

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-13(4)R  
Real Estate Transfer Tax  
August 30, 2013

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M110714A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the sale of a specified hotel suite condominium unit or units (“condo unit”, “condo units” or “Units”) are subject to tax imposed by Tax Law §1402-a (“Mansion Tax”) as a conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more. We conclude that the Mansion Tax is not due on the conveyances.

**Facts**

Petitioner is the sponsor of the [REDACTED] Hotel Condominium NY (“Hotel”). The Hotel is a high-rise luxury hotel condominium located in downtown Manhattan, consisting of approximately 400 hotel condo units. The Sponsor began offering condo units for sale in late 2007.

The Zoning Resolution of the City of New York controls permitted uses of real property located in the City. The Zoning Resolution is implemented by the New York City Department of Buildings. The Hotel is located in an area zoned as M1-6. According to Article IV of the City of New York Zoning Resolution, an M1-6 district is designated for light manufacturing. Paragraph 41-11 of the Zoning Resolution defines the purpose of the M1 designation as follows:

**M1 Light Manufacturing Districts (High Performance)**

These districts are designed for a wide range of manufacturing and related uses which can conform to a high level of performance standards. Manufacturing establishments of this type, within completely enclosed buildings, provide a buffer between Residence (or Commercial) Districts and other industrial uses which involve more objectionable influences. New residential development is excluded from these districts, except for joint living-work quarters for artists in M1-5A and M1-5B Districts, dwelling units in M1-5M and M1-6M Districts, and dwelling units in M1-1D, M1-2D, M1-3D, M1-4D and M1-5D Districts, where authorized by the City Planning Commission, both to protect residences from an undesirable environment and to ensure the reservation of adequate areas for industrial development.

Pursuant to the Zoning Resolution, a “transient hotel” is allowed to be constructed in an area zoned as M1-6. Pursuant to Section 12-10 of the Zoning Resolution, a “transient hotel” is defined as a “building” or part of a building in which (a) living or sleeping accommodations are used principally for transient occupancy, and may be rented on a daily basis; (b) one or more common entities serve all such living or sleeping units; and (c) twenty-four hour desk service is provided, in addition to one or more of the following services: housekeeping, telephone or bellhop service, or the furnishing or laundry of linens.

Residential construction expressly is not permitted in a M1-6 district. As defined by the Zoning Resolution, the term “residences” specifically excludes “such transient accommodations as transient hotels.” By contrast, an “apartment hotel” is defined in the zoning rules as a building with “dwelling units” in a

“residential building.” As a consequence, no construction of new dwelling units is permitted in the district. The Hotel’s classification for zoning purposes as a hotel was upheld by the New York State Supreme Court in *Soho Alliance v. NYC Department of Buildings*, Judge Payne, Index No. 108064/2008, 12/19/2008.

Consistent with the qualification of the Hotel as a transient hotel, the Certificate of Occupancy for the Hotel shows zero as the number of dwelling units. As a prerequisite to the issuance of a building permit by the New York City Department of Buildings, the sponsor of the Hotel entered into a Restrictive Declaration with the New York City Department of Buildings regarding the continuing use of the property. The purpose of the Restrictive Declaration was to ensure strict compliance with the transient usage zoning rules. The Restrictive Declaration imposes strict non-waivable restrictions on the use of the property to ensure that it will continue to qualify as a transient hotel. These restrictions are incorporated by reference in the Condominium Declaration, the Unit Management Agreement, the By-Laws of the condominium association, and the Purchase Agreement. Additionally, the restrictions imposed are permanent and create a covenant recorded against the property and running with the land.

The Restrictive Declaration requires each Unit Owner of the condo units to enter into a Unit Management Agreement. Pursuant to the Agreement, the operator of the Hotel provides all the services of a luxury hotel to the Unit and its occupants. The Unit Owner is required to allow the hotel operator to furnish and maintain the Unit pursuant to uniform standards set by the Hotel operator that are consistent with transient hotel Units in the Hotel and with the Units’ intended use by transient guests in a luxury hotel for the majority of the year. The Unit Management Agreement delegates to the hotel operator exclusive control over acceptance and management of reservations, enforcement of registration procedures and management of access to the Units. Unit Owners are not allowed to participate in any of those functions. Under the terms of the Restrictive Declaration and the Unit Management Agreement, the Unit must be made available for occupancy on a daily or weekly basis by Hotel guests through the Hotel operator as part of the hotel operating within the building. A Unit Owner is permitted only a limited use of his or her own Units. Conditioned upon availability, occupancy by a Unit Owner is strictly limited to a maximum of 29 consecutive days per 36 day period and to no more than 120 days in the aggregate per calendar year. Usage by non-owner guests is similarly restricted to ensure transient occupancy only. Owner access is strictly controlled by the Hotel Management Company. A Unit Owner is required to give the Hotel Management Company at least five days’ notice of intent to occupy his or her Unit. An Owner does not receive a key to his or her own Unit. Each Unit Owner is required to check in and out on a daily basis at the front desk of the Hotel just like any transient guest that rents a Unit. An Owner may access his or her Unit only when properly registered by the Hotel. During a period that the Unit is rented or otherwise occupied by a non-owner guest in accordance with the requirements for transient rentals, an Owner is absolutely prohibited from entering his or her Unit.

Unit Owners are not guaranteed availability of their Units. It is quite possible that the Units may have been rented to guests of the Hotel. As a consequence, the Hotel may not be able to accommodate a Unit Owner, and as a practical matter, the Owner may never be able to achieve a 29 day stay or 120 day annual usage, as the case may be. The Owner may not opt to keep his or her Unit vacant and available for his or her personal use as would the owner of a residential property.

Under the Restrictive Declaration and the Unit Management Agreement, the Hotel Management Company is required to keep careful accounting records of actual usage of Units by Owners and guests for the purpose of avoiding excessive stays, defined as an “exceedence.” Any exceedence of the Occupancy Restriction by a Unit Owner or guest is a violation of §27-217 of the New York City Administrative Code. Owners and guests are warned when they approach a usage limitation. An overextended stay, or exceedence,

subjects the occupant to monetary fines, part of which is payable to the City, equal to twice the daily rental rate. The NYC Department of Buildings can audit the usage and impose additional sanctions.

The Units are sold fully furnished with items typically found in a luxury transient hotel room. Under the terms of the Unit Management Agreement, all Units must be similarly furnished. Unit Owners have no input on style of furnishings or décor for the Unit. Unit Owners are prohibited from making any alterations or adding personal decorations. The existing furniture cannot even be moved, and any personal touch, such as a photo of the Owner's family, is prohibited.

Just like a guest of a hotel, the Unit Owner is liable for both the sales tax and hotel room occupancy tax for personal use of his or her Unit. In addition, the Unit Owner must pay a Unit Management Fee for each night he or she uses the Unit. Additional daily "Per Use" charges apply. A permitted sale of a condo unit by a Unit Owner is conditioned upon the purchaser entering into the Unit Management Agreement. The purchaser must honor any pre-existing reservations and rental agreements.

According to the Commercial Condominium Offering Plan, dated August 3, 2007, there are 413 condo units located on Floor 8 through Floor 45 of the Building. The condo units offered for sale vary in size from studios with approximately 422 square feet to a presidential suite with approximately 10,065 square feet. Each condominium is listed on the New York City Final Assessment roll for 2011-2012 in Tax Class 4 (commercial).

## Analysis

Tax Law §1402-a, commonly known as the "mansion tax", was enacted in 1989 (L.1989, Ch. 61). Tax Law §1402-a(a) provides that in addition to the basic real estate transfer tax imposed by Tax Law §1402, a tax is imposed on each conveyance of residential real property or interest therein "when the consideration for the entire conveyance is one million dollars or more." Such additional tax is to be paid by the grantee (Tax Law §1402-a(b)).

For mansion tax purposes, residential real property includes "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" (see Tax Law §1402-a(a); see also 20 NYCRR §575.3 (the "Transfer Tax Regulations")).<sup>1</sup>

The Petitioner acknowledges that the conveyance of each of the 413 condo units is a conveyance of an interest in real property subject to real estate transfer tax under §1402. The issue to be determined here is whether each conveyance of a condo unit is subject to the mansion tax as a conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more.

The application of the mansion tax is not dependent on the form of the underlying transactions but on the economic reality that characterizes the entire conveyance. See *Sacks v. Tax Appeals Tribunal*,

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<sup>1</sup> Section 1402-a(c) of the Tax Law provides, in part, that:

[e]xcept 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.

99 AD3d 1120 (App. Div., 3<sup>rd</sup> Dept., 2012). Generally, an individual condominium unit that may be used as a seasonal or occasional residence or rented to another person retains its character as residential real property. Conveyance of a traditional residential condominium held for income or investment purposes is subject to the mansion tax. For mansion tax purposes, the personal residence need not be the condo unit purchaser's primary or principal personal residence. As illustrated by Example 1 of section 575.3 of the Transfer Tax Regulations<sup>2</sup>, the mansion tax applies to premises that may be used as a residence regardless of whether the dwelling unit was occupied by the seller.

In the present case, each Unit Owner owns his or her condo unit and an undivided interest in the common elements in fee simple. Each Unit Owner has the right to use his or her condo unit on an occasional basis. Each condo unit is made available for rental by the Hotel when the Unit Owner does not require its use. Each condo unit is furnished and equipped to allow for use on an extended basis by the Hotel.

The condominium hotel units are sold to individuals who will be entitled to occupy the units for a limited duration of time each year. Pursuant to the New York City Department of Building requirements and zoning restrictions, the condominium units must be made available for rental as transient hotel accommodations. The certificate of occupancy is in conformance with this requirement, stating that the building has zero dwelling units. Further, for sales and hotel occupancy tax purposes, the Units are treated as hotel units.

We conclude that the zoning approval and Restrictive Declaration from the New York City Department of Buildings imposes restrictions on the use of the property to ensure that it will qualify as a transient hotel. The information outlined above supports the conclusion that, at the time of conveyance, due to the real property tax assessment classification and the Department of Building conditions, zoning restrictions and court orders, each condo unit is primarily used for commercial purposes. Accordingly, we do not believe that the Units in question qualify as personal residences for purposes of the tax imposed by section 1402-a of the Tax Law, and the conveyances of those Units are not subject to the mansion tax.

DATED: August 30, 2013

/S/  
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DEBORAH R. LIEBMAN  
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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

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<sup>2</sup> Subdivision (b) of section 575.3 of the Transfer Tax Regulations provides, in part:

Example 1: A three - family house is sold for \$1,200,000. The grantor did not occupy any portion of the house. The grantee is required to pay the additional tax of \$12,000 ( $\$1,200,000 \times .01$ ). The result would have been the same if the grantor had occupied any portion of the house.