



Department of Finance

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Diana Beinart
General Counsel/Deputy
Commissioner

March 12, 2020

XXXXXX
XXXXXX

Re: Request for Letter Ruling
Commercial Rent Tax
FLR 20-5003

Dear XXXX,

This letter is in response to your request for a letter ruling on behalf of XXXXXX dated January 16, 2020 regarding the tax treatment under the New York City commercial rent tax ("CRT") for amounts paid and received under an agreement for the early termination of a lease. A copy of the signed Third Lease Amendment, dated December 19, 2019, was provided to this office on January 24, 2020.

FACTS

The facts presented by the Taxpayer are as follows:

Taxpayer has been a CRT filer since they started occupancy of the premises located at XXXXX. On December 19, 2019 Taxpayer and their landlord entered into a lease termination agreement for the premises, through a Third Lease Amendment (the "agreement"). Under the terms of the agreement:

- 1) The current lease for the XXXXXXXX premises terminated on January 25, 2020 (the "Termination Date"), a date determined under section 1(d) of the agreement as 10 days following the date the landlord delivered notice of the landlord's lender's consent to the termination;
- 2) In consideration for the landlord agreeing to terminate the lease, the Taxpayer is to pay the landlord a termination fee, which will be paid out in monthly installments over 48 months commencing on the first day of the first full month following the Termination Date;
- 3) All the Taxpayer's possessory rights to the premises terminated on the Termination Date;

- 4) Neither the landlord nor the Taxpayer has further liability or obligation to the other except for the termination payments;
- 5) Taxpayer will return the premises to the landlord in their then as-is physical condition with no obligation to restore or make any improvement; and
- 6) To the extent the Taxpayer has pre-paid to the landlord its share of real property taxes for the periods occurring from and after the Termination Date, such amounts will be refunded to the Taxpayer.

Because the agreement and the determination of the Termination Date was contingent upon the landlord obtaining its lender's consent to the lease termination, the Taxpayer in the interim made a rental payment for the month of January 2020. Per the terms of the agreement, the termination fee was reduced by the then monthly installment that would otherwise have been payable on January 1st and the remaining balance of the termination fee is now payable over 47 months.

Prior to the agreement, Taxpayer was current on its rental payments and no portion of the termination fee represents outstanding rental payments owed to the landlord.

ISSUES

- (1) Whether the monthly installments of the termination fee paid by the Taxpayer to their landlord pursuant to a lease termination agreement are considered rent under the CRT?
- (2) Whether the January 2020 payment is subject to the CRT as rent?
- (3) Whether the Taxpayer can amend their previously filed CRT return(s) to reduce their rent by the refunded amounts representing their share of pre-paid real property tax for periods occurring after the Termination Date?

CONCLUSIONS

We have determined, under the facts and circumstances presented that:

- (1) The termination fee paid in monthly installments under the above described lease termination agreement is not considered rent, as defined under the New York City Administrative Code (the "Code"), to subject it to taxation under the CRT.
- (2) The January 2020 payment is considered rent for purposes of the CRT.
- (3) Taxpayer can file an amended CRT return for the appropriate period(s) to reduce reported rent by the refunded amounts of prepaid real estate taxes upon their receipt.

DISCUSSION

1. The monthly installments of the termination fee are not considered rent for purposes of the CRT

Under the Code the CRT is imposed on those tenants who occupy or use a property in Manhattan south of 96th Street for the use of a trade, business, profession or commercial activity and pay annual or annualized gross rent of at least \$250,000.00, while not meeting any of the exceptions found under the statute. Such tenants will be subject to a tax rate of 6% of their base rent.

Base rent is defined as the rent paid for each taxable premises by a tenant to his or her landlord for a period reduced by the amounts received by or due to such tenant for the same period from any subtenant of any part of such premises as described under subsections 11-701(7)(i)-(v).¹

Code section 11-701(6) defines rent in pertinent part as “[t]he consideration paid or required to be paid by a tenant for the use or occupancy of premises...”. Payments under the agreement between the Taxpayer and its landlord are not amounts paid for the right to use or occupy the premises, but instead are in consideration for the early termination of the lease. Therefore, such payments do not represent rent, as defined under the Code, and are not subject to tax under the CRT.²

2. Taxpayer’s possessory interest did not terminate until the Termination Date

The Termination Date was defined within the agreement as the later of (i) January 1, 2020, or (ii) ten days following the date on which the landlord notifies the Taxpayer of their lender’s approval of the agreement. The agreement was subject to obtaining the landlord’s lender’s consent. Had such consent not been obtained within the prescribed period contained in the agreement, the agreement would have automatically been deemed terminated and the lease would have remained in full force and effect.

Under the terms of the agreement, on or before the Termination Date the Taxpayer was to vacate the premises and deliver them to the landlord. Specifically, under section 5 of the agreement, “It is understood and agreed that (subject to the terms of this Amendment) all of the tenant’s possessory rights with respect to the Demised Premises shall terminate on the Termination Date.”

Until the lender’s consent was obtained by the landlord the Termination Date was not determinable and the lease remained in effect. Therefore, any amounts paid prior to the Termination Date are still considered rent payments, as the Taxpayer still had possessory rights to the property and an obligation to pay rent.³

3. Taxpayer may avail themselves to the automatic protective refund claim for the refunded real estate taxes previously paid and included in base rent on their CRT return(s)

¹ NYC Ad. Code 11-701(7).

² See In the Matter of Ted Bates Worldwide, Inc., TAT(H) 93-274(CR), March 31, 1994.

³ See In the Matter of Conboy, Hewitt, O’Brien, et al., TAT No.92-1121, December 31, 1996.

Under Code section 11-709.a, a CRT refund claim must be filed within 18 months after the filing of the annual return for the year or within six months after the payment of the tax, whichever is later. However, since tenants may receive credit or rebates of property tax escalation payments well after the applicable refund period has expired the Department modified the annual CRT return. Finance Memorandum 00-8 announces the Department's modification that the filing of the annual CRT return will provide the filer with an automatic protective refund claim with respect to any overpayment of tax due to the inclusion in base rent of property tax escalation payments for which the tenant later receives a credit or rebate. The tenant may not reduce base rent subject to tax by the amount of any such credit or rebate for the tax period in which the credit or rebate is received. The Department will not issue any CRT refund until the taxpayer receives the tax escalation rebate or credit from their landlord and the taxpayer submits sufficient information to establish the amount of overpayment of CRT.

Upon receipt of the refunds from the landlord, the Taxpayer may, in accordance with Finance Memorandum 00-8, file a refund claim for the appropriate period(s) where such refunded amounts were included in the Taxpayer's base rent on their CRT return.

The Department reserves the right to verify the information submitted. Please advise the Department of any material change in the facts presented.

Sincerely,

Diana Beinart
General Counsel

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