November 30, 2006

Re:

Real Property Transfer Tax
FLR No.: 064851-021

Dear Sir or Madam:

This is in response to your request for a ruling as to the applicability of the Real Property Transfer Tax ("RPTT") to the reconstitution of Housing Company, Inc. ("Old Taxpayer"), originally organized under the rules and regulations of the Mitchell-Lama Program, as a non-government regulated corporation ("New Taxpayer") under the New York State Business Corporation Law ("BCL").

FACTS

The facts presented are as follows:

Old Taxpayer is currently the owner of certain real property located at xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx in Manhattan (the "Property"). Old Taxpayer acquired the Property in two phases by two separate deeds from the City of New York, dated , and , , respectively. The Property contains 748 apartment units (two of which are occupied by the Property's superintendent and assistant superintendent) and approximately 12 commercial spaces (some of which have been or may be combined). Old Taxpayer operates the Property as a residential cooperative apartment building. Old Taxpayer currently has 178,390.47 issued and outstanding shares.

Old Taxpayer was formed as a limited profit housing company organized pursuant to the New York State Private Housing Finance Law ("PHFL"). Having been formed under the PHFL, the Old Taxpayer is subject to the rules and regulations of the Mitchell-Lama program[1] the effect of which is to severely limit the ability of the shareholders of Old Taxpayer to realize the full market value of their ownership interest in Old Taxpayer upon the sale of their interest. In order to withdraw from participation in the Mitchell-Lama program and to be able to realize the full market value of their ownership interest in the Old Taxpayer and pursuant to the Mitchell-Lama Rules of the New York City Housing Preservation and Development ("HPD"), Title 28 of the Rules of the City of

[1] PHFL §32(3) and §32-a.

New York ("RCNY") §3-01 to §3-25, the shareholders of the Old Taxpayer adopted the "Withdrawal Resolution" on December 14, 2004. Pursuant to the authorization granted by the Withdrawal Resolution, the directors and officers of Old Taxpayer have adopted a plan to "reconstitute" Old Taxpayer as a non-government regulated corporation under the BCL (the "Plan").

The Plan

On February 6, 2006, the board of directors and officers of Old Taxpayer caused an Offering Plan to be prepared and submitted to the New York Attorney General's office. Under the Plan, the Old Taxpayer will cause New Taxpayer to be formed under the BCL. Old Taxpayer will transfer its assets including the Property to New Taxpayer in exchange for all of the issued and outstanding shares of New Taxpayer. Old Taxpayer will distribute the shares of New Taxpayer that are received to those of its shareholders that elect to continue as shareholders of New Taxpayer in exchange for the shares of Old Taxpayer held by such shareholders.

- Under the Plan, each shareholder of record in good standing of Old Taxpayer will have the exclusive right to elect to exchange the shares allocated to his/her apartment for the shares of New Taxpayer allocated to his/her apartment. Each shareholder who participates in this exchange will execute an agreement and will surrender his/her shares in Old Taxpayer and will receive shares in New Taxpayer allocated to his/her apartment and will be entitled to a lease for his/her apartment commonly known as a proprietary lease.

- Shareholders who do not elect to surrender their shares of Old Taxpayer will be given the option to enter into a lifetime lease at rents equal to maintenance currently being paid at the time of closing with restrictions on future rent increases ("Special Lease").

- Finally, those shareholders who do not elect to either exchange their Old Taxpayer shares for the shares of New Taxpayer or enter into a Special Lease will receive a cash payment pursuant to the Occupancy Agreement and/or applicable law.

Operation as a Business Corporation

After the closing and reconstitution, New Taxpayer will operate as a private cooperative formed under the BCL and will no longer be subject to the PHFL and the Mitchell-Lama Rules and Regulations. It is contemplated that the shareholders of New Taxpayer following the closing will be not less than sixty-six and two-thirds (66 2/3%) of the shareholders of Old Taxpayer and the members of the Board of Directors of Old Taxpayer will be the initial members of the board of Directors of new Taxpayer.

ISSUES:

You have requested a ruling that the following transactions are either not subject to the RPTT or that the exemption for transactions effecting a mere change of identity or form of ownership applies to:

1. The transfer of the Property by deed from the Old Taxpayer to the New Taxpayer in exchange for the issuance of shares by New Taxpayer to Old Taxpayer;

2. The surrender of outstanding Old Taxpayer shares by Old Taxpayer shareholders to Old Taxpayer and the subsequent cancellation thereof by Old Taxpayer followed by:

   a. The transfer/exchange of New Taxpayer shares from Old Taxpayer to those shareholders engaging in the exchanges;
   b. The grant of the Special Lease or a cash payment to those not participating in the exchange.

CONCLUSIONS

1. The exemption for transactions effecting a mere change of identity or form does not apply to transfers to a cooperative corporation as defined by Administrative Code (the "Code") §11-2106(b)(8). Therefore the transfer of the Property from Old Taxpayer to New Taxpayer is subject to the RPTT. The consideration is the stock received from New Taxpayer, the value of which is deemed to be the fair market value of the realty conveyed, without reduction for any mortgage, lien or encumbrance on such realty.

2. The surrender exchange of Old Taxpayer shares for New Taxpayer shares by the current shareholders will be exempt under Code §11-2106(b)(8) to the extent there is no change in beneficial ownership of the Property. The surrender of shares for a Special Lease is not subject to tax. The surrender of shares for a cash payment is subject to tax.

DISCUSSION

Section 11-2102 of the Administrative Code of the City of New York (the "Code") imposes a tax on the transfer of real property or a controlling economic interest in real property therein where the consideration exceeds $25,000. A controlling economic interest is defined, in the case of a corporation, as 50 percent or more of the total combined voting power of all classes of stock of the corporation, or 50 percent or more of the total fair market value of all classes of stock of the corporation. Code § 11-2101.8. The RPTT also is imposed on the transfer of shares in a cooperative corporation in connection with the grant or transfer of a proprietary leasehold. Code § 11-2102.b, paragraphs (2) and (3). Except with respect to a conveyance to a cooperative housing corporation, a transaction conveying or transferring real property or a controlling economic interest therein that effects a mere change of identity or form of ownership or organization is exempt from the RPTT to the extent the beneficial ownership of the real property or economic interest remains the same as before the transaction. Code §11-2106(b)(8)[2].

For the purpose of the proper administration of the RPTT and to prevent evasion of the tax, all deeds and transfers of economic interests in real property are presumed to be taxable. Code §11-2103.

For purposes of the tax, the term consideration means the price actually paid or required to be paid for the real property or economic interest therein, without deduction for mortgages, liens and encumbrances, whether or not expressed in the deed or instrument and whether paid or required to be paid by money, property, or any other thing of value. Code §11-2101.9.

The mere change of form or identity exemption under the RPTT is inapplicable to transfers to a cooperative corporation. Code §11-2106(b)(8) provides that there is an exemption from the RPTT with respect to deeds or transactions transferring real property or a controlling economic interest that effect:

> "a mere change of identity or form of ownership or organization to the extent the beneficial ownership of such real property or economic interest therein remains the same, other than a conveyance to a cooperative housing corporation of the land and building or buildings comprising the cooperative dwelling or dwellings. For purposes of this paragraph, the term 'cooperative housing corporation' shall not include a housing company organized and operating pursuant to the provisions of article two, four, five or eleven of the private housing finance law." Code §11-2106(b)(8).

Thus, the transfer of the Property from the Old Taxpayer to the New Taxpayer is subject to the RPTT. Furthermore, the exemption under the RPTT and the exception to the exemption for cooperative housing corporations was enacted after the decision in In re Joint Queensview Housing Enterprise, Inc., 179 A.D. 2d 434 (First Dept. 1991). The Appellate Division decision in Joint Queensview Housing reversed a lower court decision annulling two letter rulings of the Department that took the position that the reconstitution of two housing cooperatives formed under the New York State Redevelopment Companies Law[3] as ordinary business corporations was a taxable event under the RPTT. Thus, it must be presumed that the Legislature was aware of the Department's position that the reconstitution of a corporation formed under the PHFL as

[2] Code §11-2106(b)(8) defines cooperative housing corporations to exclude certain corporations formed pursuant to several articles of the PHFL. Because New Taxpayer is a corporation formed under the BCL and not the PHFL the exemption will not apply to the transfer of the Property from Old Taxpayer to New Taxpayer.

[3] Article 5 of the PHFL

a business corporation was a taxable event and, despite this, still chose to include the exception to the exemption in the statute.

The exchange of stock in Old Taxpayer for shares in New Taxpayer by a current shareholder is exempt as a mere change of identity or form of ownership because the beneficial ownership of the underlying real property remains the same. The surrender of shares for a Special Lease is also exempt.[4] However, to the extent that a shareholder in Old Taxpayer chooses not to participate in the exchange for shares in New Taxpayer but instead surrenders his or her shares in return for a cash payment, such surrender would be subject to tax.

The Department reserves the right to verify the facts submitted.

Very truly yours,

Dara Jaffee
Assistant Commissioner
Office of Legal Affairs

CS:cs

[4] Under the Special Leases the tenants essentially have the right to occupy without the right to sell for a profit. Although different in kind, their interests under the Special Leases are substantially similar to the rights they had before the proposed reconstitution.