

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

TSB-A-08(2)R
Real Estate Transfer Tax
April 28, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M071001A

On October 1, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ahli United Bank (UK) PLC, F/K/A United Bank of Kuwait PLC, 35 Portman Square, London W1H 6LR, United Kingdom.

The issue raised by Petitioner, Ahli United Bank (UK) PLC, is whether real estate transfer tax is imposed on the transfer of a deed by Petitioner to its client in the arrangement described below.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner operated a federal branch in New York County until 2000. Petitioner offered specialized financing for the purchase of real property to meet the needs of certain clients. A client enters into a contract of sale with the seller of real property and makes a down payment. The client engages Petitioner to finance the remainder of the purchase price. At the request of the client, Petitioner pays the seller, the seller executes a deed to Petitioner, Petitioner leases the property to the client, and the client enters into an agreement with Petitioner to purchase the property for the remaining principal by the end of the lease term. The monthly lease payment is equivalent to a principal and interest payment in a conventional mortgage loan. The client can prepay the principal at any time and terminate the lease. The agreement to purchase states that it is intended to operate as a mortgage in the state of New York and have the same effect as a mortgage instrument pursuant to Real Property Law § 320.

A Memorandum of Lease (Lease) and a Memorandum of Agreement to Purchase both providing that they are intended to operate as a mortgage, are recorded with the County Register, and mortgage recording tax is paid. All of the required recording fees and the appropriate amounts of New York State Real Estate Transfer Tax and New York City Real Property Transfer Tax are paid upon recording the deed from the seller to Petitioner. After these documents are executed at a closing, the client takes sole possession of the property. The client is required to repair and maintain the property under the Lease. The client also funds tax payments through an escrow account provided by Petitioner. Petitioner has the traditional rights and obligations of a mortgagee. If the client fails to pay rent, remedies under the Lease or Agreement to Purchase are the traditional remedies under a mortgage securing home financing. At the end of the Lease or when the principal is repaid, whichever occurs first, Petitioner executes a deed to the client.

Petitioner requested regulatory approval from the Office of the Comptroller of the Currency, a bureau of the U.S. Department of the Treasury, in regard to the specialized financing arrangement described above. In response to Petitioner's request, Interpretive Letter #806 was issued by District Counsel for the Comptroller of the Currency. Letter #806 advised Petitioner that these transactions could be offered at Petitioner's federal branch, providing in part:

The Branch does not, and will not, actually hold real estate. It will not operate the property, pay taxes, insurance and other charges, maintain upkeep of the premises, make repairs when necessary, assume liability for injuries or other accidents on the property, or otherwise exercise dominion and control over the property. The Lessee, and not the Branch, will bear these responsibilities. Although the Branch will have legal title to the property, it will not take actual possession of the property at any point during the lease term. The Branch will only take possession of the property if the Lessee defaults or upon termination of the lease. If the Branch does take possession of the property, it will take the property as [Other Real Estate Owned] within the meaning of 12 U.S.C. § 29. Thus, despite the cosmetic appearance of the Branch holding real estate, the substance of the transaction shows that the Branch and the Lessee will have an arms-length, mortgagor-mortgagee relationship.

Applicable law and regulations

Section 1402(a) of Article 31 of the Tax Law imposes a 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(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 the Tax Law provides, in part:

The tax shall not apply to the following conveyances:

* * *

2. Conveyances which are or were used to secure a debt or other obligation;

Section 575.11(a) of the Real Estate Transfer Tax Regulations provides, in part:

The following are examples of conveyances which are subject to the real estate transfer tax.

* * *

(13) A conveyance of real property to an industrial development agency (IDA) by a person who is not the beneficiary of the IDA financing, at the direction of such beneficiary, with such beneficiary subsequently leasing the property from the IDA, is subject to tax. In such a conveyance, the beneficiary of the IDA financing and not the IDA is deemed to be the grantee, . . .

Opinion

Petitioner offers specialized financing for the purchase of real property. Section 575.11(a)(13) of the Real Estate Transfer Tax Regulations provides that a conveyance by a third party to an IDA, at the direction of the beneficiary of the IDA financing, where the property is subsequently leased by the IDA to such beneficiary, is subject to real estate transfer tax as a conveyance from the third party, as grantor, to such beneficiary, as grantee. The circumstances described in the present case are analogous to those described in section 575.11(a)(13). Petitioner, as discussed below, is providing financing to a client. The seller, at the direction of the client, conveys the real property to Petitioner, who subsequently leases the property to the client. In the present case, therefore, the seller is considered to convey the real property to Petitioner's client for purposes of the real estate transfer tax. The real estate transfer tax was due and paid when the deed to the property was conveyed to Petitioner.

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Pursuant to section 1401(e) of the Tax Law a transaction in satisfaction of a mortgage is not a conveyance for purposes of the real estate transfer tax imposed by section 1402(a) of the Tax Law. Further, pursuant to section 1405(b)(2) of the Tax Law, conveyances that are or were used to secure a debt are exempt from the real estate transfer tax. The agreements between Petitioner, the client, and the seller make it clear that when the client directed the seller to deed the property to Petitioner, the client did not intend to relinquish its control of the property and would continue to enjoy the benefits and responsibilities of ownership. The monthly lease payment by the client to Petitioner is equivalent to a principal and interest payment in a conventional mortgage loan. At the end of the lease or when the principal is repaid, whichever occurs first, Petitioner executes a deed to the client. In such case the conveyance of the fee interest at the end of the lease by Petitioner to the client represents the satisfaction of the instrument securing the debt or obligation. The conveyance of fee title by the seller to Petitioner pursuant to the client's purchase contract, the creation of the lease, and the conveyance of fee title by Petitioner to the client upon expiration or termination of the lease is a single transaction in furtherance of the purpose of financing the conveyance of the property from the seller to Petitioner's client. The real estate transfer tax due was paid on the conveyance by the seller to Petitioner. However, there is no real estate transfer tax due on the creation of the lease and the conveyance of the fee title by Petitioner to the client upon expiration or termination of the lease as these transactions are entered into solely to effect and secure Petitioner's financing of the client's acquisition of the real property. See sections 1401(e) and 1405(b)(2) of the Tax Law; *HSBC Mortgage Corporation (USA)*, Adv Op T&F, July 26, 2002, TSB-A-02(4)R; *360 Brooklyn Investors, LLC*, Adv Op T&F, April 30, 2007, TSB-A-06(3.1)R; *Matter of Atlantic Cement Company, Inc. v Murphy*, 30 AD2d 456 (1968), affd 28 NY2d 502 (1971).

DATED: April 28, 2008

/s/
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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.