

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-13(7)R
Real Estate Transfer Tax
October 17, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M130226A

The Department of Taxation and Finance received three related Petitions for Advisory Opinions from [REDACTED]. Petitioners (1) and (2) are New York limited liability companies that have the same principal and are referred to herein as “Owners.”¹ Petitioner (3), a Delaware limited liability company referred to herein as “Developer,” is not affiliated with “Owners.” Petitioners ask whether New York State (NYS) real estate transfer taxes will be due on certain conveyances of interests in real property that will take place.

We conclude that transfer taxes are not owed on the conveyances.

Facts

Owners owned the property in Manhattan (“the Property”) that is the subject of this Advisory Opinion. On March 2, 2006, Owners and Developer executed a contract (“the Contract”) and deeds, whereby Owners and Developer became tenants in common in the Property. Owners retained an undivided 12.32% interest in the Property and conveyed an undivided 87.68% interest in the Property to Developer. At the closing, all the transfer taxes then due and owing were paid to New York City and to New York State.

Simultaneously with Owners’ conveyance to Developer of the 87.68% tenant in common (TIC) interest in the Property, Owners and Developer entered into a TIC and Retail Unit Construction and Exchange Agreement (the “TIC Agreement”). Pursuant to the TIC Agreement, Developer arranged financing and engaged a contractor to construct a building on the Property, 12.32% of which would be ground floor Commercial Space corresponding to Owners’ retained interest in the Property. The TIC Agreement obligated each party to pay its pro-rata share of the costs to construct the building. Owners were required to reimburse Developer a “contract sum” representing the Owners’ share of Developer’s actual hard and soft costs for the design and construction of the Commercial Space. Developer was obligated to pay the costs of constructing and designing the remainder of the building, which would be comprised of residential units. During the construction of the building, Owners had no control except with respect to the Commercial Space.

The TIC Agreement also provided that the completed building would be converted into a condominium, pursuant to Article 9-B of the Real Property Law, with the Commercial Space

¹ Before converting to limited liability companies (LLCs) in 2010, Owners operated as partnerships. For purposes of this Advisory Opinion, the term “Owners” includes the Owners’ present and former status.

comprising one unit and the floors above the Commercial Space comprised of residential units. Upon completion of the construction and the payment by Owners of the design and construction costs of the Commercial Space and proportional costs of the common areas benefiting the Commercial Space, Owners would transfer their 12.32% TIC interest in the Property to Developer, and Developer would transfer its undivided interest in the Commercial Space condominium unit to Owners, including the respective percentage of common interests attributed to the Commercial Space. Following the transfers, Owners would hold all right, title and interest in and to the Commercial Space, and Developer would hold all right, title and interest in and to the residential units, except that each party would share proportionate ownership of the common space. Owners would have no control over the residential units and could not benefit from their sale or lease, and Developer would have no control over the Commercial Space and could not benefit from its sale or lease. A Declaration of Condominium, signed by Owners and Developer and dated June 6, 2012, was recorded on July 25, 2012.

Petitioners ask (1) whether real estate transfer taxes will be due and payable by either Owners or Developer upon the payment by Owners to Developer of \$4,275,000, which represents Owners' share for the hard and soft costs pertaining to the construction of the Commercial Space; (2) whether transfer taxes will be due and payable by either Owners or Developer upon Owners' conveyance to Developer of Owners' 12.32% undivided TIC interest in the Property; and (3) whether transfer taxes will be due and payable by either Owners or Developer upon Developer's conveyance to Owners of the Commercial Space condominium unit in fee simple.

Analysis

Under Tax Law §1402(a), a tax is imposed on each conveyance of real property or interest therein. A "[c]onveyance" means the transfer or transfers of any interest in real property by any method...." Tax Law §1401(e). However, conveyances that "effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership" are not subject to this tax. Tax Law §1405(b)(6).

The payment by Owners to Developer for the construction costs attributable to the Commercial Space is not a payment of consideration for a conveyance of an interest in real property and, thus, would not be subject to transfer taxes.

A conveyance by Owners of their 12.32% undivided interest in the Property to Developer would be a conveyance of an interest in real property: when Owners convey to Developer the 12.32% undivided interest in the property, the Petitioners' tenancy in common will be severed, and Developer will become the sole fee owner of the Property. Likewise, the conveyance to Owners by Developer of the fee interest in the Commercial Space condominium unit would also be a conveyance of an interest in real property.

Pursuant to the TIC Agreement, Developer has a nominal undivided interest in the Commercial Space, but Developer has no right to sell, lease, license, use, or further encumber the

unit. After the conveyances, Owners will have a fee interest in the commercial space equal to the fee interest in the Property that they had prior to the construction of the building. Likewise, pursuant to the TIC Agreement, all proceeds from the sale or lease of any residential condominium unit can accrue solely to Developer, and Owners have no right to sell, lease, use, or further encumber any of the residential condominium units. After the conveyances, Developer will own the same beneficial interest in the Property (i.e., the portion attributable to the residential units) that it acquired under the Contract. The parties were in exactly the same position before and after the conveyances. Accordingly, these two conveyances would effect a mere change of identity or form of ownership or organization with no change in beneficial ownership and, thus, would be exempt from the Tax Law §1402(a) real estate transfer taxes. See Tax Law §1405(b)(6); TSB-A-01(3)R, *Columbus Centre LLC*; TSB-A-99(3)(R), *Armory Place LLC* and TSB-A-94(3)R, *115 Spring Street Company*.

DATED: October 17, 2013

/S/

DEBORAH R. LIEBMAN
Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.