



Department of Finance

Legal Affairs Division
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January 22, 2025

**RE: Request for Ruling
Real Property Transfer Tax
FLR 24-5033**

Dear Mr. :

This letter ruling is in response to your request dated August 14, 2024 regarding the application of the New York City Real Property Transfer Tax ("RPTT") to the sale of (the "Property") from ("LLC") to (the "Purchaser"). DOF received additional information regarding this application on October 4, 2024. For the reasons stated below, we find the sale to be subject to the RPTT.

FACTS

Based on representations you have made, the Department of Finance (the "Department") understands the facts to be as follows:

The LLC, which was the title holder of the Property prior to the sale, is wholly owned by (the "College"). The College was granted 501(c)(3) status in . The College was incorporated by the New York Board of Regents on , for the purpose of establishing and maintaining an institution of higher education at the collegiate level. The College's charter was amended several times after its incorporation, with one of the amendments relating to the relocation of its campus from to New York City in .

On , the College purchased the Property for the purpose of housing its students and supervising housing staff. As a result of the COVID pandemic, the College began to experience financial difficulties requiring it to obtain a loan secured by the Property in . Those financial difficulties continued, requiring the College to refinance its loan in 2022 with a bridge loan of \$10,000,000. In order to refinance the original loan, the new lender (the "Lender")

required the College to transfer the Property to a limited liability company that would be a bankruptcy remote entity with the College as the sole member.

On 2022, the College formed the LLC as a single purpose entity to own the Property. The College formed the LLC as a disregarded entity that shared the same Employer Identification Number as the College. In addition, as a condition of the loan, the Lender required that the College draft the operating agreement for the LLC (the "Operating Agreement") in a manner to protect the Lender from the LLC being taken into bankruptcy in the event of financial difficulty. As such, the Lender demanded that the College appoint a director independent from the College to the LLC board of directors. The three other members of this board were employees of the College. The LLC did not have employees at any time.

Accordingly, the Operating Agreement contains certain provisions that are designed to protect the Lender. Section 2.01(o) of the Operating Agreement required at least one independent director with no ownership interest in the LLC or the Property and no other affiliation with the LLC. This section of the Operating Agreement provides that the independent director could not be replaced without cause and without at least three business days' prior notice to the Lender. Such notice must include a statement as to the reasons for such removal and the identity of the proposed replacement independent director, as applicable, with a certification that such replacement satisfies the requirements for an independent director. Section 2.01(p) of the Operating Agreement provides that the LLC expressly acknowledges that the Lender is an intended third-party beneficiary of these provisions. Furthermore, Section 2.01(q) of the Operating Agreement provides that, without the unanimous consent of the board of directors, including the independent director, the LLC could not file for bankruptcy, liquidate, or take any action that might cause it to become insolvent, admit to an inability to pay debts generally as they became due, or make an assignment for the benefit of creditors. Furthermore, under this Section 2.01(q), the independent director while owing a duty to the LLC, does not owe any fiduciary duty to, and shall not consider the interests of, the members, the other affiliates of the LLC or any group of affiliates of which the LLC is a part, provided this provision did not supersede the implied contractual covenant of good faith and fair dealing.

On 2022, the College transferred the Property to the LLC without any consideration, filing a Form TP-584-NYC claiming an exemption from the RPTT as a mere change of identity, in reliance on New York City Administrative Code (the "Code") section 11-2106(b)(8), which provides such an exemption in certain circumstances.

The College filed Internal Revenue Service Form 990 tax return declaring that the LLC was a disregarded entity and was included as a part of the College's financials. Schedule R of Form 990 indicates that the College was the direct controlling entity of the LLC, which was a disregarded entity.

You have represented that the LLC was treated as a disregarded entity and part of the financial structure of the College with all expenses paid by the College and all revenues paid directly to the College. In addition, the College continued to depreciate the Property for the purposes of

its tax filings. The College's employees at all times operated and managed the Property as though the College owned the Property solely for the benefit of the College.

In 2023, the LLC entered into a contract of sale to sell the Property. In 2023, the College, as the sole member of the LLC submitted a proposed Petition to the Attorney General of the State of New York ("Attorney General") seeking the approval to sell the Premises in accordance with Not For Profit Corporation Law section 511-a(a), which authorizes the Attorney General's Office to render such an approval. The Attorney General, ultimately required the College to file the Petition with the New York State Supreme Court pursuant to Not For Profit Corporation Law section 511-a. The Attorney General required the College to seek both *nunc pro tunc* approval of the earlier transfer from the College to the LLC in 2022 and approval to sell the Property to the Purchaser, a newly formed entity. The Attorney General's took the position that the sale of the Property required Court approval because the LLC was still wholly owned by the College, which as noted above, is a not-for-profit. On 2024, the Court, pursuant to Not For Profit Corporation Law sections 510 and 511, approved the transfer of the Property to the LLC *nunc pro tunc* and the sale of the Property by the LLC to the Purchaser, subject to a hearing of the creditors. *See Matter of* . Following a hearing of the creditors, the Court approved the sale of the Property for \$ on 2024. *Matter of* . The Lender received repayment on the bridge loan through the proceeds of the sale of the Property in the amount of \$. You assert that the only tax that the court ordered to be paid was the New York State transfer tax of \$. *But see id.* at 2 ("[T]he closing costs for the transaction that are permitted to be paid from the proceeds of the sale [include] . . . approximately \$ in real estate property tax due and owing as of April 2024 or such lesser amount that results from the pending appeal[.]"). The title company for the transaction took the position that it could not guarantee that the LLC was exempt from the RPTT. The Purchaser refused to close the transaction without the LLC paying the \$ in RPTT and requesting a letter ruling that it was entitled to a refund of this tax.

ISSUE

Whether the transfer of the Property to the Purchaser is exempt from the RPTT under New York City Administrative Code (the "Code") section 11-2106(b)(2) as a conveyance from a corporation organized and operated exclusively for educational purposes.

CONCLUSION

While the transaction from the College to the LLC is exempt from the RPTT, based on Code §11-2106(b)(2), the LLC's conveyance of the Property to the Purchaser is subject to the RPTT.

DISCUSSION

Except to the extent an exemption applies, the RPTT applies to each deed conveying an interest in New York City real property and to each instrument or transaction whereby any economic interest in real property is transferred when the consideration for the real property or economic interest exceeds \$25,000. Code Section 11-2102(a), (b), 11-2106.

Code section 11-2106(b)(2) provides that the RPTT:

shall not apply to . . . [a] deed, instrument or transaction conveying or transferring real property or an economic interest therein by or to any corporation, or association, or trust, or community chest, fund or foundation, organized or 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 . . .

Because of the substantial similarity between Code section 11-2106(b)(2) and United States Internal Revenue Code (“IRC”) section 501(c)(3), which exempts certain religious, charitable, and educational organizations from federal income tax, DOF has long taken the position that an organization exempt from tax under IRC section 501(c)(3) will be considered exempt from RPTT under Code section 11-2106(b)(2). *See, e.g.*, FLR 15-4974 (May 23, 2016) (the “2016 Ruling”); FLR 05-4840-021 (Nov. 10, 2005); FLR 044828-021 (Feb. 22, 2005). Because the College is such an exempt organization for federal income tax purposes, if the College were to directly sell the Property to the Purchaser, there would be no question that the sale would be exempt from the RPTT. However, you have inquired regarding the question of whether Code section 11-2106(b)(2) will apply to the transaction between the LLC and the Purchaser.

In submitting this ruling request, you contend that the facts of this case are directly on point and analogous to the facts described in the 2016 Ruling. The Department does not agree. The relevant facts of the 2016 Ruling were as follows: The applicant was an education corporation chartered by the New York State Education Department that owned certain property through a limited liability company (“2016 Ruling LLC”). Under the operating agreement at issue in the 2016 Ruling LLC, the individual members of the 2016 Ruling LLC held such membership as nominees of the applicant and were required to act with respect to their membership as the applicant directed. Absent a court order, the 2016 Ruling LLC’s members were prohibited from transferring their membership interest to any person other than the applicant. The Department of Finance, upon reviewing the facts, determined that 2016 Ruling LLC’s sole purpose was to own and hold the property for the applicant, the 2016 Ruling LLC’s members were required to act as the applicant directed, and the applicant had complete ownership and control over the 2016 Ruling LLC. The Department determined that the 2016 Ruling LLC had no

purpose other than to own and hold the property for the benefit of the applicant and engaged in no other activity. Under these facts and circumstances, the Department found that the transfer of the property by the 2016 Ruling LLC to a developer was exempt from the RPTT under Code section 11-2106(b)(2).

The 2016 Ruling was explicitly not intended to apply broadly. Indeed, the 2016 Ruling states that it is in derogation of the general rule that “[t]he transfer of real property by or to an entity that is legally separate from . . . [a charitable] organization . . . would, ordinarily, not be exempt from RPTT.”

The facts in this case are distinguishable from those in the 2016 Ruling. As noted above, the applicant’s complete control of the 2016 Ruling LLC and the purposes of the 2016 Ruling LLC were central to the basis of the 2016 Ruling’s conclusion. In contrast, under the facts presented, the College does not have complete control over the LLC, and its purposes are not exclusively to benefit the College. Rather, the Lender is an intended third-party beneficiary of the Operating Agreement. The Lender insisted on at least one independent director who could not be replaced without cause and without at least three business days’ prior notice. The independent director was required to consider only the interests of the LLC, including its creditors. The independent director owed no fiduciary duty to and, in taking actions such as voting, was prohibited from considering the interests of members, other affiliates of the LLC or any group of affiliates. These terms comport with the economic reality of the situation, as the Lender had provided the College with a bridge loan in an amount roughly equal to two-thirds of the ultimate sales price of the Property and required that the structure of the LLC protect its interests. Based on these facts, the conveyance of the Property to the Purchaser by the LLC would not be exempt from the RPTT.

Ultimately, the transaction is subject to taxation based on the deal structure that the College, the LLC, and the Purchaser selected. “It is true that the tax authorities often urge the courts to disregard form and to look to the substance and the courts have responded to that argument by holding that, if the transaction in substance is one which comes within the statute, it is taxable, notwithstanding its form. But this does not necessarily work the other way. If a transaction comes within the form which the statute has made taxable, it is no answer to say that it is indistinguishable in substance from a transaction in a different form which could have accomplished the same result in a non-taxable manner.” *Sverdlow v. Bates*, 283 A.D. 487 (3rd Dep’t 1954); *see also 107 Delaware Assocs. v. New York State Tax Comm’n*, 64 N.Y.2d 935 (1985) (reversing for the reasons stated in 99 A.D.2d 29, 33-34 (3rd Dep’t 1984) (Casey, J. dissenting)); *Ormsby Haulers, Inc. v. Tully*, 72 A.D.2d 845, 846 (3rd Dep’t 1979).

Therefore, it is the opinion of the Department that, based on the facts provided, the transaction between the LLC and the Purchaser is subject to the RPTT.

Sincerely,

Michael Smilowitz
General Counsel