STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M100218A

The Petitioner, [redacted], asks whether certain real estate conveyances to Petitioner or Petitioner's wholly-owned subsidiaries are subject to the real estate transfer tax (RETT) or the mortgage recording taxes (MRT). We conclude that the below described conveyances to Petitioner or subsidiaries of Petitioner are exempt from RETT. We also conclude that the recording of an assignment of leases and rents by Petitioner or Petitioner's wholly-owned subsidiaries is exempt from MRT.

Facts

Petitioner expects to purchase a commercial condominium unit in Long Island City (the Premises) as the CUNY Law School's new home. In order to finance the purchase and renovation of the Premises, Petitioner plans to use proceeds from a combination of federally-taxable Build America bond and/or tax-exempt governmental bond issues. In order to finance the project, once Petitioner is conveyed title to the condominium, Petitioner expects to convey fee title to the CUNY Financing Corporation (CFC), a Type C not for profit corporation controlled by Petitioner. Petitioner will be the sole member of CFC and therefore appoint CFC's Board of Directors. The CFC Certificate of Incorporation specifies that it shall be CFC's purpose to acquire, develop, equip and lease the premises to Petitioner to operate the Law School, to issue bonds in the name of CFC on behalf of Petitioner to finance the project, and to repay the Bonds solely with monies paid by Petitioner to CFC as rent for the Premises. Petitioner and CFC will enter into a lease agreement, the term ending with the full repayment of the bonds, with Petitioner required to pay rent to CFC during the term in an amount sufficient to pay the principal and interest payable by CFC on the bonds, together with any other operation and maintenance costs of the Premises. According to Petitioner, all of the benefits and burdens of ownership will remain with Petitioner at all times. Petitioner will remain liable for all indebtedness and for all obligations secured by mortgages on the Premises. In addition, Petitioner will remain liable for all other expenses associated with the Premises. The Lease will provide that, during the term, Petitioner will have exclusive possession of the Premises, with an option to purchase the Premises from CFC upon payment by Petitioner of amounts due on the outstanding bonds. Both Petitioner and its wholly owned subsidiary CFC are instrumentalities of New York State. To secure payment of principal and interest on the Bonds, Petitioner and CFC will assign all their rights and interest in the lease of the premises and the rents payable to a trustee for the bondholders.

Analysis

Real Estate Transfer Tax (RETT): Petitioner asks whether the anticipated conveyance of the Premises by an otherwise taxable private party to Petitioner and Petitioner's subsequent transfer to CFC are exempt from RETT. RETT is imposed on each conveyance of real property or interest therein, when the consideration exceeds $500. Certain governmental organizations or entities are exempt from the payment of RETT, including the state of New York and any of its agencies, instrumentalities, political subdivisions, or public corporations (*see* Tax Law §1405; 20 NYCRR §575.9(b)(1)). The conveyances of the Premises between Petitioner and CFC are not subject to RETT, since both Petitioner and CFC are instrumentalities of the State of New York and therefore immune from taxation in this case (Tax Law §§1405(a)(1) and (b)(1); 20 NYCRR §575.9(c); *see also* Ad Op Comm T&F, TSB-A-86(1)M), August 22, 1986.

Mortgage Recording Tax (MRT): Petitioner asks whether an assignment of leases and rents given by CFC and Petitioner with respect to the Premises financing is exempt from MRT. Article 11 of the Tax Law imposes taxes on the recording of mortgages on real property, based on the principal debt or obligation secured by the mortgage being recorded (Tax Law §253). The term "mortgage" includes an assignment of rents to accrue from tenancies, sub-tenancies, leases or subleases, given as security for an indebtedness, but only with respect to real property located within any city in New York State having a population of one million or more (Tax Law §250(2)(a)).

The MRT statute enumerates certain exemptions (Tax Law §§252, 252-a, 253(3)) but some other exemptions arise under the common law. It is well established that State agencies enjoy immunity from taxation, independent of the statutory exemptions, for property used in the public interest, on the theory that imposition of a tax on a mortgage held by a State agency is tantamount to a tax on the agency itself in violation of its immunity from taxation. Petitioner, as an instrumentality of the state of New York, is generally immune from all taxation, unless the immunity is expressly waived by the State Legislature. Accordingly, the recording of the assignment of rents by Petitioner and CFC is exempt from MRT (*see* 20 NYCRR §644.1(a)(1); TSB-A-86(1)M, August 22, 1986; *City of New York v. Tully*, 86 AD2d 330, 451 NYS2d 261 (3d Dept., 1982)). The assignment of rents is also exempt from the New York City MRT. Taxes imposed under Chapter 26 of Article 11 of the New York City Administrative Code are administered and collected in the same manner as the taxes imposed under §§253 and 255 of the Tax Law (*see* Admin. Code § 11-2603).

DATED: March 19, 2010

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.