

Transfer Tax - Multiple Residential Cooperatives and Condominiums

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In computing New York City's Real Property Transfer Tax ("RPTT") on a transfer of real property in the City one must first determine the applicable transfer tax rate. It should be that this process is not complicated. The RPTT is generally applied to the transfer of a one-to-three family dwelling, an individual residential condominium unit and an individual residential cooperative apartment at the rate of 1% when consideration is \$500,000.00 or less, and at the rate of 1.425% when consideration is more than \$500,000.00. These rates of tax are often identified as the "residential" rates. The transfer of other property is taxed at the so-called "commercial" rates of 1.425% when consideration is \$500,000.00 or less, and 2.625% when consideration is above that amount.

However, the process is often not straightforward, particularly when multiple residential condominium units are being conveyed by separate deeds from the same grantor to the same grantee, or when the same transferor is transferring more than one cooperative apartment unit to the same transferee. In such instances, the parties to the transaction are often surprised at closing, or after closing when they receive a notice of an audit, when they first become aware that the residential tax rates do not apply, and the transfer tax payable to the City of New York is substantially greater than the amount anticipated. This is because the City's Department of Finance deems multiple unit transfers as bulk sales and applies its commercial transfer tax rates. This is its position regardless of whether, in the case of condominium units, all units are transferred by a single deed or each unit is conveyed by a separate deed, and regardless of whether, for cooperative units, there is one assignment or separate assignments of proprietary leases. The transferor and transferee both have RPTT liability for an underpayment of tax, and for any resulting interest and penalties.

The Rules of the City of New York on "Imposition" of the RPTT deal with the transfer of multiple cooperative units by a single transferor to a single transferee. An illustration in 19 RCNY Section 23-03 (h)(8) indicates that the 2.625% commercial rate applies in such an instance, and consideration includes a portion of the outstanding balance of the underlying

mortgage on the cooperative corporation's property allocated based on the transferor's percentage ownership interest in the cooperative corporation.

In addition, under 19 RCNY Section 23-03 (h)(6) a proportionate amount of the cooperative corporation underlying mortgage attributable to the shares of stock in the cooperative corporation being transferred is included in taxable consideration on the initial transfer of shares of cooperative stock by the sponsor or on the subsequent transfer of shares of stock attributable to a unit that is not an individual residential unit. For the transfer of multiple cooperative units between the same parties, the Department of Finance has determined that there is not the transfer of an individual residential unit and, therefore, consideration for the sale of each unit will include a portion of the building's underlying mortgage debt.

The Rules do not, however, set forth the rate to be applied when multiple condominium units are being conveyed between the same parties.

Department of Finance Memorandum 00-6 issued June 19, 2000, entitled "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units" [1], confirms that commercial transfer tax rates will be applied to the entire, aggregated amount of consideration on the bulk sale of cooperative units. The Memorandum further advises that while commercial rates will be applied to the bulk sale of condominium units, the rates will be separately applied to the consideration allocated for each deed, provided that the units are conveyed by separate deeds. The Memorandum provides that the "Department will accept the taxpayer's apportionment of the consideration for the bulk sale to each deed provided the apportionment reasonably reflects the relative values of the units transferred". The Memorandum does not detail how these standards are to be applied.

Application of the standards in the Memorandum is set forth in a Letter Ruling of the Department of Finance dated May 23, 2003 (FLR-034801-021) [2]. The hypothetical facts set forth in that Ruling are that a seller contracts to sell two units to a single buyer under two independent contracts of sale. The larger unit, a single family dwelling, is to sell for \$2,500,000.00 and the smaller unit, a maid's quarters, is under contract for \$100,000.00. The units are on separate floors and are not connected.

The Ruling sets forth that commercial transfer tax rates will apply to a transfer of multiple condominium units or cooperative apartments, notwithstanding their residential use. For condominium units, the higher commercial rate of 2.625% will apply to the transfer of the family's dwelling since its purchase price is in excess of \$500,000.00. The lower commercial rate, or 1.425% will apply to the transfer of the maids quarters; the purchase price for that unit is \$500,000.00 or less.

The Ruling indicates that if cooperative apartments are being transferred, the higher commercial transfer tax rate of 2.625% will apply to the aggregate consideration for the transfers. Consideration will include a proportionate share of the underlying mortgage of the cooperative corporation and no continuing lien deduction as to that mortgage debt would be applied.

New York City Administrative Code Section 11-2102 provides that on the transfer of a individual residential condominium unit or an individual residential cooperative apartment (or a one-to-three family house or an interest in any such dwelling) consideration may, with certain exceptions, exclude the “amount of any mortgage or other lien or encumbrance...that existed before the delivery of the deed or the transfer [which] remains thereon after the date of delivery of the deed or the transfer”. The transfer of multiple units or apartments not being deemed a transfer of an individual residential unit, no continuing lien deduction would be available on the computation of transfer tax for any of the units being transferred.

According to informal advise from the Department of Finance, the rules under which the transfer of a residential unit will be subject to the commercial RPTT rate may also apply to the transfer between the same parties of a residential unit and either a garage or parking space unit or a storage unit. However, a 1999 Letter Ruling (FLR-984736-021) [3] of the Department of Finance dealing with such a situation does not provide clear guidance. In that Ruling, the Department determined that residential transfer tax rates would apply on the transfer between the same parties of a residential unit and a parking space unit. The consideration for the transfer of the parking space unit was under \$25,000.00, and therefore not taxable, and the conveyance of the parking space was not contingent on its being transferred to a residential unit purchaser. The Ruling also noted that the residential unit and the parking space were different types of property. It is not certain how the Department of Finance would apply this holding if the amount of consideration for the parking space was above the threshold for application of the transfer tax or if the sale of a parking unit is required to be in connection with the transfer of a residential unit.

There are limited ways to avoid application of the commercial rates when multiple units are being separately transferred pursuant to separate contracts of sale between the same parties. First, according to the Letter Ruling of May 23, 2003, the lower, residential rates may apply, and the transfer of units or apartments not be treated as a single transaction, if “facts and circumstances indicate that the transfer of multiple condominium or cooperative units are independently negotiated and are unrelated”. This will not be possible to establish in most circumstances. Whether the closings take of the units take place on the same day or on separate days is immaterial in determining if the transfers are unrelated.

Another approach is to combine the units into a single unit prior to closing. Finance Memorandum 00-6 provides that if the units are adjacent and have been physically combined into a single residence prior to their transfer, the lower, residential rates would apply. According to the Memorandum, “the Department will examine all of the applicable facts and circumstances in determining whether two or more apartments or units have been physically combined. The issuance of a revised Certificate of Occupancy, a letter of completion from the Buildings Department or a revised tax lot designation reflecting the joining of two or more apartments or units will be acceptable evidence of such a combination. However, the absence of any of these documents will not be conclusive”. (Emphasis added)

The letter of completion referred to may issue under the Building Department’s Technical Policy and Procedure Notice #3/97 [4]. That Notice eliminates for all multiple dwellings the requirement that a certificate of occupancy be amended when apartments are combined to create larger dwelling units. An Alteration Type II application is required and, after filing of a

completion sign-off by a Professional Engineer or a Registered Architect, the Building Department will issue a letter of completion. The letter of completion will state that the “Department of Buildings does not require a new or amended certificate of occupancy for combining these apartments”.

The Technical Policy and Procedure Notice sets forth certain requirements. The combining of apartments must result in no greater number or zoning room, each new room must comply with natural light and air requirements and those requirements must not be diminished for existing non-compliant rooms, egress is not to be altered, and the second kitchen must be eliminated. In addition, when condominium units are being combined, a new tentative tax lot number for the combined unit must be obtained from the Department of Finance before the Alteration Type II Application is filed.

The Department of Finance has applied the residential transfer tax rates if the units have been combined in compliance with Notice #3/97. The Department requires that an affidavit of the owner of the unit accompany the NYC - RPT transfer tax form when submitted stating that (i) the transfer involves two or more units that have been combined into a single unit, (ii) the second kitchen has been eliminated, (iii) the combination of units has been approved by the Department of Buildings, and (iii) the combination of the units was approved under Building Department’s Technical Policy and Procedure Notice #3/97. An affidavit of an architect certifying that the units were combined and that there is one kitchen is also required. Sample forms should be available from an office of a title insurer located in New York City.

Accordingly, when transferring between the same parties more than one condominium unit or the stock and proprietary leases attributable to multiple cooperative apartments, advance planning, if allowed by the circumstances, will be necessary to limit the amount of RPTT payable. Consultation with a tax advisor and counsel for a title insurance company or agent may be advisable.

Footnotes:

1. http://www.nyc.gov/html/dof/html/pdf/00pdf/fm00_6.pdf(Memorandum)
2. <http://www.nyc.gov/html/dof/html/pdf/02pdf/034801r.pdf>(Ruling)
3. <http://www.nyc.gov/html/dof/html/pdf/984736r.pdf>(Ruling)
4. <http://www.nyc.gov/html/dob/html/reference/tpn0397.shtml> (Notice)

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