

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

TSB-A-07(1)R
Real Estate Transfer Tax
April 12, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M060531A

On May 31, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from 450 Partners LLC, c/o The Chetrit Group, 404 Fifth Avenue, 4th Floor, New York, NY 10018. Petitioner, 450 Partners LLC, submitted additional information pertaining to the Petition on January 19, 2007.

The issue raised by Petitioner is whether the “Title Conveyance,” “Leaseback,” and “Reversion” transactions described below are subject to the real estate transfer tax imposed by Article 31 of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is the owner of real property located at 450 West 33rd Street, New York, NY (the “Property”). Petitioner is contemplating the creation of a condominium at the Property. The condominium would consist of two condominium units: one unit covering that portion of the Property currently leased to WNET/Channel 13 (the “Channel 13 Unit”) and one unit covering the remainder of the Property (the “Landlord Unit”).

Title Conveyance

Pursuant to a condominium unit deed (the “Deed”), Petitioner will convey title to the Channel 13 Unit to The Trust for Cultural Resources of the City of New York (the “Trust”) for a consideration of \$10.00 and subject to (1) an existing mortgage with an outstanding principal balance of approximately \$34 million (the “First Mortgage”) and (2) a second mortgage in the principal amount of \$14,592,000 (the “Collateral Mortgage”) serving as additional collateral for a portion of indebtedness in the original principal amount of \$232,776,000, which indebtedness is secured by a first mortgage lien on the Landlord Unit (the First Mortgage and Collateral Mortgage together are hereinafter referred to as the “Mortgages”). The Trust was formed under Articles 20 and 21 of the Arts and Cultural Affairs Law.

In spite of the Title Conveyance of the Channel 13 Unit to the Trust, Petitioner will remain liable for all indebtedness secured by the Mortgages and for all obligations under the Mortgages. In addition, Petitioner will remain liable for all other expenses associated with the Channel 13 Unit and will remain the beneficial owner of the Channel 13 Unit for federal, state, and local income tax purposes. The Trust will have no obligation to improve, replace, service, adjust, repair, or maintain any portion of the Channel 13 Unit.

Leaseback

The Trust will net lease the Channel 13 Unit back to Petitioner for an annual rent of \$10.00. The term of the Net Lease will expire on the earlier of the fourth anniversary of the date of the Title Conveyance of the Channel 13 Unit to the Trust or the occurrence of any reverter event described in the Deed.

Petitioner will sublease the Channel 13 Unit to WNET/Channel 13 pursuant to the terms of an existing lease between Petitioner and WNET/Channel 13, as modified by the parties (the "Sublease"). Channel 13 shall subordinate the Sublease to the condominium declaration and the Leaseback.

Reversion

According to the terms of the Deed and the Leaseback, title to the Channel 13 Unit will revert to Petitioner upon the earlier of the fourth anniversary of the date of the Title Conveyance or the occurrence of any reverter event described in the Deed.

Applicable law and regulations

Section 1402(a) of the Tax Law imposes the real estate transfer tax on each conveyance of real property or interest therein and provides, in part:

A tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; . . .

Section 1401(d) of the Tax Law provides, in part:

"Consideration" means the price actually paid or required to be paid for the real property or interest therein, including payment for an option or contract to purchase real property, whether or not expressed in the deed and whether paid or required to be paid by money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to.

Section 1401(e) of the Tax Law provides:

"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.

Section 1401(f) 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. It shall also include an option or contract to purchase real property. It shall not include a right of first refusal to purchase real property.

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

The tax shall not apply to the following conveyances:

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings;

Section 575.10 of the Regulations provides, in part:

To the extent that a conveyance effectuates a mere change of identity or form of ownership or organization and there is no change in beneficial ownership, the real estate transfer tax does not apply....

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Opinion

Section 1405(b)(6) of the Tax Law provides an exemption from the real estate transfer tax to the extent that a conveyance effectuates a mere change of identity or form of ownership or organization where there is no change in beneficial ownership.

In the present case, all of the benefits and burdens of ownership remain with Petitioner at all times. Petitioner will remain liable for all indebtedness and for all obligations secured by the Mortgages. Petitioner will also continue to sublease the unit to WNET/Channel 13 pursuant to the terms of the existing lease, as modified, between Petitioner and WNET/Channel 13. In addition, Petitioner will remain liable for all other expenses associated with the Channel 13 Unit and will remain the beneficial owner of the Channel 13 Unit for federal, state, and local income tax purposes. The Trust will have no obligation to improve, replace, service, adjust, repair, or maintain any portion of the Channel 13 Unit.

Therefore, the Title Conveyance, Leaseback, and Reversion are all exempt from the real estate transfer tax as conveyances that constitute a mere change of identity or form of ownership or organization pursuant to section 1405(b)(6) of the Tax Law since there is no change in beneficial ownership of the Property. See *Urban Development Corporation (d/b/a Empire State Development Corporation) and Milstein Brothers 42nd Street LLC*, Adv Op T&F, October 9, 2003, TSB-A-03(1)R.

DATED: April 12, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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