

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

TSB-A-08(4)R
Real Estate Transfer Tax
July 29, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M071219A

On December 19, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Joan Meyler, Esq., 10 Clinton Street, Dc11, Brooklyn, NY 11201. Petitioner, Joan Meyler, Esq., provided additional information pertaining to the Petition on March 10, 2008.

The issue raised by Petitioner is whether the transactions described below are subject to the real estate transfer tax imposed by Article 31 of the Tax Law.

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

Cadman Towers, Inc. (Cadman Towers) is currently the owner of certain real property located in New York City (the Property). Cadman Towers was organized under Article II of the Private Housing Finance Law (PHFL) to operate the property under the supervision of the New York City Department of Housing Preservation and Development (HPD) as a not-for-profit residential cooperative apartment building for persons who meet HPD's income eligibility requirements. Cadman Towers currently has 16,000 issued and outstanding shares. There are 421 residential units and several commercial spaces in the Property.

Having been formed under the PHFL, Cadman Towers is subject to the Mitchell-Lama Program rules and regulations that prevent shareholders of Cadman Towers from realizing the market value of their interest in Cadman Towers upon the sale of their interest. Cadman Towers is also provided certain advantageous tax and financing benefits.

The Mitchell-Lama Program allows withdrawal from the program through the voluntary dissolution of the limited-profit housing company. In conjunction with a dissolution of the limited-profit housing company, title to the property may then be conveyed to the owner of the limited-profit housing company's capital stock or to a corporation designated for that purpose, or the limited-profit housing company may be reconstituted pursuant to the appropriate laws relating to the formation and conduct of corporations.

Upon withdrawal from the Mitchell-Lama Program, the existing mortgages encumbering the land and building are required to be satisfied. Additionally, upon withdrawal, all surplus funds remaining in the treasury of Cadman Towers prior to the voluntary dissolution must be surrendered to New York City.

A Voluntary Dissolution and Reconstitution Plan (the Plan) to convert Cadman Towers to private cooperative ownership has been drafted. Under the Plan, Cadman Towers, as the sponsor

of the Plan, will organize Cadman Towers Owners Corp. (Cadman Towers Owners) as its wholly owned subsidiary pursuant to the New York State Business Corporation Law (BCL).

Cadman Towers will be dissolved in accordance with the provisions of the PHFL. Upon dissolution, Cadman Towers will reconstitute itself as a BCL corporation by merging into Cadman Towers Owners. The reconstituted corporation will be operated on a for-profit basis, will cease to be governed by the PHFL, and will have all the powers and authority of a BCL corporation.

Cadman Towers Owners will have 101,038 shares issued and outstanding. Each issued share of Cadman Towers will become, on an average, 6.2482 shares of Cadman Towers Owners varying for each apartment with a low of one share of Cadman Towers becoming 3.8875 shares of Cadman Towers Owners and a high of one share of Cadman Towers becoming 7.4848 shares of Cadman Towers Owners, in order to meet the "reasonable relationship" test in section 216 of the Internal Revenue Code. In addition, Cadman Towers shareholders' current leases for their apartments will be exchanged for proprietary leases for their apartments appurtenant to their shares of Cadman Towers Owners.

The dissolution of Cadman Towers and reconstitution as Cadman Towers Owners will allow shareholders of Cadman Towers Owners to sell the shares appurtenant to their apartments at market prices. The shareholders will no longer be limited to selling their shares only to a specified list of purchasers for equity paid plus amortization.

Control of the corporation while it is a PHFL corporation is exercised under the supervision and direction of HPD. When Cadman Towers reconstitutes to become Cadman Towers Owners organized under the BCL, the control exercised by HPD will cease, waiting lists of income-eligible applicants will be eliminated, HPD supervision of who can live in the building and of maintenance charges and assessments will end, and complete control over these matters will be transferred to Cadman Towers Owners.

Applicable law and regulations

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

(a) In addition to the tax imposed by section fourteen hundred two of this article, a tax is hereby imposed on each conveyance of residential real property or

interest therein when the consideration for the entire conveyance is one million dollars or more. For purposes of this section, residential real property shall include any premises that is or may be used in whole or in part as a personal residence, and shall include a one, two, or three-family house, an individual condominium unit, or a cooperative apartment unit. The rate of such tax shall be one percent of the consideration or part thereof attributable to the residential real property. . . .

* * *

(c) Except as otherwise provided in this section, all the provisions of this article relating to or applicable to the administration, collection, determination and distribution of the tax imposed by section fourteen hundred two of this article shall apply to the tax imposed under the authority of this section with such modifications as may be necessary to adapt such language to the tax so authorized. Such provisions shall apply with the same force and effect as if those provisions had been set forth in this section except to the extent that any provision is either inconsistent with a provision of this section or not relevant to the tax authorized by this section.

Section 1401(d) of Article 31 of the Tax Law provides, in part:

“Consideration” means the price actually paid or required to be paid for the real property or interest therein, including payment for an option or contract to purchase real property, whether or not expressed in the deed and whether paid or required to be paid by money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to.

* * *

(v) In the case of (i) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative corporation or cooperative plan sponsor and . . . consideration shall include a proportionate share of the unpaid principal of any mortgage on the real property of the cooperative housing corporation comprising the cooperative dwelling or dwellings. Such share shall be determined by multiplying the total unpaid principal of the mortgage by a fraction, the numerator of which shall be the number of shares of stock being conveyed in the cooperative housing corporation in connection with the grant or

transfer of a proprietary leasehold and the denominator of which shall be the total number of shares of stock in the cooperative housing corporation.

Section 1405(b) of the Tax Law provides, in part:

The tax shall not apply to the following conveyances:

* * *

6. Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership, other than conveyances to a cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings;

Section 1405-B(a) of the Tax Law provides, in part:

Notwithstanding the definition of "controlling interest" contained in subdivision (b) of section fourteen hundred one of this article or anything to the contrary contained in subdivision (e) of section fourteen hundred one of this article, the tax imposed by this article shall apply to (1) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative corporation or cooperative plan sponsor, and (2) the subsequent conveyance of such stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the owner thereof. . . . In determining the tax on a conveyance described in paragraph one of this subdivision, a credit shall be allowed for a proportionate part of the amount of any tax paid upon the conveyance to the cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings to the extent that such conveyance effectuated a mere change of identity or form of ownership of such property and not a change in the beneficial ownership of such property. The amount of the credit shall be determined by multiplying the amount of tax paid upon the conveyance to the cooperative housing corporation by a percentage representing the extent to which such conveyance effectuated a mere change of identity or form of ownership and not a change in the beneficial ownership of such property, and then multiplying the resulting product by a fraction, the numerator of which shall be the number of shares of stock conveyed in a transaction described in paragraph one of this subdivision and the denominator of which shall be the total number of shares of stock of the cooperative housing corporation (including any stock held by the corporation). In no event, however, shall such credit reduce the tax, on a conveyance described in paragraph one of this subdivision, below zero, nor shall any such credit be allowed for a tax paid more than twenty-four months prior to the date on which occurs the first in a

series of conveyances of shares of stock in an offering of cooperative housing corporation shares described in paragraph one of this subdivision.

Section 575.8 of the Real Estate Transfer Tax Regulations provides, in part:

(a) Notwithstanding the definition of controlling interest contained in section 575.1(b) of this Part or anything to the contrary contained in section 575.1(e)(1) of this Part, the real estate transfer tax applies to:

(1) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative housing corporation or cooperative plan sponsor; and

(2) the subsequent conveyance of such stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the owner thereof.

* * *

(c) Credit for tax previously paid.

(1) In the case of conveyances described in paragraph (a)(1) of this section, a credit shall be allowed for a proportionate part of the amount of any tax paid upon the conveyance to the cooperative housing corporation of the real property comprising the cooperative dwelling or dwellings to the extent that such conveyance effectuated a mere change of identity of form of ownership of such property and not a change in the beneficial ownership of such property.

(2) The amount of the credit is determined by multiplying the amount of tax paid upon the conveyance to the cooperative housing corporation by a percentage representing the extent to which such conveyance effectuated a mere change of identity or form of ownership and not a change in the beneficial ownership of such property, and then multiplying the result by a fraction, the numerator of which is the number of shares of stock conveyed in a transaction described in paragraph (a)(1) of this section and the denominator of which is the total number of shares of stock of the cooperative housing corporation (including any stock held by the corporation).

(3) The credit will not reduce the tax below zero. The credit will not be allowed for a tax paid more than 24 months prior to the date on which occurs the first in a series of conveyances of shares of stock in an offering of cooperative housing corporation shares as described in paragraph (a)(1) of this section.

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.

* * *

(12) A conveyance by a sponsor to a cooperative housing corporation is subject to tax. (Consideration in such case includes the amount of cash received by the sponsor, the amount of any mortgages, liens or encumbrances on the real property and the fair market value of the shares in the cooperative housing corporation which are transferred to the sponsor.)

Section 35 of Article II of the New York State Private Housing Finance Law provides, in part:

Voluntary dissolution. 1. A company aided by a loan made prior to May first, nineteen hundred fifty-nine, may voluntarily be dissolved, with the consent of the commissioner or of the supervising agency, as the case may be, not less than thirty-five years after the occupancy date upon the payment in full of the remaining balance of principal and interest due and unpaid upon the mortgage held by the state or a municipality pursuant to this article and payment to the municipality of a sum equal to the total of all accrued taxes for which tax exemption was granted and received pursuant to section thirty-three of this article, provided however that such payment of accrued taxes shall be waived if a company is voluntarily dissolved subsequent to the original maturity date of any mortgage held by the state or a municipality pursuant to this article.

* * *

3. Upon such dissolution, title to the project may be conveyed in fee to the owner or owners of its capital stock or to any corporation designated by it or them for the purpose, or the company may be reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations, provided, however, that prior to any such dissolution and conveyance or reconstitution, payment shall be made of all current operating expenses, taxes, indebtedness and all accrued interest thereon and the par value of and accrued dividends on the outstanding stock of such company. If after making such payments, and after conveyance of the project, a surplus remains in the treasury of the company, such surplus, except in the case of a project aided by a state loan made after May first, nineteen hundred fifty-nine, shall upon dissolution, be paid into the general fund of the municipality which granted tax exemption. After such dissolution and conveyance, or such reconstitution, the provisions of this article shall become and be inapplicable to any such project and its owner or owners and any tax exemption granted

with respect to such project pursuant to section thirty-three hereof shall cease and terminate.

Opinion

The conveyance of the Property from Cadman Towers to Cadman Towers Owners is a conveyance by a sponsor to a cooperative housing corporation of real property comprising a cooperative dwelling or dwellings subject to the real estate transfer tax. The consideration subject to tax on the conveyance will be the amount of cash received by Cadman Towers; the amount of any mortgages, liens or encumbrances on the real property; and the fair market value of the shares in the cooperative housing corporation (Cadman Towers Owners) that are transferred to Cadman Towers as sponsor. See section 575.11(a)(12) of the Real Estate Transfer Tax Regulations. In general, the transaction described above would be deemed to constitute a mere change of identity or form of ownership or organization. However, the exemption provided under section 1405(b)(6) of the Tax Law for conveyances that effectuate a mere change of identity or form of ownership or organization does not apply to conveyances to a cooperative housing corporation of real property comprising the cooperative dwellings.

The original conveyance of shares in Cadman Towers Owners in connection with the grant or transfer of proprietary leaseholds will be subject to real estate transfer tax. See section 575.8(a)(1) of the Real Estate Transfer Tax Regulations. Consideration for each original conveyance of shares of stock by Cadman Towers Owners is deemed to be the fair market value of the shares apportioned to each unit. See section 1401(d) of the Tax Law. However, to the extent that the conveyance of the shares in the private cooperative to the participating shareholders of the limited-profit housing company effects a mere change in the identity or form of ownership or organization where there is no change in beneficial ownership, the mere change exemption under section 1405(b)(6) of the Tax Law may apply.

As previously noted, the real estate transfer tax applies to transfers by a sponsor to a cooperative housing corporation of the property comprising the cooperative dwellings notwithstanding that there may have been no change in beneficial ownership. Pursuant to section 1405-B(a) of the Tax Law and section 575.8(c) of the Real Estate Transfer Tax Regulations, a credit is allowed for a proportionate part of the amount of any tax paid upon the conveyance of the property by the sponsor to the cooperative housing corporation against the tax imposed on the original conveyance of stock shares in the cooperative housing corporation in connection with the grant or transfer of a proprietary lease. Thus, to the extent the mere change rule is not otherwise applicable, any real estate transfer tax on the conveyance of shares in the BCL private cooperative housing corporation to the participating shareholders may be offset by a credit for a proportionate part of the amount of any real estate transfer tax paid upon the conveyance by Cadman

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Towers to Cadman Towers Owners of the interest in the real property comprising the cooperative dwellings.

It should be noted that, pursuant to section 1402-a(a) of the Tax Law, if the consideration for the conveyance of shares related to an individual cooperative apartment unit is for \$1 million or more, the conveyance will be subject to an additional 1% tax at the time of conveyance. However, as stated above, the mere change exemption may apply if the conveyance effectuates a mere change of identity or form of ownership or organization.

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/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.