no change in beneficial ownership.

The second conveyance that is effected by the SSBTT Deed -- the deemed conveyance of title by Petitioner to SSBTT -- is exempt from transfer tax as a financing transaction. The Transfer Tax Statute explicitly states that conveyances that are used to secure a debt are not subject to transfer tax. Section 1401(e) of the Tax Law states that a taxable "conveyance of real property" does not include the "creation . . . assignment . . . release or satisfaction of a mortgage" Regulation §575.11(b) gives two "examples of conveyances which are not subject to the real estate transfer tax." In example (1), "[a] conveyance of real property by the beneficiary of the industrial development agency (IDA) financing [i.e., the borrower, in this case Petitioner] to the IDA [(i.e., the lender, in this case SSBTT)] in connection with the receipt of financing . . ." is not subject to transfer tax. In example (2), "[a] conveyance of real property by the IDA [(i.e., SSBTT)] as grantor, to the beneficiary of the IDA financing [i.e., Petitioner], as grantee . . ." is not subject to transfer tax.

The Synthetic Lease is substantively the same as the IDA financing discussed in the Transfer Tax Regulations. In both types of transactions the lender acquires fee title to the security and leases it to the borrower. The payments that are denominated rent constitute debt service, and the parties intend, and their agreements provide for, the conveyance of title to the security to the lessee upon termination of the lease. In both cases for Federal income tax purposes the parties treat the lessee as the owner of the asset that constitutes the lender's security. In the Synthetic Lease title is conveyed to SSBTT to secure a debt, and at the end of the lease term SSBTT conveys title to

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Petitioner in release or satisfaction of its security interest. Accordingly, neither the conveyance of title to SSBTT nor the conveyance of title by SSBTT to Petitioner is subject to real estate transfer tax.

For the same reason, the Lease is not subject to real estate transfer tax. While in form SSBTT grants Petitioner a lease of real property coupled with an option, in substance the Lease is another component of the financing transaction. As such, the Lease is not subject to real estate transfer tax.

Thus, based upon the foregoing, with respect to issue (1) presented by Petitioner, the SSBTT Deed will be treated as a transfer of title to the TWI Unit by LLC to Petitioner, followed by the grant of a mortgage encumbering the TWI Unit by Petitioner, as mortgagor, to SSBTT, as mortgagee.

With respect to issue (2), the SSBTT Deed is exempt from real estate transfer tax pursuant to Section 1402(b)(6) of the Tax Law as a transfer that is a change in form with no change in beneficial interest.

With respect to issue (3), the lease is exempt from real estate transfer tax pursuant to Section 1405(b)(2) of the Tax Law as a conveyance which is used to secure a debt.

With respect to issue (4), the conveyance of fee title to the TWI Unit to Petitioner upon termination of the synthetic lease is not subject to the real estate transfer tax pursuant to Section 1401(e) of the Tax Law, as such conveyance, in substance, constitutes a satisfaction of a mortgage.

Applicable Law and Regulations - Mortgage Recording Tax

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 date of execution thereof or at any time thereafter. Also, in addition to the Statewide mortgage recording taxes, Section 253-a of the Tax Law authorizes New York City to impose a tax on the recording of mortgages of real property situated within New York City.

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. . . . 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 the purpose of this article, and shall be taxable as such upon the amount of such increase or addition. . . .

Section 255.1(a) of the Tax Law provides as follows:

If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded for the purpose of correcting or perfecting any recorded mortgage, or pursuant to some provision or covenant therein, or an additional mortgage is recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional instrument or mortgage shall not be subject to taxation under this article. . . unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage, in which case, a tax is imposed as provided by section two hundred fifty-three of this chapter on such new or further indebtedness or obligation.

Section 641.6(b) of the Mortgage Recording Tax Regulations states in part:

The following are examples of instruments which are mortgages when given as security for a debt or the performance of an obligation:

(1) an instrument in the form of an absolute deed, which in fact is merely security. . . .

Section 645.1(a) of the Mortgage Recording Tax Regulations states in part as follows:

A supplemental mortgage is an additional instrument or mortgage which is recorded subsequent to the recording and prior to the discharge or satisfaction of a prior primary mortgage on which all taxes, if any, accrued under article 11 of the Tax Law have been paid, the terms of which make reference to the prior recorded primary mortgage, and which is given and recorded:

(1) for the purpose of correcting or perfecting such prior recorded primary mortgage;

(2) pursuant to some provision or covenant in such prior recorded primary mortgage;

(3) for the purpose of providing additional or further security for the payment of the principal debt or obligation secured by the prior recorded primary mortgage by spreading the lien of the prior recorded primary mortgage to additional real property or by imposing a new lien on such additional real property (see section 645.2[c], [d], [e], or [f] of this Part); or

(4) for the purpose of coordinating or consolidating the liens of prior recorded primary mortgages to form a single and coordinate equal lien; or

(5) for the purpose of modifying a prior recorded primary mortgage, for reasons including but not limited to the following:

(i) adjusting the term for the payment of the debt secured by the prior recorded primary mortgage;

(ii) changing the interest rate on the debt secured by the prior recorded primary mortgage;

(iii) substituting a new mortgagor for the mortgagor;

(iv) substituting a new mortgagee for the mortgagee due to an assignment of the mortgage;

(v) evidencing a change in the amount of debt or obligation which is secured or which under any contingency may be secured by the prior recorded primary mortgage; or

(6) for the purpose of severing the lien(s) of a prior recorded primary mortgage or mortgages into separate liens.

Section 645.2 of the Mortgage Recording Tax Regulations states in part:

(a) The recording of a supplemental mortgage is subject to the applicable mortgage recording taxes. . . . to the extent that such mortgage creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured or which under any contingency may be secured by the prior recorded primary mortgage(s). . . .

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(b) For purposes of this subdivision, the principal indebtedness or obligation secured by or which under any contingency may be secured by the prior recorded primary mortgage is equal to the remaining principal indebtedness secured or which under any contingency may be secured by such mortgage at the time that the supplemental mortgage is executed or at any time thereafter.

Conclusion - Mortgage Recording Tax

Beth Israel Medical Center, Adv OP T & F, October 7, 1998, TSB-A-98(69)S, (3)R analyzes the application of the mortgage recording tax to a nominal lease that in fact represents a financing transaction. As stated in that Advisory Opinion, section 250.2 of the Tax Law defines the term “mortgage,” and Regulation section 641.6(b)(1) includes among instruments which are mortgages when given as security for a debt, “an instrument in the form of an absolute deed, which in fact is merely security....”

Matter of Atlantic Cement Co. v. Murphy, 30 AD2d 456 (1968), aff'd 28 NY2d 502 (1971) held that “an instrument which purports to be a conveyance of real property in fee may in fact be a mortgage depending upon the circumstances surrounding the giving of such instrument.” Id., at 457. In classifying the transaction as a mortgage in that case the Court looked to the parties’ intent, as evidenced by their testimony, the surrounding circumstances, and the terms of their agreement, and stated that: “The intention of the parties is the only true and infallible test.” Id., at 458.

In this Advisory Opinion, as in Atlantic Cement, the parties’ intent that the instrument for the conveyance of real property constitute a financing is explicitly set forth in the documents and is clear from the operative terms of the transaction as well.

Therefore, with respect to issue (5) it is concluded that the recordation of the SSBTT Deed conveying the TWI Unit by LLC to SSBTT is for purposes of the mortgage recording tax treated as (i) the conveyance by LLC to Petitioner of fee title to the TWI Unit, followed by (ii) the conveyance by Petitioner to SSBTT of fee title to the TWI Unit as security for Petitioner’s indebtedness to the Participants. Accordingly, the recordation of the SSBTT Deed is considered the recordation of a mortgage encumbering the TWI Unit for purposes of the mortgage recording tax.

As noted above, Section 250 of the Tax Law provides that: “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 the purpose of this article, and shall be taxable as such upon the amount of such increase or addition.”

Section 255 of the Tax Law provides, in part:

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If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded...such additional instrument or mortgage shall not be subject to taxation under this article. . . . unless it creates or secures a new or further indebtedness or obligation other than the principal indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage. . . .

Under these statutory provisions, where a mortgage is already of record and the proper amount of mortgage recording tax has been paid, the mortgage recording tax is imposed on the recording of a supplemental instrument or mortgage only to the extent such instrument serves to increase the amount of secured indebtedness beyond that which is secured by the primary recorded mortgage

The courts have construed Sections 250, 253 and 255 of the Tax Law, to avoid double taxation of assigned, supplemented, modified, or amended mortgages. For example, in Matter of Bay View Towers Apts. v. State Tax Comm., 48 A.D.2d 86, 40 N.Y.2d 856, aff'd, the Court of Appeals affirmed that the tax was not applicable to the recording of a substitute mortgage agreement, stating:

Applicable precedents establish that a mere substitution of one mortgage agreement for another, even in combination with a change of mortgagors, is insufficient to create a new mortgage for purposes of section 253 of the Tax Law. . . . Since no “new” mortgages were created in this case, there is no need to examine the statutory exemption for supplemental mortgages.

In Matter of Fifth Avenue Corporation v. Bragalini, 4 A.D.2d 387, 165 N.Y.S.2d 312, involving a loan purchased from the original lender, where the purchasing lender advanced additional amounts to the borrower, the court held that mortgage recording tax was due only with respect to the additional borrowings. The court stated:

It is true, as the State Tax Commission contends, that the indenture of mortgage is not technically a supplemental mortgage within the terms of section 255 of the Tax Law but a mortgage agreement does not have to come within the technical terms of that section in order to be exempted from the tax. . . . An agreement increasing the amount of a mortgage to secure an additional loan is exempt from tax with respect to the amount of the pre-existing indebtedness under section 250 of the Tax Law. That section provides that an “agreement by which the indebtedness secured by any mortgage is increased or added to...shall be taxable as such upon the amount of such increase or addition.” Under the basic taxing section, section 253, as judicially construed, the tax is imposed upon an agreement modifying, extending

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or consolidating a mortgage or mortgages, only to the extent of any new “principal debt or obligation” secured thereby.

In Matter of City of New York v. Procaccino, 46 A.D.2d 594, the court held that the recording of a supplemental indenture that consolidated various mortgages, altered the applicable interest rate, lengthened the repayment terms and dealt with different parties than were on the original mortgage did not trigger a mortgage recording tax. The court noted that in that instance, notwithstanding the significant modifications to the terms of the debt, as long as the parties are careful not to extinguish the original indebtedness so as not to create a new indebtedness, no mortgage recording tax should be incurred.

Moreover, no mortgage recording tax is incurred on the recording of a document “which does no more than to formally complete a transaction which was fully contemplated at the time of, and was part and parcel of, the original mortgage upon which the recording tax has already been paid.” (200 E. 64th St. Corp. v. Manley, 44 A.D.2d 11)

The Acquisition/Construction Financing provides for the severance of the A/C Mortgage into the Participants' Mortgage and the other mortgages securing the other Unit's Allocable Shares of such financing, and provides for the assignment of the Participants' Mortgage to the Administrative Agent in furtherance of the Synthetic Lease. The Participation Agreement and the Lease specifically set forth the parties' intent that all of the transactions undertaken in connection with the Synthetic Lease constitute a single financing by the Participants directly to TWI, and that SSBTT holds title to the TWI Unit to secure TWI's obligations to repay the financing to the Participants.

Thus, with respect to issue (6) based upon the foregoing, it is concluded that:

1. Assuming that the proper amount of mortgage recording tax has been paid on the recording of the A/C Mortgage(s) granted by the LLC to the Acquisition/Construction Lender pursuant to the Acquisition/Construction Financing, and that the consolidation and severance of the A/C Mortgage do not create or secure any new or further indebtedness in addition to that on which mortgage recording tax has been paid:

- (a) The recording of an instrument which by its terms consolidates the separate mortgages granted by the LLC to secure the Acquisition/Construction Financing into a single A/C Mortgage will not be subject to additional mortgage recording tax;
- (b) The recording of the agreement severing the A/C Mortgage into separate mortgages securing the Units' respective Allocable Shares of the proceeds advanced under the Acquisition/Construction Financing will not be subject to additional mortgage recording tax; and

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(c) The recording of the assignment of the Participants' Mortgage by the Acquisition/Financing Lender to the Administrative Agent as agent for the Participants will not be subject to additional mortgage recording tax.

2. The SSBTT Deed will be considered a supplemental instrument or mortgage recorded pursuant to the recorded Participants' Mortgage. The recording of the conveyance of the SSBTT Deed subject to the Participants' Mortgage will be subject to the mortgage recording tax only to the extent that it creates or secures a new or further indebtedness or obligation over and above the indebtedness or obligation secured by the recorded Participants' Mortgage. TWI did not borrow under the Acquisition/Construction Financing to fund its Allocable Share of the Land acquisition cost, but instead financed its Allocable Share of the Land Acquisition cost through the Synthetic Lease facility, and initially secured such borrowing through a security interest in the TWC Membership Interest in the LLC. As a result, the Participants' Mortgage will not have secured TWI's Allocable Share of the Land acquisition cost. The SSBTT Deed will, however, secure TWI's obligations under the Synthetic Lease to repay the approximately \$120,000,000 Advance made through the Synthetic Lease facility to fund TWI's share of the Land Acquisition Cost. Accordingly, recording the SSBTT Deed will give rise to mortgage recording tax, but only to the extent the SSBTT Deed secures an indebtedness that was not included in TWI's Allocable Share of the Acquisition/Construction Financing secured by the Participant's Mortgage.

3. The recording of the amended and restated A/R Participants' Mortgage will be supplemental to the recorded Participants' Mortgage and the SSBTT Deed, and will not secure any additional indebtedness. It will therefore not be subject to any additional mortgage recording tax.

4. The recording of the Memorandum of Lease in respect of the Lease from SSBTT to TWI, and of an Assignment of the Lease to the Administrative Agent as security for TWI's indebtedness will likewise be supplemental to the recorded mortgages, and will not be subject to additional mortgage recording tax.

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/s/

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