

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-07(4)R
Real Estate Transfer Tax
Mortgage Recording Tax
September 5, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M070816A

On August 16, 2007, 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 August 28, 2007.

The issues raised by Petitioner are:

- (1) 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.
- (2) Whether the split, modification and spreading agreements for the Mortgage involved in the transactions described below are subject to the mortgage recording tax imposed by Article 11 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”).

Mortgage

Prior to the creation of the condominium, Wachovia Bank, National Association (“Wachovia”) loaned to Petitioner a loan in the original principal amount of \$365 million, secured by a first mortgage lien on the Property. The \$365 million Mortgage was recorded and all appropriate mortgage taxes were paid. After the creation of the condominium, the \$365 million Mortgage will be split and modified as follows: (i) the Channel 13 Unit will be encumbered by (A) a first mortgage lien in favor of Wachovia, in the original amount of \$47,347,800 (the “Channel 13 Unit 1st Mortgage”) and (B) a collateral mortgage lien in favor of Wachovia, in the original principal amount of \$317,652,200 (the “Channel 13 Unit Collateral Mortgage”) and (ii) Landlord Unit will be encumbered by (A) a first mortgage lien in favor of

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Wachovia, in the principal amount of \$317,652,200 (the "Landlord Unit 1st Mortgage") and (B) a collateral mortgage lien in favor of Wachovia in the original Principal amount of \$47,347,800 (the "Landlord Unit Collateral Mortgage"). The Channel 13 Unit Collateral Mortgage will be given as additional security for the notes secured by the Landlord Unit 1st Mortgage. The Landlord Unit Collateral Mortgage will be given as additional security for the notes secured by the Channel 13 Unit 1st Mortgage.

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 (i) consideration of \$10.00 and (ii) subject to (A) the Channel 13 Unit 1st Mortgage and (B) the Channel 13 Unit Collateral Mortgage. 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 payments due under the notes secured by the Channel 13 Unit 1st Mortgage and the Channel 13 Collateral Mortgage and for all obligations under the Channel 13 Unit 1st Mortgage and the Channel 13 Collateral Mortgage. 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. As additional security for the Wachovia Loan, the Channel 13 Unit 1st Mortgage and the Channel 13 Unit Collateral Mortgage will be spread to encumber the Net Lease.

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, the Leaseback, the Channel 13 Unit 1st Mortgage and the Channel 13 Collateral Mortgage.

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.

In addition to the facts presented above Petitioner provides that the Channel 13 Unit will also be conveyed to the Trust subject to a “springing” net lease, between Petitioner, as landlord, and Petitioner’s affiliate (Affiliate), as tenant (the “Affiliate Lease”). Affiliate is a single-purpose entity formed by Petitioner solely to function under the Affiliate Lease. The term of the Affiliate Lease shall commence on the fourth anniversary of the date of the conveyance of the Channel 13 Unit to the Trust. Affiliate shall join in the Channel 13 Unit 1st Mortgage and the Channel 13 Unit Collateral Mortgage in order to grant a first mortgage lien on its interest in the Affiliate Lease.

Applicable law and regulations

Section 250(2)(a) of Article 11 of the Tax Law provides, in part:

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 253 of Article 11 of the Tax Law imposes taxes on the recording of mortgages of real property measured by the principal debt or obligation secured by such mortgages.

Section 255(1)(a) of Article 11 of the Tax Law provides, in part:

(i) 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 primary mortgage, in which case, a tax is imposed as provided by section two hundred and fifty-three of this article on such new or further indebtedness or obligation.

(ii) Notwithstanding any provision to the contrary in subparagraph (i) of this paragraph, the taxes imposed by or pursuant to the authority of this article shall apply to the recording of a spreading agreement or additional mortgage which imposes the lien thereof upon real property located in any city in the state having a population of one million or more and not originally covered by or described in a recorded primary mortgage, unless the real property that becomes subject to the lien of such spreading agreement or additional mortgage is owned by the mortgagor of the real property subject to the lien of such recorded primary mortgage....

Section 1402(a) of Article 31 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 Article 31 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 Article 31 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 Article 31 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 Article 31 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 Real Estate Transfer Tax 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....

Technical Services Bureau Memorandum entitled *2004 Amendments to the Tax on Mortgages*, November 22, 2004, TSB-M-04(9)R , provides, in part:

A95. Notwithstanding the provisions explained in A7 and A8 above, the provisions contained in Tax Law, section 255(1)(a)(ii) are not intended to adversely affect the recording of mortgage spreading agreements or additional mortgages undertaken for legitimate business purposes, such as the following transactions:

- a. The recording of an instrument extending the lien of the recorded primary mortgage to cover new leases, new improvements, new construction or additional interests, such as easements, on the property described in or originally covered by the recorded primary mortgage.
- b. The recording of an instrument to sever and modify the lien of the recorded primary mortgage to reflect a declaration of condominium ownership or subdivision of the real property.

Opinion

Issue 1

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; *450 Partners LLC*, Adv Op T&F, April 12, 2007, TSB-A-07(1)R.

Petitioner has provided facts in regard to creation of a sublease with WNET/Channel 13 and possible creation of a net lease between Petitioner and Petitioner's affiliate. It should be

noted that this Opinion does not address whether such transactions are subject to the tax imposed by Article 11 or Article 31 of the Tax Law.

Issue 2

Upon the creation of the condominium, Petitioner's \$365 million Mortgage with Wachovia encumbering the property will be split and modified to encumber the Channel 13 Unit and the Landlord Unit. The total amount of the mortgages on the condominium units will be equal to the amount of the existing Mortgage with Wachovia. To the extent the split and modification of the existing Mortgage do not extinguish the original debt and do not create a new indebtedness the mortgage is exempt from mortgage recording tax, either because such action will not create a new mortgage subject to tax under section 253 of the Tax Law or because the instrument constitutes a supplemental mortgage under section 255 of the Tax Law provided that the instrument so recorded is not subject to tax under section 255(1)(a)(ii) of the Tax Law. As provided in *TSB-M-04(9)R, supra*, the recording of a mortgage to sever and modify the lien of the recorded primary mortgage to reflect a declaration of condominium ownership is considered to be undertaken for a legitimate business purpose and is not subject to tax under section 255(1)(a)(ii) of the Tax Law. See also *Matter of Bay View Towers Apartments v State Tax Comm.*, 48 AD2d 86, *affd* 40 NY2d 856.

When a person acquiring real property assumes an existing mortgage or takes ownership of the real property subject to an existing mortgage, to the extent no new debt or further obligation is created, no mortgage recording tax is due upon the recording of a supplemental mortgage for the purposes of modifying the existing mortgage to reflect the new owner as mortgagor. See *Sugar Maple Farm, Inc.*, Adv Op T&F, February 7, 1990, TSB-A-90(2)R. Since Petitioner will remain liable for all payments due under the notes secured by the Channel 13 Unit 1st Mortgage and the Channel 13 Collateral Mortgage and for all obligations under the Channel 13 Unit 1st Mortgage and the Channel 13 Collateral Mortgage it appears that no new debt or obligation is created. Accordingly, when Petitioner transfers the Channel 13 unit to the Trust subject to the Channel 13 Unit 1st Mortgage and the Channel 13 Unit Collateral Mortgage, a supplemental mortgage reflecting the Trust as mortgagor may be recorded without the payment of mortgage recording taxes.

If there is no new debt or further obligation, a supplemental instrument spreading the lien of the recorded primary mortgage to encumber a separate leasehold interest in the property may be recorded without the payment of mortgage recording taxes, pursuant to section 255 of the Tax Law. See *Brodsky and Second Nominated Properties v Murphy et al.*, 26 AD2d 225, [July 1966]. As provided in *TSB-M-04(9)R, supra*, the recording of a mortgage extending the lien of the recorded primary mortgage to cover new leases on property described in or originally covered by the recorded primary mortgage is considered to be undertaken for a legitimate

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business purpose and is not subject to tax under section 255(1)(a)(ii) of the Tax Law. Therefore, in the present case, since a supplemental instrument that reflects the spreading of the Channel 13 Unit 1st Mortgage and the Channel 13 Unit Collateral Mortgage to encumber the Net Lease does not secure any new debt or obligation, such instrument may be recorded without the payment of mortgage recording taxes.

DATED: September 5, 2007

/s/
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Taxpayer Guidance Division

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.