

CITY OF CHICAGO
DEPARTMENT OF FINANCE
REAL PROPERTY TRANSFER TAX RULING

Pursuant to Sections 2-80-040, 3-4-030 and 3-33-140 of the Municipal Code of Chicago, I hereby promulgate Real Property Transfer Tax Ruling #6, set forth below.

Erin Keane
City of Chicago Comptroller

Real Property Transfer Tax Ruling #6
Subject: Long-term Ground Leases – Additional Issues
Effective date: January 1, 2019

Background

1. On December 14, 2014, the Department of Finance ("Department") issued Real Property Transfer Tax Ruling #5, confirming that the creation of a long-term ground lease of real property located in the City of Chicago ("City") constitutes the transfer of a beneficial interest in real property, subject to the Real Property Transfer Tax, Municipal Code of Chicago ("Code") Chapter 3-33. The purpose of this Ruling #6 is to discuss certain additional issues relating to such transfers.

Pertinent Ordinance Provisions

2. Code Section 3-33-030(A) provides in pertinent part: "Except as otherwise provided in this chapter, a tax is imposed upon the privilege of transferring title to, or beneficial interest in, real property located in the city ..."

3. Code Section 3-33-020(A) defines a "beneficial interest in real property" as including "[t]he lessee interest in a ground lease (including any interest of the lessee in the related improvements) that provides for a term of 30 or more years when all options to renew or extend are included, whether or not any portion of the term has expired."

4. As of the date of this ruling, the rate of the "City portion" of the tax is \$3.75 per \$500.00 of the transfer price, and the rate of the "CTA portion" of the tax is \$1.50 per \$500.00 of the transfer price. Code Sections 3-33-030(A), 3-33-030(F).

5. Code Section 3-33-020(H) defines the "transfer price" as "the consideration furnished for the transfer of title to, or beneficial interest in, real property, valued in money, whether paid in money or otherwise, including cash, credits and property, determined without any deduction for mortgages, liens or encumbrances, and specifically including the amount of any indebtedness or obligation canceled or discharged in connection with the transfer."

6. Code Section 3-33-030(B)(1) states that "[t]he tax imposed by this chapter is due upon the earlier of the delivery or recording of the deed, assignment or other instrument of transfer."

7. Code Section 3-33-100 provides: "In the case of a transfer where any part of the transfer price is contingent upon the occurrence of a future event or the attainment of a future level of financial performance, additional tax shall be due at the time each additional amount of consideration is furnished and shall be paid directly to the department. A supplemental real estate transfer declaration shall be filed with the department at the time each tax payment is due."

Taxable Ground Leases

8. The ordinance does not define the term "ground lease." Black's Law Dictionary defines the term as "[a] long-term (usually 99-year) lease of land only." The ICSC Dictionary of Shopping Center Terms defines it as "[a] lease only for the land; also called a land lease, in which the owner of the building does not own the land in fee simple." The ordinance varies from these definitions in two principal ways, and the ordinance controls. See City of Chicago v. StubHub, Inc., 2001 IL 111127 at ¶ 17 (2011).

a. The ordinance requires only "a term of 30 or more years when all options to renew or extend are included ..." Code Section 3-33-020(A).

b. The ordinance specifically states that a taxable ground lease "includ[es] any interest of the lessee in the related improvements." Thus, the fact that the lease includes not only the land but also a building does not prevent the lease from being a taxable ground lease.

See also: 31 C.J.S. Estates § 197 (2018) ("A ground lease, also termed a ground-rent lease or land lease, is a long-term (often 99-years) lease of land only, typically involving commercial property, and any improvements built by the lessee usually revert to the lessor. It has been said that a lease that defines the leased premises as a portion of ground together with buildings and improvements thereon is a ground lease."); N.Y. Comp. Codes R. & Regs. Title 20, § 575.7(a) (2018) (taxing the creation of a lease where "the sum of the term of the lease ... and any options for renewal exceeds 49 years," and "substantial capital improvements are or may be made by or for the benefit of the lessee," and "the lease ... is for substantially all of the premises constituting the real property.").

Payment of the Tax

9. Code Section 3-33-030(B)(1) states that "[t]he tax imposed by this chapter is due upon the earlier of the delivery or recording of the deed, assignment or other instrument of transfer."

10. Code Section 3-33-020(H) defines the taxable transfer price as "the consideration furnished for the transfer of title to, or beneficial interest in, real property

..." If the consideration furnished includes amounts that are not for the lessee's interest in real property, then those amounts may be deducted from what would otherwise be the taxable transfer price. For example, if the lease payments include amounts paid for the lease of personal property, those amounts are not part of the transfer price and may be deducted.

Transfer of an Existing Lease

11. In the case of the transfer of an existing taxable ground lease, the transfer price is the consideration paid to the original lessee, by the new lessee, for the transfer of the remainder of the lease.

Creation of a Lease – Present Valuing of Scheduled Lease Payments

12. In the case of the creation of a taxable ground lease, the transfer price is the lump sum that represents the present economic equivalent (or "present value") of the lease payments scheduled to be made over the term of the lease (excluding any option periods that have not yet been exercised). See, e.g., People v. American Airlines, Inc., 39 Ill. 2d 11, 18 (1967) (which concerned the valuation of a leasehold for purposes of the *ad valorem* property tax, but which included a discussion of how to determine the present value of a stream of lease payments). See also N.Y. Comp. Codes R. & Regs. Title 20, § 575.7(b)(1) (2018).¹ In order to do this, a discount rate must be used. As a safe harbor, the Department will accept the use of a discount rate equal to 110% of the Long-term Applicable Federal Rate (AFR), based on monthly compounding, as periodically published by the Internal Revenue Service, for purposes of Section 1274(d) of the Internal Revenue Code, as amended, that is in effect for the calendar month in which the transfer occurs. See N.Y. Comp. Codes R. & Regs. Title 20, § 575.7(b)(2) (2018).

Creation of a Lease – Option to Pay Tax in Arrears

13. The Department recognizes that calculating the present value of future lease payments can sometimes involve uncertainty, especially if the amounts of those payments will depend on future events, such as gross revenues or other variable performance measures.

14. Therefore, as an administrative convenience, and in lieu of the procedures set forth in paragraph 12 above, the Department will allow taxpayers the option of deferring payment of the tax until the corresponding lease payments are made. In order to do this, a taxpayer must file a real estate transfer declaration at the time the taxable ground lease is created, but the taxpayer may specify on the declaration that it is electing to pay the tax when the lease payments are made.

¹ New York includes option periods that have not yet been exercised. Taxpayers in Chicago may either file a supplemental declaration and pay additional tax when an option period is exercised or follow the New York procedure and pay tax up front on all option periods, so that they will not have to take any further action in the future.

15. If a taxpayer chooses the option set forth in paragraph 14 above, the tax shall be paid on an annual basis, rather than on a monthly basis, even if the lease payments are made on a monthly basis. This shall be done by the filing of a supplemental real estate transfer declaration, accompanied by payment of the tax, by the end of January each year, for all lease payments made during the prior calendar year.

16. The procedures set forth in paragraphs 14 and 15 above are consistent with Code Section 3-33-100, which provides that "[i]n the case of a transfer where any part of the transfer price is contingent upon the occurrence of a future event ... additional tax shall be due at the time each additional amount of consideration is furnished," and which further provides that "[a] supplemental real estate transfer declaration shall be filed with the department at the time each tax payment is due."

Creation of a Lease – Safe Harbor Based on Fair Market Value

17. As an alternative safe harbor, and in lieu of the procedures set forth in paragraphs 12 through 16 above, a taxpayer may pay tax based on a transfer price equal to the estimated fair market value (FMV) of the real property to be leased. In that case, the estimated FMV may be the most recent FMV certified by the Cook County Board of Review for the real property to be leased. The application of this safe harbor will depend upon the situation, as discussed in the following paragraphs.

18. If the lease is of land only, the Department will accept tax based on a transfer price equal to the estimated FMV of the land. This will apply where there are no improvements on the land at the time of the transfer, and the lease does not require the lessor to add any improvements.

19. If the lease is of the land and certain improvements that already exist at the time of the transfer, the Department will accept tax based on a transfer price equal to the estimated FMV of the land and existing improvements combined.

20. If the lease requires the lessor to add improvements after the time of the transfer, the Department will accept either of the following procedures:

a. The taxpayer may pay tax at the time of the transfer based on the estimated FMV of the land plus the lessor's estimated cost of supplying the additional improvements. If pursuant to an audit or other investigation, the lessor's actual cost is determined to exceed the lessor's estimated cost by less than ten percent (10%), then the taxpayer shall be liable for the tax on such difference, plus interest, but without any penalties. If the taxpayer's actual cost is determined to exceed the lessor's estimated cost by ten percent (10%) or more, then the taxpayer shall be liable for tax on such difference, plus interest and late payment penalties.

b. The taxpayer may initially pay tax based on the estimated FMV of the land as unimproved and then, after the contemplated improvements have been added, file a supplemental declaration and pay additional tax based on the estimated FMV of the

improvements. The estimated FMV of the improvements may be the most recent FMV certified by the Cook County Board of Review for the improvements.

21. A taxpayer who takes advantage of this safe harbor may not obtain a transfer tax refund based on the fact that: (a) the FMV certified by the Cook County Board of Review is later reduced pursuant to a property tax appeal, certificate of error or otherwise; or (b) the taxpayer's actual cost of the additional improvements referenced in paragraph 20(a) above is determined to be less than the lessor's estimated cost.

Miscellaneous

22. Calculation of the taxable transfer price is a fact specific issue. Given sufficient time and information, the Department will work with taxpayers to attempt to arrive at an agreed taxable transfer price in advance of a closing. The Department encourages taxpayers to contact it or the City's Department of Law with any questions.

23. The Department will make available appropriate forms for taxpayers to use in connection with the filings and payments discussed in this ruling, and these forms and related instructions will be posted on the Department's web site.