FINANCE
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THE CITY OF NEW YORK
DEPARTMENT OF FINANCE
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February 21, 2007

Re: Exemption Request
Real Property Transfer Tax

Dear :

This is in response to your request for an exemption from the New York City Real Property Transfer Tax ("RPTT") on behalf of Corporation (the "Taxpayer") with respect to the transfer of a 98.99% limited partnership interest in Limited Partnership (the "Partnership"), which owns (the "Project"). The Project consists of an affordable housing development located at in Brooklyn, New York (Block , Lots and). Additional information was received on September 13, and November 17 and 20, 2006.

FACTS:

The facts presented are as follows:

The Project is owned by the Partnership. The sole general partner of the Partnership, , Inc. (the "General Partner"), is a business corporation formed under section 402 of the New York Business Corporation Law with a 1% interest in the Partnership. The sole shareholder of the General Partner is Assn., Inc. (the "Sponsor"), a not-for-profit corporation formed under section 501(c)(3) of the Internal Revenue Code of 1986 ("IRC').[1] The current limited partner owning a 98.99% interest in the Partnership is Fannie Mae. Additionally Organization, Inc. (" ") is currently a special limited partner with a .01% interest in the Partnership. The First Amended and Restated Agreement of Limited Partnership requires that the Project be operated as a qualified low income housing project within the meaning of section 42 of the IRC.

The Project consists of an affordable housing development, which comprises two multifamily structures containing 69 units of affordable housing (including a superintendent's unit). Seven (approximately 10% of the units) are reserved for individuals who formerly resided in the New York City shelter system. The rental stream for these units is the payments that such individuals would have paid to continue living in the shelter system. Forty-eight (approximately 70%) of these units are reserved for "low-income" individuals earning 30-60% of area median income. Thirteen (approximately 19%) of these units are reserved for "moderate-income" individuals earning approximately 80% of area median income. Therefore, approximately 90% of the units will be devoted to low-income and moderate-income individuals.

[1] When the Partnership was formed in 1989, the Sponsor initially held 51% of the General Partner's stock (102 shares) and , Inc. (the "Co-sponsor"), a New York not-for-profit corporation exempt under IRC Section 501(c)(3), owned 49% of the stock (98 shares). transferred its shares to the Sponsor on July 23, 2002.

The Sponsor financed the Project in part by participating in the Federal Low Income Housing Tax Credit Program. The tax credits were allocated to the, Project by the New York City Department of Housing Preservation and Development (HPD). Under the Federal Low Income Housing Tax Credit Program, existing investors received all of the tax credits they were entitled to receive in the 10th year of a project's operations and after the 15th year, they are entitled to transfer their interests in the project to another entity. In your affidavit dated November 20, 2006 you have represented that Fannie Mae has received all the tax credits it is entitled to receive as a limited partner of the Partnership, the tax credits for the entire project have been exhausted and no other entity associated with the Project is entitled to receive tax credits.

Fannie Mae, the current investor, now proposes to transfer its limited partnership interest to the Taxpayer for \$1.[2] Both HPD and the Department of Community Renewal consent to the proposed transfer of Fannie Mae's interest in the Partnership to the Taxpayer. The Certificate of Limited Partnership will be amended to state that the general character of the business is to "acquire, rehabilitate, improve, own and operate the Project…as a qualified low income housing project as defined under Section 42-9(g)(1)(B) of the Internal Revenue Code" and to engage in "any other kind of lawful activity related to the foregoing; provided, however that the Partnership may also sell the Project in accordance with the Partnership Agreement."

The Taxpayer, was formed by the Sponsor on May 2, 2006 and you have represented that the Sponsor and the Taxpayer are under common control. Three members of the Sponsor's executive board are officers of the Taxpayer. The Taxpayer is currently preparing an application for exemption under IRC section 501(c)(3) but has not obtained a determination letter from the Internal Revenue Service. The Taxpayer is a New York not-for-profit corporation formed on May 2, 2006 under section 402 of the New York Not-for-Profit Corporation Law and Article XI of the New York State Private Finance Law. The Taxpayer was organized exclusively for the purpose of acquiring, developing and managing housing projects for persons of low income. No part of the net earnings or net income of the Taxpayer is permitted to inure to the benefit of, or be distributable to, any private individual. The Taxpayer is not authorized to carry on propaganda or otherwise attempt to influence legislation. In the event of dissolution, any assets remaining of the Taxpayer after satisfying its liabilities must be distributed for one or more exempt purposes within the meaning section 501(c)(3) of the IRC, including but not limited to distribution to other housing development fund corporations formed under Article XI of the Private Housing Finance Law and the Not-for-Profit Corporation Law. You have represented that the Taxpayer was formed solely for the purpose of purchasing the limited partnership interest in the Partnership and is not conducting any activities at present.

There is a Property Management Agreement between the Sponsor and the Partnership dated February 16, 1989 entitling the Sponsor to receive an 8% management fee, based on rent collections. The Sponsor contracted with an unrelated outside management company to provide management services and retains 1% of these fees with the management company receiving the other 7%.[3] Although this agreement expired on April 30, 2006, in your affidavit dated November 20, 2006, you have represented that it is anticipated that the agreement will be renewed for an additional one year term to expire on April 30, 2007 at the same terms as the initial agreement.

[2] As of December 31, 2005, there were mortgages on the Project totaling \$4,512,026.

[3] Upon the transfer of the limited partnership interest, the Co-sponsor will receive one-half of the developer's fees being held in an account with the Sponsor receiving the other half.

ISSUE:

You have requested a ruling that the conveyance of the partnership interest to the Taxpayer will be exempt from the RPTT under section 11-2106(b)(2) of the New York City Administrative Code (the "Code").

CONCLUSION:

Based upon the facts presented and the representations submitted, we have determined that Code section 11-2106(b)(2) will apply to the conveyance of the partnership interest from Fannie Mae to the Taxpayer. Thus, the conveyance will be exempt from the RPTT. However, the Taxpayer will be required to inform this office in the event that its application for exemption under IRC section 501(c)(3) is denied.

DISCUSSION:

The RPTT applies to each instrument transferring an economic interest in New York City real property when the consideration for that interest exceeds $25,000, unless the transfer is otherwise exempt. Code § 11-2102(b). Under Code section 11-2101, an economic interest in real property includes the ownership of an interest in a partnership that owns real property in the City. Code section 11-2101.7 provides that a "transfer" of an economic interest in property occurs when the interest transferred constitutes a "controlling interest" in the entity owning the property. Under Code section 11-2101.8, an interest in a partnership is a controlling interest if it represents 50 percent or more of the capital, profits, or beneficial interests in the partnership. Code section 11-2101.9 defines "consideration as the price paid or required to be paid for the property and includes the amount of any indebtedness on the property, whether or not the indebtedness is assumed.

Code section 11-2106(b) exempts certain deeds instruments and transactions from the RPTT. Code section 11-2106(b)(2) exempts conveyances of real property or a controlling interest in real property by or to any corporation:

> Organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph…

The Taxpayer's certificate of incorporation requires that all income and earnings must be used exclusively for the Taxpayer's corporate purposes; that no part of its earnings can inure to the benefit of any individual or private entity and that, in the event of dissolution any assets remaining in the Taxpayer after satisfying its liabilities must be distributed to the organizations qualifying under IRC section 501(c)(3) or must be distributed to the federal, state or local government for a public purpose. You have also represented that the Taxpayer is not authorized to carry on propaganda or otherwise attempt to influence legislation. You have represented that none of the Taxpayer's income is credited to surplus and that under no circumstance will any of the Taxpayer's income inure to any private stockholder or individual. The Taxpayer was formed to acquire the limited partnership interest and will contribute equity to the Partnership and share in the profits and losses.

Code section 11-2106(b)(2) closely resembles IRC section 501(c)(3), which exempts certain religious, charitable, and educational organizations from federal income tax. Code section 11-2106(b)(2) does not expressly require an organization to have received a federal exemption under IRC section 501(c)(3) to be exempt from the RPTT. However, because of the substantial similarity between the IRC and Code provisions, this Department will take notice of judicial and administrative interpretations of IRC section 501(c)(3) in applying Code section 11-2106(b)(2).

In Revenue Ruling 70-585, 1970-2 C.B. 115, the Internal Revenue Service ("IRS") addressed the question of when an organization formed and operated to provide housing qualifies as "charitable". Situation 1 of that ruling involved an organization formed and operated to provide housing for low-income persons. The IRS concluded that '[b]y providing homes for low-income families who otherwise could not afford them, the organization is relieving the poor and distressed [and thus] is organized and operated exclusively for charitable purposes" under IRC section 501(c)(3). In Situation 4 of that ruling, the IRS considered an organization formed to provide rental housing at cost to moderate income families; the IRS found that organization did not provide relief to the poor or carry out any other function within the definition of "charitable." In Situation 3 of Revenue Ruling 70-585, the IRS addressed the exemption of an organization formed and operated to combat community deterioration by assisting in the rehabilitation of an old and run-down residential area. The IRS concluded that the organization was organized and operated for charitable purposes under IRC section 501(c)(3). This case appears similar to Situation 1 of the revenue ruling since the Partnership Agreement states that the purpose of the Partnership is to acquire, rehabilitate, own, operate, and lease as low-income housing the Project's 69 apartments and the Taxpayer's certificate of incorporation provides that it is "organized exclusively for the purpose of acquiring, developing and managing housing projects for persons of low income."

SAFE HARBOR GUIDELINES:

In Revenue Procedure 96-32, 1996-20 IRB 14, the IRS established safe harbor guidelines for determining when low-income housing organizations will be considered to relieve the poor and distressed. Organizations not meeting the safe harbor guidelines may, nevertheless qualify as "charitable" pursuant to other criteria set forth in the revenue procedure. An organization will qualify under the safe harbor guidelines if it establishes, for each project, that (1) at least 75 percent of the units are occupied by residents that qualify as low-income (defined generally as persons earning no more than 80 percent of the median area income); and (2) either at least 20 percent of the units are occupied by residents that also meet the very low- income limit for the area (defined generally as persons earning no more than 50 percent of the median income) or 40 percent of the units are occupied by residents that also do not exceed 120 percent of the area's very low-income limit. Up to 25 percent of the units may be provided at market rates to persons who have incomes in excess of the low-income limit.

In this case, the Project meets the safe harbor guidelines specified in Revenue Procedure 96-32 because seven (approximately 10% of the units) are reserved for individuals who formerly resided in the New York City shelter system – the rental stream for these units is the payments that such individuals would have paid to continue living in the shelter system. Forty-eight (approximately 70%) of these units are reserved for "low-income" individuals earning 30-60% of area median income for the area. Thirteen (approximately 19%) of these units are reserved for "moderate-income" individuals earning approximately 80% of area median income. Thus, at least 75% of the units will be reserved for persons earning no more than 80% of the area median income and at least 40% of the units are reserved for persons whose income does not exceed 120% of the area's very low income limit, i.e., 60% of the area's median income.

However, Revenue Procedure 96-32 further provides that even if an organization furthers a charitable purpose such as relieving the poor and distressed, it nevertheless may fail to qualify for exemption because private interests of individuals with a financial stake in the project are furthered. For example, the role of a private developer or management company in the organization's activities will be examined to identify impermissible private benefit resulting from real property sales, development fees, or management contracts. In the current case, the general partner holding a 1% interest in the partnership is a business corporation. However it is our opinion that this does not disqualify the Taxpayer.

In Rev. Rul. 98-15, 1998-1 C.B. 718, the IRS analyzed two alternate situations involving partnerships between non-profit and for-profit entities. In the first situation, the non-profit entity was found to qualify for exemption because the partnership's governing documents committed the partnership to a charitable purpose rather than maximizing profit. The IRS concluded that through the entity's voting control of the board and its specifically enumerated powers over changes in activities, disposition of assets and renewal of the management agreement ensured that the assets it owned through the partnership and the activities of the partnership were used primarily to further exempt purposes. In the second situation, these factors were not present and the IRS concluded that the benefit to the for-profit entity was not incidental to the furtherance of an exempt purpose and that the non-profit, under that situation, was not being operated exclusively for exempt purposes.

In Housing Pioneers, Inc., T.C. Memo 1993-120, affirmed 75 A.F.T.R. 2d 95-1398, 49 F.3d 1395, 58 F. 3d 401 (9th Cir. 1995), another instance in which an exemption was denied, the Ninth Circuit upheld the denial of IRC section 501(c)(3) exemption status to a corporation acting as a co-general partner in for-profit limited partnerships that owned real estate to be used as low income housing. In Housing Pioneers, the petitioner's authority as co-general partner under the management agreements was severely limited. The Ninth Circuit noted that to qualify for the exemption, it was necessary for a qualified nonprofit organization to own an interest in the project (directly or through a partnership) and to materially participate within the meaning of IRC section 469(h) in the development and operation of the project throughout the period involved. IRC section 469(h) provides that a taxpayer is treated as “materially participating” in an activity only if the taxpayer is involved in the operations of the activity on a basis that is regular, continuous and substantial. The appellate court in Housing Pioneers noted that the because of its limited role in the partnership, the petitioner's participation in the project was not regular, continuous or substantial.

The facts presented here are similar to the first situation described in Rev. Rule 98-15. In this case the General Partnership is entirely owned by the Sponsor, an organization exempt under IRC §501(c)(3). Furthermore, the Sponsor has been involved in the Project since its inception, is in charge of the management of the Project pursuant to an agreement with the Partnership and has formed the Taxpayer for the sole purpose of acquiring the interest in the Partnership. Unlike the situation in Housing Pioneers, Fannie Mae has received all the tax credits available and no other entity associated with the Project is entitled to receive any additional tax credits. The Sponsor, a nonprofit organization, also is in control of the Taxpayer. Because of the pervasive control of the operation of the Project, the Sponsor will be able to ensure that the Project is operated in accordance with the Taxpayer’s and its own charitable purpose. Because of these facts, it is our opinion that the participation by the Taxpayer as a limited partner in the Partnership does not substantially further a non-exempt purpose so as to disqualify the Taxpayer.

Based on the facts and representations presented, it is our opinion that the Taxpayer is a charitable organization within the meaning of Code §11-2106(b)(2) and the transfer of the Property to the Partnership is exempt from the RPTT. Notwithstanding the exemption granted by this ruling, the Taxpayer must report the transfer of the Property on form NYC-RPT and should attach a copy of this ruling to that return.

The Department reserves the right to verify the information submitted. Furthermore, the Taxpayer must advise the Department of any changes in its Federal tax status, including a grant or denial of IRC section 501(c)(3) status.

Very truly yours,

Dara Jaffee
Assistant Commissioner for
Legal Affairs

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