

October 15, 2019

Re: Request for a Ruling
Real Property Tax Law § 420-a Exemption
FLR-19-4999

Dear Mr. _____ :

This is in response to your request dated July 1, 2019, on behalf of XXXXXX Associates c/o _____ (“XXXXXX”), for a letter ruling regarding the application of § 420-a of the Real Property Tax Law (“RPTL”) as it applies to a leasehold condominium created by the XXX School (“XXX”) on an underlying 30 plus year leasehold located at New York, New York (block _____ ; lot _____) (the “Premises”). On September 16, 2019, via e-mail you made a representation concerning XXX’s leasehold interest in the land (the “representation”).

FACTS:

The facts that we have relied upon for this letter ruling are based on your aforementioned letter dated July 1, 2019, (the “submission”), as well as the representation. At the time of application for exemption, additional documentation may be requested to verify those actions yet to be taken by XXX in support of the exemption request.

According to the submission, XXXXXX owns the Premises which is currently improved with a two-story commercial building. The second floor of the building is currently leased to XXX. XXX is a not-for-profit educational corporation with a 501 (c)(3) tax exemption. XXXXXX is currently in negotiations with XXX to enter into a long-term lease (the “XXX Leasehold Premises”). The term of lease will be for at least thirty (30) years and cover the majority of the first floor and the entire second floor, thereby comprising approximately ninety-five (95%) percent of the floor area of the Premises. Per the representation you indicated that XXX will also have a leasehold interest in 95% of the land for the term of the lease. XXXXXX contends that XXX will continue to utilize the XXX Leasehold Premises for educational purposes and that XXX will not accrue any pecuniary income from its usage. The lease will also provide that XXX will be responsible for the maintenance of the XXX Leasehold Premises and be obligated to pay any real estate taxes attributable to the Premises.

Contemporaneously, with the executing of the long term lease with XXX, XXXXXX will execute a long term lease with a wholly owned subsidiary (the “XXXXXX Subsidiary”) for the remainder of the first floor of the Premises, as well as the land, that is not part of the XXX Leasehold Premises (the “XXXXXX Leasehold Premises”). The long term lease

with the XXXXXX Subsidiary shall have a term of at least thirty (30) years and shall provide that the XXXXXX Subsidiary will be responsible for the maintenance of the XXXXXX Leasehold Premises and be responsible to pay any real estate taxes which are attributable to the XXXXXX Leasehold Premises.

Upon the execution of the long-term leases for the XXX Leasehold Premises and the XXXXXX Leasehold Premises, XXX and the XXXXXX subsidiary will form a leasehold condominium. The leasehold condominium will be comprised of two (2) leasehold condominium units consisting of the XXX Leasehold Premises (the “XXX Unit”) and the XXXXXX Leasehold Premises (the “XXXXXX Unit”). The condominium declaration establishing the leasehold condominium will require that each respective unit owner pay any and all real estate taxes that are assessed against their respective units.

After the condominium declaration is approved and recorded, title to the XXX Unit shall vest in XXX and/or for liability purposes legal title may be conveyed to a wholly owned subsidiary of XXX (the “XXX Subsidiary”) which will be organized and conducted for educational purposes and will also qualify as a tax-exempt entity pursuant to Section 501(c)(3) of the Internal Revenue Code (the “Code”). Title to the XXXXXX Unit shall vest in the XXXXXX Subsidiary.

If formed the XXX Subsidiary will then lease back the XXX Unit to XXX and the rent paid by XXX to the XXX Subsidiary for the XXX Unit will not exceed the XXX Subsidiary’s maintenance costs, carrying cost and/or depreciation charges for the XXX Unit.

ISSUES:

May a real property tax exemption pursuant to § 420-a of the RPTL be granted to real property owned by XXX that is in the form of a leasehold condominium unit, where the condominium declaration requires the unit owner to pay all taxes attributable to its unit?

May a real property tax exemption pursuant to § 420-a of the RPTL be granted to real property owned by the XXX Subsidiary, that is in the form of a leasehold condominium unit, and where the XXX subsidiary will lease back the XXX Unit to XXX and the rent paid by XXX to the XXX subsidiary will not exceed the XXX Subsidiary’s maintenance costs, carrying costs and/or depreciation charges for the XXX Unit?

May a real property tax exemption pursuant to § 420-a of the RPTL be granted to real property owned by XXX and/or the XXX Subsidiary, that is in the form of a leasehold condominium unit, where a for profit subsidiary of the sponsor owns the other unit in the condominium?

CONCLUSION:

Real property owned by XXX in the form of a leasehold condominium unit including the leasehold of the land will be eligible for an exemption pursuant to § 420-a of the RPTL.

Real property owned by the XXX Subsidiary, in the form of a leasehold condominium unit including the leasehold of the land, and where the XXX subsidiary will lease back the XXX Unit to XXX and the rent paid by XXX to the XXX subsidiary will not exceed the XXX Subsidiary's maintenance costs, carrying costs and/or depreciation charges for the XXX Unit, will be eligible for an exemption pursuant to § 420-a of the RPTL.

Each unit together with its common interest in the leasehold is a single tax parcel and therefore real property owned by XXX and/or the XXX Subsidiary, in the form of a leasehold condominium unit including the leasehold of the land will be eligible for an exemption pursuant to § 420-a of the RPTL.

LAW:

RPTL § 420-a provides a tax exemption for mandatory classes of nonprofit organizations in pertinent part as follows:

[r]eal property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

Article 9B of the Real Property Law ("RPL") the "Condominium Act" governs the creation, characteristics and management of condominiums. Specifically § 339-e, of the RPL provides the following relevant definitions:

Subdivision 3. "Common elements" unless otherwise provided in the declaration, mean and include: (a) the land on which the building is located ...and (h) all other parts of the property necessary or convenient to the existence, maintenance and safety or normally in common use...

Subdivision 5. "Common interest" means the (i) proportionate, undivided interest in fee simple absolute, or (ii) proportionate undivided leasehold interest in the common elements appertaining to each unit, as expresses in the declaration...

Subdivision 7. "Declaration" means the instrument by which property is submitted to the provisions of this article, as hereinafter provided...

Subdivision 11. "Property" means and includes the land, the buildings and all other improvements thereon, (i) owned in fee simple absolute, or (ii) in the case of a condominium devoted exclusively to non-residential purposes, held under a lease or sublease, or separate unit leases or subleases, the unexpired term of which on the date of the recording of the declaration shall not be less than thirty years...

Subdivision 14. "Unit" means a part of the property intended for any type of use or uses, and with an exit to a public street or highway or to a common element or elements leading to a public street or highway...

Subdivision 16. "Unit owner" means the person or person owning a unit in fee simple absolute or in the case either (i) of a condominium devoted exclusively to non-residential purposes, or (ii) a qualified leasehold condominium, owing a unit held under a lease or sublease.

RPL § 339-f (1) provides that the Act "shall be applicable only to property the sole owner or all the owners of which submit the same to the provisions hereof by duly executing and recording a declaration..."

RPL § 339-g provides that "each unit, together with its common interest, shall for all purposes constitute real property."

Finally, RPL § 339-y (1) (a) which governs taxation of condominiums, provides in pertinent part that:

With respect to all property submitted to the provision of this article...each unit and its common interest...shall be deemed to be a parcel and shall be subject to separate assessment and taxation by each assessing unit... except that the foregoing shall not apply to a unit held under lease or sublease unless the declaration requires that the unit owner to pay all taxes attributable to his unit.

ANALYSIS:

XXXXXX proposes to enter into a thirty (30) plus years lease with XXX. According to the submission, XXX a not-for-profit corporation organized or conducted for educational purposes will lease the XXX Leasehold Premises, XXX will then use the XXX Leasehold Premises to carry out its stated educational purpose. Contemporaneously XXXXXX proposes to enter into a thirty (30) plus year lease with the XXXXXX Subsidiary for the XXXXXX Subsidiary Leasehold Premises.

XXX and the XXXXXX Subsidiary will form a leasehold condominium. The leasehold condominium will be comprised of two (2) leasehold condominium units consisting of the

XXX Unit and the XXXXXX Unit. The condominium declaration establishing the leasehold condominium will require that each respective unit owner pay any and all real estate taxes that are assessed against their respective units.

As RPTL §420-a specifically requires ownership of real property by a corporation or association organized for exempt purposes, the initial issue is whether XXX's ownership of a condominium unit in the form of a leasehold condominium, constitutes ownership of real property for purposes of the statute.

In 1964 New York legalized condominium ownership of property by enacting the Condominium Act (the "Act"). A "condominium" has been defined as a system of separate ownership of individual units in a multi-unit project. See, Susskind v. 1136 Tenant Corp., 251 N.Y.S. 2d 321 (N.Y.C. Civ. Ct 1964); see also Murphy v. State of New York 787 N.Y.S. 2d 120 (2d Dept. 2004), where the court said that "[i]t is now settled that the condominium form of ownership is manifested as a division of a single parcel of real property into individual units and common elements in which an owner holds title in fee to his individual unit as well as an undivided interest in the common elements of the parcel." Under the Act a unit owner is the person or person owning a unit in fee absolute or in the case... (i) of a condominium devoted exclusively to non-residential purposes..., owning a unit under a lease or sublease RPL § 339-e (16).

Accordingly, per the Act, XXX will have an ownership interest in the XXX leasehold condominium unit created from its 30 plus year leasehold. The leasehold condominium ownership interest for the XXX Unit will include title to the unit and the unit's respective common interest, including an undivided percentage interest in the common elements, which includes the underlying leasehold of the land. Moreover, since RPL § 339-g provides that each unit, together with its common interest, constitutes real property, it follows that the underlying leasehold of the land constitute real property for purposes of RPTL § 420-a. Consequently, once the contemplated declaration is filed by XXX, XXX will be deemed to be the owner of its unit for the term of the lease, and also have a leasehold interest in the land.

After the condominium declaration is approved and recorded, title to the XXX Unit shall vest in XXX. However, we have been advised that for liability purposes legal title may be conveyed to the XXX Subsidiary, and if formed the XXX Subsidiary will then lease back the XXX Unit to XXX and the rent paid by XXX to the XXX Subsidiary for the XXX Unit will not exceed the XXX Subsidiary's maintenance costs, carrying costs and/or depreciation charges for the XXX Unit. We have been further advised that the XXX subsidiary will be organized and conducted for educational purposes and will also qualify as a tax-exempt entity pursuant to Section 501(c)(3) of the Code.

Assuming ownership of the XXX Unit by the XXX Subsidiary, the issue is whether property owned by the XXX Subsidiary will qualify for a RPTL 420-a exemption. Where a separate not-for-profit "operates solely to carry out a purpose of the exempt corporation" and the property is used exclusively to benefit a separate exempt organization, the courts

have held that property may be exempt under §420-a even though title is held by a related not-for-profit organization, St. Joseph Health Center Properties v. Srogi, 51 N.Y. 2d 127, 432 N.Y.S.2d 865 (1980); In the Matter of Canton Human Services Initiatives, Inc. v. Town of Canton, 4 Misc. 3d 413, 780 N.Y.S. 2d 714 (2004). The courts have also disallowed an exemption for an affiliated entity that was not itself organized or conducted exclusively for charitable purposes and the activities carried on by the affiliated entity were statutorily denied to the charitable entity. See, In the Matter of Youth Bldg. Corp. v. Board of Assessors of the County of Nassau, 56 N.Y. 2d 765, 352 N.Y.S. 2d 18 (1982); In the Matter of J-Cap Foundation, Inc. v. Finance Administration of the City of New York 481 N.Y.S 2d 109 (2 Dept. 1984). However, in view of the fact that the XXX subsidiary will be organized and conducted for education purposes and will also qualify as a tax-exempt entity pursuant to Section 501(c)(3) of the Code, these cases are distinguishable and therefore the property owned by the XXX subsidiary will be exempt pursuant to RPTL § 420-a.

In addition, the Court of Appeals has ruled that realty rented by one not-for-profit to another not-for-profit may retain its exempt status, so long as the rental does not produce a profit. See, Sisters of St. Joseph v. City of New York, 49 N.Y.2d 429, 426 N.Y.S. 2d 444 (1980). Consequently, since rent paid by XXX to the XXX subsidiary will not exceed the XXX Subsidiary's carrying, maintenance and depreciation charges for the XXX Unit the XXX Subsidiary will be allowed to retain its exempt status pursuant to RPTL § 420-a.

With regard to separate taxation, each of the respective leases provides that the unit owner will be required to pay the taxes assessed on its unit. Pursuant to RPL § 339-y (1) (a) each unit and its common interest is deemed to be a tax parcel. Accordingly, the tax parcel, which is subject to assessment, will consist of the unit and its common interest including the leasehold of the land. As a result, the Department of Finance will assess each unit together with its common interest in the leasehold as a single tax parcel. Hence, XXX and or the XXX Subsidiary as the owner of the XXX Unit in the two unit condominium will be assessed the full value of its unit, which will include the unit's pro rata share of all of the common elements, of the two unit condominium, one of which is the land.

RPTL §420-a provides an exemption for real property owned by a corporation or association organized or conducted for an exempt purpose provided the property is used to carry out such exempt purpose. Consequently, a not-for-profit that does not own the property but is merely a lessee pursuant to a long-term lease is not eligible for an exemption. However, we have determined that XXX and or the XXX Subsidiary as the owner of a leasehold condominium unit with a term of 30 plus years or more is eligible for exemption from taxation pursuant to RPTL §420-a.

To receive its exemption XXX will be required to file an application with the Exemption Unit. If the documents and facts presented at the time of the application are consistent with the representations made to Legal Affairs for the purposes of this letter ruling, the tax parcel consisting of the XXX unit and its respective common interests should be granted an exemption pursuant to RPTL § 420-a.

Notwithstanding the analysis and conclusions discussed above, the Department of Finance reserves the right to review the information submitted.

Sincerely,

Diana Beinart
Deputy Commissioner
Legal Affairs Division