

NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition

Of

ISLAND EQUITIES REALTY & ASSET
MANAGEMENT, LLC

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: DETERMINATION
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: TAT(H) 06-27 (RP)
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Murphy, A.L.J.:

Petitioner, Island Equities Realty & Asset Management, LLC, filed a Petition with the New York City ("City") Tax Appeals Tribunal on September 11, 2006, protesting a Notice of Determination of City Real Property Transfer Tax (RPTT) issued with respect to the October 9, 2003 transfer of real property located at 685 Ralph Avenue, Brooklyn, New York, Block 3509, Lot 10 ("Property").

Petitioner was represented by its managing member, Kirk A. McCleod. Respondent, the Commissioner of Finance ("Commissioner"), was represented by Martin Nussbaum, Esq., Assistant Corporation Counsel.

A Hearing was held on August 6, 2008, at which time documents were admitted into evidence. Respondent filed a statement of positions on February 13, 2009 and Petitioner filed a statement of positions on February 19, 2009.

CONCLUSION

The transfer of the Property, a four-family dwelling, is subject to the City RPTT as a transfer of real property by deed for consideration. The evidence does not establish that the grantor

was a disclosed or undisclosed agent, straw man, dummy or conduit of the grantee.

FINDINGS OF FACT

On October 10, 2003, Petitioner filed an RPTT Return with the Department of Finance ("Department") reporting the October 9, 2003 transfer of the Property from Wilbert Wilson as Grantor to Petitioner as Grantee. ("Return").

The Property was described on the Return as a four-family residential property and the transaction was identified as an arms-length transfer of a fee interest. The Return reported consideration of \$374,436 for the transfer, which was comprised of a \$352,836 pre-existing mortgage held by Wilshire Credit Corporation, \$1,000 of cash, \$2,600 of accrued real estate taxes and an \$18,000 "Utility Company" lien. Petitioner indicated on the Return that the consideration should be reduced by \$373,436, representing the mortgage and the other debt amounts as constituting an "excludible" lien. The Return therefore indicated RPTT due of \$10, based on a reported taxable consideration of \$1,000. This amount was not paid. Mr. Wilson signed the Return as Grantor and Junie Green signed as "Officer & Member of Grantee."

At the hearing, Petitioner submitted several documents into evidence in an effort to establish that the Grantor, Mr. Wilson, had owned the Property as Petitioner's agent prior to the Transfer. Many of the documents pre-dated the transaction. These documents included copies of the following: (1) A letter on the stationery of First Island Realty Corp., dated January 5, 2000, which is encaptioned "Affidavit of Ownership Transfer" and indicates a transfer of Mr. Wilson's "ownership interest" in the Property to

First Island Realty Corp. on that date. (2) A July 1, 2003 City Department of Environmental Protection document which is a bill for water usage at the Property. This bill appears to have been addressed to Mr. Wilson at the Property and, according to handwritten notations, to have been forwarded to Mr. Wilson c/o First Island Realty Corp.¹ (3) An October 17, 2002 HPD Property Registration Receipt which states that the Property was owned by First Island Realty Corp. and that Mr. McLeod was Managing Agent. (4) A December 16, 2002 insurance bill which indicates that the property was a dwelling "not over four families" and not owner-occupied; that the "insured" was "Wilbert Wilson c/o First Island Realty Corp." and that the "producer" was Mr. McLeod "c/o Prudential Insurance Co." at Petitioner's address. (5) An HPD Property Registration Form dated October 9, 2003 (which was the transfer date) which states that the Property was owned by Petitioner and that the "Responsible Persons" were Mr. McLeod as an officer of Petitioner and Junie Green as a member of Petitioner. Mr. McLeod also is listed on this document as a managing agent affiliated with First Island Realty Corp. Petitioner specifically states on this form that it was not "the same [owner] as previously registered." (6) Several checks and money orders which are made payable to Wilshire Credit Corporation. Some of these documents were signed by Wilbert Wilson or prepared by First Island Realty Corp. on behalf of Mr. Wilson; others were signed by Kirk A McLeod Agency;² and yet others were signed by or prepared on behalf of First Island Realty Corp. One check, dated October 29, 2003, a date after the transfer, bears a handwritten reference to Mr.

¹ This entity was only referred to in the documents and was not described in the proceedings. There was no explanation, for example, of any relationship with Petitioner LLC.

² Mr. McLeod stated in colloquy during Respondent's voire dire on certain documents that Kirk McLeod Agency was "one of [his] agencies." T. 17. No other information was provided.

Wilson. Many of the money orders which are dated after the transfer (e.g., 2005) have handwritten notations referencing Mr. Wilson and the loan number 768428. The copies of checks and money orders submitted are incomplete, are not seriatim and in some instances are duplicated in the same exhibit.³ Some bear the address 4209 Farragut Road, Brooklyn, NY. 11203 and some reference the loan number 768428, but do not indicate whether they specifically pertain to the Property. Some are not legible. (7) Four documents encaptioned "MORTGAGOR [Wilbert Wilson] PAYMENT COUPON" identify the mortgagee as Wilshire Credit Corp., bear the loan number 768428, and recite as "Collateral" the address 685 Ralph Avenue (the Property). (8) An unnumbered page of a Loan Adjustment Agreement which was signed by Wilbert Wilson and is dated March 1, 2003. The Agreement does not identify the Property, does not bear a loan number, and is not signed by a representative of Wilshire Credit Corporation. No testimony was offered with respect to these documents or to the ownership of the Property, as Mr. Wilson was not present at the hearing and Petitioner's managing agent, Mr. McLeod, declined to testify. T. 14-15.

In 2006 the Property was transferred by Petitioner to Susan Grant. That transfer is not at issue in this proceeding.

In 2005 the Department reviewed the filed RPTT return. The Department's auditor, Ronald Anderson, concluded that the RPTT deduction for excludible liens was not available as the Property was a four-family building. Pursuant to Code §11-2102(a), Mr. Anderson applied a tax rate of 1.425% to consideration of \$374,436. A Notice of Determination was issued to Petitioner on April 5, 2006 asserting RPTT due in the base tax amount of \$5,335.71, with

³ For example, a copy of a check dated February 7, 2005 appears in two places in Petitioner's Exhibit 2.

interest in the amount of \$1,063.25 computed to May 5, 2006 and penalty of \$266 for late-filing the RPTT return.

A Conciliation Conference was held at the Department's Bureau of Conciliation and, on June 15, 2006, a Conciliation Decision was issued discontinuing the proceeding. On September 11, 2006, Petitioner filed a Petition with the Tax Appeals Tribunal protesting the Conciliation Decision and the Notice of Determination.

STATEMENTS OF POSITIONS

Petitioner argues that, pursuant to Code §11-2106(b)(7), the October 9, 2003 transfer was exempt from the RPTT as a transfer by its agent of property that was already beneficially owned by Petitioner. Respondent asserts that Petitioner has not established that the transfer was one from an agent to a principal or that beneficial ownership of the Property did not change. Respondent further asserts that as the Property was a four-family property, Petitioner was not entitled to the Code §11-2102(a) exemption for lien amounts which existed before the transfer and remained following the transfer.

CONCLUSIONS OF LAW

RPTT is imposed on the transfer by deed of City real property for consideration greater than \$25,000 at the time the deed is delivered by the grantor to the grantee. Code §11-2102(a). Real property transfers are taxed at a rate equal to a percentage of the consideration for the transfer, depending upon the date of the transfer, the size of the building and the amount of the consideration. Code §11-2102(a)(9). For 2003 transfers of larger

than three-family residences where consideration is less than \$500,000, the RPTT rate is 1.425%.

RPTT Rules ("Rules") §23-03(k)(1) states that the consideration for transfer of a one-, two-, or three-family house does not include the amount of any "excludible lien" on the property. An excludible lien includes a mortgage, lien or encumbrance placed on the real property before delivery of the deed which remains on the property after the date of the delivery of the deed. Rule §23-03(k)(3). There is no similar adjustment available for transfers of four-family properties, and taxable consideration for those transactions includes the lien or mortgage amount "whether or not the underlying indebtedness is assumed." Code §11-2101.9. See, also, Code §11-2103 which specifically provides:

The burden of proving that a lien or encumbrance existed on the real property or interest therein [. . .] before the delivery of the deed and remained thereon thereafter and the burden of proving the amount of such lien or encumbrance at the time of the delivery of the deed shall be on the taxpayer.

Since the Property is a four-family house, the excludible lien provisions do not apply to reduce the amount of taxable consideration for the transfer to Petitioner.

The Code exempts transfers between principals and agents from imposition of the RPTT. Code §11-2106(b)(7) provides that the tax does not apply to:

A deed . . . conveying or transferring real property . . . from a mere agent, dummy, straw man or conduit to his principal . . .

See, also, Rule §23-05(a)(7).

Rule §23-05(b)(7) defines an exempt transfer between a disclosed agent and principal as:

(iii) A conveyance between a principal and its agent where:

(A) a written agreement is entered into at the time of the transaction establishing such a relationship with respect to the realty or economic interest therein,

(B) the purported agent functions as an agent with respect to the realty or economic interest therein for all purposes, and

(C) the purported agent is held out as the agent and not the principal in all dealings with third parties relating to the realty or economic interest therein.

Neither the Code nor the Rules address the RPTT ramifications of an undisclosed agency. However, there are instances where such unexpressed relationships are recognized. For example, a "straw man" transaction has been defined to include a transfer between an agent and principal where the agent "purchases property for another to conceal [the] identity of [the] real purchaser. . ." Black's Law Dictionary (Sixth Edition at p. 1421) [emphasis supplied], cited in *Matter of Charles Fridman*, Administrative Law Judge Determination, TAT(H)93-1435(RP) (City Tax Appeals Tribunal ALJ Division, September 25, 1996). See, also, *MCP Associates L.P.* TAT(E) 93-1435 (RP) (City Tax Appeals Tribunal, October 31, 1997).

A real property transfer between related parties where a third party holds the property as a "conduit" for a short period of time to enable a principal to obtain certain Internal Revenue Code tax benefits, also is exempt from RPTT. See, e.g., *46 West 55th Street Corporation*, TAT 92-0408 (City Tax Appeals Tribunal, June 3, 1999). While the Rules express a preference for a disclosed agency,

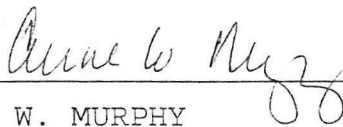
Section 23 was amended in 1989 to provide that the conduit exception would apply to agents of an undisclosed principal for short-term mortgage financing transactions where the property is reconveyed immediately after financing is obtained. Rule §23-05(b)(7)(i), (ii).

Petitioner did not offer testimony or provide any evidence that there was a written agency agreement which would confirm that the transferor, Mr. Wilson, acted as either a disclosed or undisclosed agent, straw man, dummy or conduit for Petitioner when the Property was transferred on October 9, 2003. Although the evidence submitted suggests that there was an undefined "business" relationship between Petitioner, Mr. Wilson, Mr. McLeod and certain entities, this evidence falls far short of supporting a finding that Mr. Wilson was Petitioner's agent. The documents submitted are confusing and contradictory. No testimony was provided with respect to the various corporate entities referred to in the documents and their relation (or lack thereof) to Petitioner. The fact that Mr. Wilson held himself out to third parties (including governmental agencies) as owner of the property for several years, both before and after the transfer, does not establish an agency relationship. Neither does the fact that Mr. Wilson was a "business associate" of Mr. McLeod (as was Junie Green, apparently) establish that Petitioner is entitled to an exemption from RPTT on the transfer. Petitioner has not met its burden of proving that the transfer of the Property was exempt from the imposition of City RPTT as a transfer between a principal and an agent. *Matter of Young v. Bragalini*, 3 NY2d 602 (1958); *Matter of Blue Spruce Farms v. New York State Tax Commission*, 99 AD2d 867, *aff'd*, 64 NY2d 682 (1984). See, also, *Matter of Hudson Sheraton Corporation D/B/A Sheraton Centre Hotel*, (NYS Tax Appeals Tribunal No.8006736, September 29, 1988).

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner Island Equities Realty & Asset Management LLC failed to prove that Wilbert Wilson was its agent, straw man, dummy or conduit at the time of transfer. Petitioner is therefore liable for RPTT on the transfer by deed of the property. Nor did Petitioner prove that the Property was not a four-family dwelling, and that it therefore was entitled to adjust taxable consideration by the amount of an outstanding mortgage lien.

The Notice of Determination, dated April 5, 2006, therefore is sustained in full.

DATED: August 19, 2009
New York, New York



ANNE W. MURPHY
Administrative Law Judge

