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New York Expands Liability Provisions for New York Real Estate Transfer Tax

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On April 19, Governor Andrew Cuomo signed into law the New York Budget Bill for the 2021-2022 state fiscal year (Senate Bill S2509C) (the New Budget Bill). The New Budget Bill contains a major change to the liability provisions for New York State's real estate transfer tax (RETT).

Generally, the RETT is imposed on all conveyances of real property or interests of real property when the consideration exceeds $500. N.Y. Tax Law. § 1402(a). The liability for the RETT is imposed on the grantor, but if the grantor fails to pay or is exempt from the tax, the tax is levied on the grantee. N.Y. Tax Law §1404(a). For purposes of the RETT, the grantor is defined as "the person making the conveyance of real property or interest therein." N.Y. Tax Law § 1401(g).

The New Budget Bill expanded the definition of "person" to include any individual, corporation, partnership or limited liability company (LLC), or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of an LLC, who as such officer, employee, manager or member is under a duty to act or has so acted for such corporation, partnership, LLC or individual proprietorship in complying with the RETT laws. N.Y. Tax Law § 1401(a)(2); S.B. S2509C, Pt. O, §1. Previously, this liability was limited to individuals, entities and other persons who were acting in a fiduciary or representative capacity of the grantor. N.Y. Tax Law § 1401(a)(1).

The New Budget Bill also explicitly states that unless the parties contractually agree otherwise, the RETT is paid by the grantor and is "not to be payable, directly or indirectly, by the grantee." S.B. S2509C, Pt. O, §2. While the RETT provisions still maintain that the grantee can be held liable for the RETT, if the grantor has failed to pay the RETT when due, or if the grantor is exempt from paying the tax, in such instances, however, the New Budget Bill will provide the grantee a statutory cause of action against the grantor for recovery of the payment of the RETT (including interest and penalties). S.B. S2509C, Pt. O, §2.

These provisions in the New Budget Bill will apply to all conveyances occurring on or after July 1, unless the conveyances made are pursuant to a binding written contract entered into on or before April 1.

The New Budget Bill expands the number and type of persons who can be held liable for the RETT and thus raises many questions and potential concerns. For instance, if there is a foreclosure of a property, and the foreclosing bank pays the RETT, could the foreclosing lender utilize its rights of action to hold an individual manager of the insolvent grantor entity personally liable for the RETT? Based upon a strict reading of the New Budget Bill, it appears that the answer is "yes." It is also unclear how the New Budget Bill would apply to tiered ownership and management structures, and whether the new law can "pierce the veil" and hold individual managers of entities multiple levels above the grantor entity liable for the RETT. This question is particularly more acute with respect to "off record" transactions such as certain upper tier equity transfers or surrenders of leasehold estates, where no documents are recorded and where the RETT may be due, but a transfer tax return is not filed due to the parties' failure to satisfy the filing requirement. Additionally, although New York City has not passed a similar expansion in its liability laws regarding the New York City Real Property Transfer Tax (RPTT), should New York City pass a similar set of laws, there will be additional transfer tax exposure for these same individuals subject to the New Budget Bill.

The chief concern with respect to the New Budget Bill, however, is that the new law expands personal liability without providing much needed and long sought guidance on how to apply the RETT in transactions that are more complicated than a simple conveyance of property. Real estate joint ventures will regularly involve complicated profit and loss allocations between the parties, such that if there are equity transfers at the upper tiers, it is not always clear that the RETT is due. Affordable housing transactions are particularly at risk because they typically involve complicated waterfalls yet have limited economic resources to pay transfer taxes should filings be determined to have been made incorrectly. Moreover, title insurance coverage is not available to insure against the risk of exposure, if it ultimately turns out that the RETT was due on a certain transaction. Without providing clearer guidance on how to apply the RETT laws to these types of transactions, it adds more pressure on the parties involved to resolve any RETT ambiguities, which is likely to add time and costs and may result in a chilling effect on real estate transactions.

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