NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition	:	**DETERMINATION**
of	:	**TAT(H) 10-34(RP)**
Trump Village Section 4, Inc.	:	

Hauben, C.A.L.J.:

Petitioner, Trump Village Section 4, Inc. (Trump 4), 2928 West Fifth Street, Brooklyn, New York, filed a Petition for redetermination of a deficiency of New York City (City) Real Property Transfer Tax (RPTT) under Chapter 21 of Title 11 of the Administrative Code of the City of New York (Administrative Code) in connection with the June 15, 2007 reconstitution of Trump 4, which owned real property located in Brooklyn (Block 7273, Lots 25 and 50).

A hearing was held before the undersigned at One Centre Street, New York, New York, on December 15, 2011, June 27 and 28, 2012 and August 27 and 28, 2012. Petitioner and Respondent filed briefs, the last one of which was filed on December 21, 2012. Petitioner was represented by Richard L. Claman, Esq. and Steven R. Hochberg, Esq. of Stempel Bennett Claman & Hochberg, P.C. The Commissioner of Finance (Respondent) was represented by Frances Henn, Esq., Senior Counsel, Vincent D'Orazio, Esq., Deputy Chief, and Barbara Moretti, Esq., Assistant Corporation Counsel, all with the City's Law Department.

ISSUES

I. Whether the dissolution-reconstitution of Petitioner by amendment of its certificate of incorporation was a deed transfer for purposes of the Real Property Transfer Tax.

II. Whether the dissolution-reconstitution of Petitioner was a taxable transfer of economic interests for purposes of the Real Property Transfer Tax.

III. If the dissolution-reconstitution of Petitioner was a deed transfer or a taxable transfer of economic interests, whether the consideration for the transfer as determined by the Commissioner, based on the market value of all of the apartments contained in Petitioner's residential apartment complex was correct.

FINDINGS OF FACT

Petitioner is a residential housing cooperative complex located in Brooklyn, New York consisting of four buildings with a total of 1,144 residential apartments. Petitioner was incorporated on August 29, 1961 as a Mitchell-Lama cooperative housing corporation organized pursuant to the provisions of the Private Housing Finance Law (PHFL)(ML Trump 4).

As a Mitchell-Lama cooperative, ML Trump 4 operated under the PHFL and under the supervision of the New York State Division of Housing and Community Renewal (DHCR). Applicants for apartments had to meet income guidelines and paid a fixed price for their apartment.[1] Residents filed annual income affidavits and maintenance surcharges could be imposed. Residents who moved out surrendered their shares to ML Trump 4 at the price that they originally paid plus the amount of their proportionate share of the amortization of the mortgage on the buildings and any capital assessments paid to the corporation. As a Mitchell-Lama

[1] Purchasers received shares in the cooperative corporation and a proprietary lease that entitled them to reside in their respective apartments.

cooperative, ML Trump 4 was eligible for City property tax benefits and low-cost financing.

Under Section 35 of the PHFL, a Mitchell-Lama cooperative may voluntarily withdraw from the Mitchell-Lama program. It may do so by: (i) dissolving, and then (ii) either (a) conveying the underlying Mitchell-Lama project to the shareholders or a designated corporation, or (b) reconstituting as a new business corporation (dissolution-reconstitution).

Petitioner decided to withdraw from the Mitchell-Lama program using the dissolution-reconstitution route. Among the steps Petitioner took to traverse this route were: (1) paying off its mortgages in 2005, (2) receiving permission by means of a no-action letter from the New York State Attorney General (Attorney General) to proceed with the Voluntary Plan of Reconstitution (Plan), (3) obtaining the approval of two-thirds of the shareholders of record, (on a one vote per unit basis) and (4) amending its certificate of incorporation with the approval of the New York Secretary of State.

The Amended Certificate of Incorporation, among other things, (1) removed reference to the Limited-Profit Housing Companies Law[2] and substituted in its place the Business Corporation Law, (2) removed language referring to Article XII of the Public Housing Law and substituted in its place the Business Corporation Law (BCL), (3) made changes to the purposes for which the company was formed[3],

[2] The Limited-Profit Housing Companies Law is Article II of the Private Housing Finance Law.

[3] Article II of the original Certificate of Incorporation essentially provided that the purpose of the corporation was to act as a "state-aided project" under the Public Housing Law. The Amendment to the Certificate of Incorporation eliminated that purpose and added new purposes including (a) to be a cooperative housing project and to provide homes for its stockholders, (b) own and operate its real property and have the authority to do the things involved

(4) eliminated references to the Commissioner of DHCR, (5) deleted an Article relating to restrictions on the sale, encumbrance, transfer and assignment of real property pursuant to the Limited-Profit Housing Companies Law, (6) removed Articles relating to other restrictions imposed by the Limited-Profit Housing Companies Law and (7) added an article relating to each shareholder's right to occupy an apartment in the premises pursuant to a proprietary lease, providing for an original lease term of 99 years, and authority for a transfer fee to be paid by a selling stockholder.

On June 15, 2007, having obtained shareholder approval and a no-action letter from the Attorney General and after amending its certificate of incorporation, ML Trump 4 effected its exit from the Mitchell-Lama program and was no longer a Mitchell-Lama cooperative. Upon its reconstitution it became a cooperative housing corporation (BCL Trump 4) no longer governed by the regulations and requirements of the Mitchell-Lama program. After the reconstitution, the tenant-shareholders of record were unchanged. These tenant-shareholders were entitled to new stock certificates and continued to own the same number of shares and to occupy the same residential cooperative apartment as they did before the reconstitution. The number of shares issued and share allocation remained the same. The voting rights of the tenant-shareholders remained the same: one vote per stock certificate. BCL Trump 4 had the same tax identification number as it did before reconstitution. The tenant-shareholders could sell their apartments on the market without approval from DHCR. The property was no longer entitled to the real property tax benefits accorded Mitchell-Lama housing complexes.

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in carrying on the business of the corporation and owning and operating property, and (c) have all the powers "enumerated in Section 202 of the [BCL] or any other [State] statute."

Prior to the dissolution-reconstitution, typical prices payable to tenant-shareholders as a result of moving out of Trump 4 during 2004-2005, as noted in the Plan, ranged from $10,502, the low end for one-bedroom apartments, to $23,105, the high end for three-bedroom apartments. The projected resale price, per room, used by the cooperative and its accountants for budgeting purposes and included in material provided to shareholders to induce them to withdraw from the Mitchell-Lama program was $85,000 per room, as reported to tenant-shareholders in the Plan. While resale apartment prices did not reach that level in 2007, in the months after reconstitution, apartment sales averaged over $270,000 per apartment. While Lollie Reich, President of the Board of Directors of Trump 4 testified that the Board wanted to be free of DHCR oversight, it is found that the primary motivation for ML Trump 4 to leave the Mitchell-Lama program was the current residents' desire to be able to sell their apartments at market prices.

Prior to the dissolution-reconstitution, tenant-shareholders had three-year proprietary leases that were renewed automatically. After reconstitution, tenant-shareholders had 99-year proprietary leases.

Petitioner did not file a RPTT return or pay RPTT in connection with its dissolution and reconstitution.

On August 10, 2010, Respondent issued a Notice of Determination to Petitioner asserting an RPTT deficiency in the principal amount of $8,235,727.50 plus interest accrued as of August 9, 2010 of $2,325,548.00 and a penalty of $2,058,932 for a total deficiency of $12,620,207.50. The Notice of Determination stated in part:

> Trump Village Section 4, Inc., now a private cooperative corporation, amended its certificate of incorporation and left the Mitchell-Lama program. A reconstitution to this new form of ownership constitutes a conveyance of the underlying real property and is therefore subject to the Real Property Transfer Tax.

The principal amount of the consideration involved was estimated to be $313,742,000 based on sales of apartments by Trump 4 shareholders after the events of June 2007. Respondent determined an average sales price from reports of sales during 2007 and 2008 and multiplied that average by 1,144, the number of apartments in the Trump 4 complex.

Petitioner submitted an appraisal to show that the consideration used by Respondent overvalued the Property for RPTT purposes. The Appraisal Report was prepared by Marilyn Kramer Weitzman, MAI, CRE, FRICS, of the Weitzman Group. Ms. Weitzman concluded that the appropriate consideration involved in the June 15, 2007 reconstitution of Petitioner was $47,300,000.

In arriving at that amount, Ms. Weitzman used a bundle of rights analysis. Ms. Weitzman viewed the effective circumstances as Trump 4, a corporation that owned land and buildings subject to the possessory rights of the tenant-shareholders. According to Ms. Weitzman, the complete bundle of rights of a property owner includes: the right to sell an interest; the right to lease an interest; the right to occupy the property; the right to mortgage an interest and the right to give an interest away. In Ms. Weitzman's analysis Petitioner has leased out to others the full

rights of occupancy, retaining only a leased fee interest[4]. Ms. Weitzman valued Trump 4's leased fee interest.

Ms. Weitzman's analysis consisted of valuing the fee simple interest and the leasehold interest[5]. She then subtracted the value of the leasehold interest from the value of the fee simple interest to arrive at the value of Petitioner's leased fee interest.

For purposes of this analysis, Ms. Weitzman valued the fee simple interest as if the building was vacant, unleased and the units available to be sold on the market on June 15, 2007. She used the Discounted Cash Flow Technique of the Income Approach. This analysis seeks to obtain a present value based on a projection of the sale of all of the units in the building over a period of time.

Ms. Weitzman projected revenue from the sale of the 1,144 units over an eight-year period (12 units per month) as well as the costs of running the Property over that period. Ms. Weitzman assumed an average price per unit on June 15, 2007 of $255,000 based on sales of apartments at Trump 4 from conversion through December 31, 2008. Ms. Weitzman assumed a 3.0% annual price increase. Ms. Weitzman assumed net sales proceeds of $304,571,642. After factoring in various costs over the eight-year period, Ms.

[4] A leased fee interest is the lessor's or landlord's interest which includes the right to rent to be paid by the lessee, the right to repossession at the termination of the lease, default provisions, and the right of disposition of the property subject to the lessee's rights during the lease term. (Appraisal Institute [2008]. *The Appraisal of Real Estate*, 13th Edition, Page 114.)

[5] A leasehold interest is the lessee's, or tenant's, estate, which includes the right to possess the leasehold estate for the lease period, to sublease the leasehold estate (if permitted by the lease), and possibly to improve the leasehold estate (if permitted by the lease). (Appraisal Institute [2008]. *The Appraisal of Real Estate*, 13th Edition, Page 114.)

Weitzman assumed net sales proceeds of $260,465,711. After considering various benchmark financial instruments and rates she assumed a discount rate of 10%. Applying a discount rate of 10% to the net sales proceeds, Ms. Weitzman obtained a present value of $171,383,537 for the fee simple interest.

Ms. Weitzman valued the leasehold interests of the tenant-shareholders at $124,085,021 using an analysis based on the valuation of single cooperative housing units. For purposes of this part of the analysis, instead of viewing the building as vacant and the units as unleased, Ms. Weitzman assumed that the building was fully occupied and that the tenant-shareholders of all 1,144 units wished to sell their units on June 15, 2007. She also assumed that first sales would be subject to a 20% flip charge. In this analysis, the sales, over an eight-year period yielded gross sales revenue of $326,391,318 (at $255,000 per unit and assuming annual price increases of 3% annually). This amount was further adjusted to reflect selling costs and a 10% discount rate, resulting in the $124,085,021 value for the leasehold interests of the tenant-shareholders.

Ms. Weitzman then calculated the value of Petitioner's leased fee interest at $47,298,516 by subtracting the value of the leasehold interests of the tenant-shareholders ($124,085,021) from the value of the fee simple interest ($171,383,537). Ms. Weitzman assumed that Trump 4 imposed a flip tax on the sales of individual apartments as authorized by the amended certificate of incorporation and concluded that the value of the leased fee interest represented mainly the flip tax that Trump 4 would receive upon the sales.

Respondent submitted an appraisal to support the deficiency asserted in the Notice of Determination. Respondent's Appraisal Report was prepared by Richard Marchitelli, MAI, CRE, FRICS, of Cushman & Wakefield. Mr. Marchitelli concluded that the appropriate consideration involved in the June 15, 2007 reconstitution of Petitioner was $338,000,000.

Mr. Marchitelli used a sales comparison approach; not of apartment buildings occupied by tenants with long-term leases, but of individual residential units. In this approach, the value of cooperative apartment units in the Trump 4 complex was determined by reference to sales of units sold within Trump 4 and nearby similar buildings.[6] Mr. Marchitelli determined that based on the comparable sales of apartment units that apartments at Trump 4 should be valued at $350 per square foot. Trump 4 has 967,560 square feet of net apartment area. Multiplying 967,560 by $350 yields a total of $338,646,000 as the expected sales price of all 1,144 apartments,[7] all sold individually by tenant-shareholders on June 15, 2007. Mr. Marchitelli assumed that the value of Trump 4's interest in the Property is reflected in the value of its individual apartment units. Mr. Marchitelli concluded that the value of Trump 4's interest in the land and buildings comprising Trump 4 was the same as the value of the sales revenue of the projected individual sales by tenant-shareholders. Mr. Marchitelli also assumed that on June 15, 2007, Trump 4 had a built-in market for the apartments, namely the tenant-shareholders who already owned their apartments. Mr. Marchitelli's analysis did not assume or reflect that anything of value was received by Trump 4 upon the sale of the individual apartment units by tenant-shareholders.

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[6] Mr. Marchitelli used sales from Trump Village 4, Trump Village 3, Brighton Towers and Seacoast Towers. The auditor used sales from Trump 4.

[7] The units were each valued at approximately $296,000 per apartment.

STATEMENT OF POSITIONS

Petitioner asserts that the dissolution-reconstitution is not subject to the RPTT because it is neither a deed transfer nor a transfer of economic interests in real property. If the dissolution-reconstitution is found to be a transfer of economic interests in real property, Petitioner contends that such transfer is entitled to the exemption for transfers that are mere changes in form of the entity that owns the Property. If it is found that there is a taxable transfer, Petitioner contends that the consideration received by the grantor is the value of Trump 4's leased fee interest, which represents the fee simple interest less the leasehold interests of the tenant-shareholders.

Respondent first asserts that the Amended Certificate of Incorporation of Trump 4 is a deed that was conveyed from ML Trump 4 to BCL Trump 4. Respondent next argues if there was a transfer of economic interests rather than a deed transfer, the transfer is taxable because either there was a transfer of the land and buildings comprising Trump 4 or there was a change in beneficial ownership of the economic interests and therefore the mere change in form exemption does not apply. Respondent contends that the consideration for the transfer is equal to the sum of the potential sales prices for each apartment as if all the apartments were sold separately on June 15, 2007.

CONCLUSIONS OF LAW

Administrative Code § 11-2102.a imposes the RPPT on a deed at the time of delivery by a grantor to a grantee where the consideration is more than $25,000.

The term "Deed" is defined in Administrative Code § 11-2101.2 as follows:

> Any document or writing (other than a will), regardless of where made, executed or delivered, whereby any real property or interest therein is created, vested, granted, bargained, sold, transferred, assigned or otherwise conveyed, including any such document or writing whereby any leasehold interest in real property is granted, assigned or surrendered.

Grantor is defined as "the person or persons making, executing or delivering the deed . . . [or who] transfer an economic interest in real property." [Administrative Code § 11-2101.14.] Grantee is defined as "the person or persons who obtain any of the real property which is the subject of the deed or any interest therein . . . [or] to whom an economic interest in real property is transferred." [Administrative Code § 11-2101.15.]

Petitioner argues that the RPTT does not apply to the dissolution-reconstitution of Petitioner. Respondent contends that the RPTT law was drafted broadly and applies to the dissolution of ML Trump 4 and its reconstitution as BCL Trump 4 because the dissolution-reconstitution effectuated a conveyance of real property from ML Trump 4 to BCL Trump 4. Petitioner contends that the Amended Certificate of Incorporation is not a deed. Respondent argues that the Amended Certificate of Incorporation is a deed within the meaning of Administrative Code § 11-2101.2 and that the deed was delivered from ML Trump 4, as grantor, to BCL Trump 4 as grantee; as the RPTT is imposed on a "deed at the time of delivery by a grantor to a grantee" under Administrative Code § 11-2102.a, the transfer is taxable.

Whether a set of events that indirectly involve real property amounts to a deed transfer of the property must be considered in the context of the history of the RPTT. When first enacted, the RPTT applied only to transfers of real property by deed. Where property was held by a corporation, a transfer of all of the corporation's shares effectively transferred the corporation's real property without incurring the RPTT.

In response to the sale of the corporation that owned the Pan Am Building in 1981, a transaction to which the RPTT did not apply,[8] the State Legislature amended the RPTT enabling act to permit the imposition of the RPTT on transfers of economic interests. The legislative history noted:

> [t]his bill closes that loophole by permitting the taxation of transfers of controlling interests in corporations, partnerships, associations, trusts and other entities which own real property. As a result, transactions which effectively, albeit indirectly, convey property will now be taxed.[9]

The legislative history reflects a correct understanding that Administrative Code § 11-2101.2 as then in effect applied only where the "transfer is actually reflected in a deed." *Id.*[10] *(See*

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[8] A transaction involving a change in ownership of the shares in a corporation that owned real property was not considered to involve a "document or writing" whereby real property was "conveyed" under Administrative Code §§ 11-2102.a or 11-2101.2.

[9] Governor Carey's approval letter. 1981 McKinney's Session Laws p. 2636-37.

[10] Moreover, a deed transfer anticipates both a grantor and a grantee. [Administrative Code § 11-2102.a.] A grantor is not authorized to transfer property to itself alone. [*See*, Real Property Law § 240-b] As Trump 4 reconstituted by amending its certificate of incorporation, if a deed was involved here, Trump 4 would be both grantor and grantee. The "deed" would not affect Trump 4's interest in the Property.

also, *Bancamerica Commercial Corporation*, City Tax Appeals Tribunal, March 27, 2002.)[11]

The dissolution-reconstitution and the Amended Certificate of Incorporation does not involve a transfer of real property that is reflected in a deed. The Amended Certificate of Incorporation, like shares in a corporation, is not a deed under Administrative Code § 11-2102.a. (*Trump Village Section 3, Inc. v City of New York*, 100 AD3d 170,[2nd Dept 2012], *Bancamerica Commercial Corporation*.)

Respondent argues that if the Tribunal finds that there was no deed transfer the dissolution-reconstitution and amendment to the Certificate of Incorporation should be deemed a taxable transfer of an economic interest in real property and that the RPTT exemption for 'mere changes in form' [*see infra*] does not apply here.

The RPTT is imposed on the transfer of a "controlling economic interest in real property." [Administrative Code § 11-2102.b.] An "economic interest in real property" includes the "ownership of shares of stock in a corporation which owns real property." [Administrative Code § 11-2101.6.] This includes the ownership of shares in a cooperative corporation. When used in relation to an economic interest in real property, "transfer" or "transaction" includes the transfer or issuance of shares in a corporation "which shares of stock . . . constitute a controlling interest in such corporation . . .." [Administrative Code § 11-2101.7.]

[11] A settlement agreement was not a deed because it did not "create, vest, grant, bargain, sell, transfer, assign, or otherwise convey real property," and "did not 'deliver' the Property from [grantor] to [grantee]. . .." (*Bancamerica Commercial Corporation, at pp. 20-21.*)

Recently, the Appellate Division, Second Department found that a dissolution-reincorporation involves neither a direct nor an indirect transfer of real property. In *Trump Village Section 3, Inc. v City of New York*, 100 AD3d 170,[2nd Dept 2012] (Trump 3) involving a transaction similar to the one here, the Court considered the City's arguments that the RPTT applied:

> . . . the City defendants essentially contend that by voluntarily dissolving and subsequently reconstituting, Trump Village [Section 3] became a new corporation and that, accordingly, the amended certificate constituted a deed. Thus they conclude that the purported deed was delivered at the time of execution . . . from an 'old' Trump Village to a 'new' Trump Village. We find no support in either the case law or the record for the City defendants' interpretation of the law. . . *Upon amending its certificate of incorporation, Trump Village remained the same entity, although it was relieved of various restrictions previously imposed upon it by the Mitchell-Lama housing program . . .. Id, at 176-177* . [Emphasis added.]

The Second Department's holding that the cooperative housing corporation "remained the same" leaves no room for a finding that there is a transfer of economic interests in a dissolution-reconstitution of a Mitchell-Lama Housing Corporation that involves amending the Certificate of Incorporation. The dissolution-reconstitution involved only one entity. There was no transfer of real property or of economic interests in real property as there was no transfer. After the dissolution-reconstitution, Trump 4 had the same shareholders with the same interests as before the dissolution-reconstitution.

However, even if the dissolution-reconstitution and the Amended Certificate of Incorporation transferred economic interests in real property, this transaction is still not subject to tax.

The Administrative Code provides exemptions from RPTT for certain otherwise taxable transfers. [Administrative Code § 11-2106.b.8.] One exemption, colloquially referred to as the "mere change in form exemption" provides:

> 8. A deed, instrument or transaction conveying or transferring real property or an interest therein *that effects a mere change of identity or form of ownership or organization to the extent the beneficial ownership of such real property or economic interest therein remains the same*, other than a conveyance to a cooperative housing corporation of the land and building or buildings comprising the cooperative dwelling or dwellings. For purposes of this paragraph, the term "cooperative housing corporation" shall not include a housing company organized and operating pursuant to the provisions of article two, four, five or eleven of the private housing finance law. [Emphasis supplied.]

The parties agree that if this transaction involved the conveyance of the land and buildings comprising Trump 4 that the "mere change in form" exemption would not apply. Petitioner argues, however, that land and buildings were not conveyed in the dissolution-reconstitution.[12] Petitioner contends that no matter how viewed, the dissolution-reconstitution is not a taxable event.

[12] While it may be arguable whether, in the context of this exemption provision, the land and buildings should be considered transferred, assuming that there was a transfer of economic interests between distinct entities, considering the decision in *Trump 3*, it must be found that no such transfer of land and buildings took place.

Petitioner argues that in any event the "mere change in form" exemption applies because there was no change in beneficial ownership.

Assuming that ML Trump 4 is different from BCL Trump 4, the shareholders of those entities remained the same. Respondent argues however that even though the shareholders remained the same, what they owned before and after the dissolution-reconstitution changed significantly so that the beneficial ownership in the real property changed and the mere change in form exemption does not apply.

In *East Midtown Housing Company, Inc. v Cuomo,* [20 NY3d 161 2012], the Court of Appeals decided that the dissolution-reconstitution of a Mitchell-Lama cooperative development involved the "offering or sale" of securities within the meaning of the Martin Act [General Business Law (GBL)§ 352-e, et seq.][13] and that the Attorney General had jurisdiction over the cooperative's plan to leave the Mitchell-Lama program. In reaching its decision, the Court stated that the applicable law [GBL § 352-e(1)(a)] "should be liberally construed to give effect to its remedial purpose of protecting the public from fraudulent exploitation in the offer and sale of securities." The Court noted that to protect investors from fraud in the offering of securities courts have held that "changes in the rights of the holders of existing securities can amount to a purchase or sale" within the meaning of the applicable laws. The Court of Appeals focused on the fact that after the dissolution-reconstitution, apartments could be sold at market rates rather than the restricted amount under the Mitchell-Lama

[13] The Martin Act gives the Attorney General broad powers to fight financial fraud. Under the Martin Act the Attorney General has the authority to oversee offerings of stock in cooperative housing corporations.

program. After reviewing the changes to shareholder rights, the Court concluded that upon amending the Certificate of Incorporation in the dissolution-reconstitution "the changes affecting shareholders are substantial enough to constitute a different investment such that the proposed privatization can fairly be characterized as an 'offering or sale' of securities under the Martin Act."

Certainly, since the purpose of the Martin Act is to protect the public from fraud, it should be liberally construed to accomplish its purpose. However, even if a dissolution-reconstitution is treated as an "offering or sale of securities" for Martin Act purposes, there is no reason to apply a Martin Act analysis to the RPTT. A broad reading of beneficial interest is not warranted for RPTT purposes. For the mere change in form exemption to apply, the owners of the real property or the interests in real property must be the same before and after the change in ownership. As the shareholders in ML Trump 4 are the same as the shareholders in BCL Trump 4, with the same interests before and after the dissolution-reconstitution, and there has been no showing that someone else was the beneficial owner of Trump 4, there was no change in beneficial ownership within the meaning of the Administrative Code. Thus, even assuming a taxable transaction, the "mere change in form" exemption would apply despite any increased value in what the shareholders owned. Accordingly, the dissolution-reconstitution and amendment of the Certificate of Incorporation did not effect a change in ownership of real property either directly or indirectly and is therefore not subject to the RPTT.

In view of the above, it is not necessary to reach the issue of the consideration that would be involved if there were a taxable

transaction. However, for completeness, I will briefly discuss the issue.

Administrative Code § 11-2101.9 defines consideration as:

> [t]he price actually paid or required to be paid for the real property or economic interest therein, without deduction for mortgages, liens and encumbrances, whether or not expressed in the deed or instrument and whether paid or required to be paid by money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, lien or encumbrance, whether or not the underlying indebtedness is assumed.

The RPTT also provides that "[w]here the consideration includes property other than money, it shall be presumed that the consideration is the value of the real property or interest therein." [Administrative Code § 11-2103.] Consideration under the RPTT assumes that a grantor receives something of value upon the transfer or conveyance of real property to a grantee.

Again, assuming a conveyance of realty or an economic interest therein, Respondent contends that the RPTT Rules apply to the reconstitution as a "conveyance of realty (or an economic interest therein) by a sponsor or other party to an entity formed for the purpose of cooperative ownership of real property. . ." [Rules of the City of New York, 19 RCNY § 23-03(h)(1).] Since there was no cash paid or required to be paid, or mortgages, liens or encumbrances on the realty, Respondent argues that consideration received by the grantor for the transfer of the land and buildings was equal to the fair market value of interests in the cooperative entity received; that is, the shares of stock in Trump 4.

Typically, the RPTT applies to cooperative apartment sales in the case of the original transfer of cooperative housing corporation stock by the cooperative housing corporation (or sponsor) in connection with the grant of a proprietary lease, and in the case of a subsequent sale of a cooperative apartment by a tenant-shareholder. [Rules of the City of New York, 19 RCNY § 23-03(h)(1).] Neither of these situations is involved in this matter. The usefulness of the Rules is thus limited. Consideration "includes the amount of cash paid or required to be paid, the amount of any mortgages, liens or encumbrances on the realty and the fair market value of interests in the cooperative entity received by the sponsor." *Id.* In the absence of cash paid or required to be paid or mortgages, Petitioner and Respondent both made numerous assumptions regarding any "fair market value of interests" in Trump 4 that the "sponsor" may have received, if any.

Respondent's appraisal of the consideration received simply determines an average retail sale price of a unit and multiplies it by the number of units in Trump 4. The result is Respondent's value on June 15, 2007. This consideration, the sale price for 1,144 apartments as if sold on the same day, that cannot realistically occur, without adequate explanation of how sales proceeds received by shareholders is consideration received by Trump 4 while simple, is not a reasonable methodology or approach and is not accepted. Moreover, Mr. Marchitelli's assumption that the tenant-shareholders, who already owned their units, who had to meet stringent income requirements to qualify for the Mitchell-Lama program and who paid no more than $23,105 for their units provided a built-in market for the apartments on June 15, 2007 at an average price of approximately $296,000 per unit has no basis in fact or experience and cannot be used to support his appraisal.

Petitioner's appraisal, with respect to the discounted value of the fee simple, is more thorough and thoughtful and is accepted. Assuming there was a taxable transaction, Trump 4 received a discounted value and not the total retail value of the individual apartments as reflected in sale prices for individual units. Petitioner's carving out of the leasehold interests of the tenant-shareholders from consideration is also reluctantly accepted.[14]

ACCORDINGLY, IT IS CONCLUDED THAT the dissolution of Trump 4 as a Mitchell-Lama Housing Corporation and its reconstitution by means of an Amended Certificate of Incorporation as a cooperative housing corporation under the BCL is not subject to RPTT because such dissolution-reconstitution involves neither a conveyance by deed nor a taxable transfer of economic interests in real property. The Petition of Trump Village Section 4 is granted and the Notice of Determination dated August 10, 2010 is cancelled.

Dated: July 11, 2013
New York, New York

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Warren P. Hauben
Chief Administrative Law Judge

[14] While Petitioner's treatment of Trump 4 as separate from its shareholders is accepted, the tenant-shareholders approved the Plan to withdraw from the Mitchell-Lama program because of the anticipated increased value in the corporation's shares, a financial benefit that they hoped to reap when they sold their shares in the corporation. Additional rights received by Trump 4 or the tenant-shareholders that appear not to have been considered in Petitioner's appraisal include the tenant-shareholders right to determine the annual budget and control the finances of the corporation including the maintenance for the apartments and the "flip tax" rate, and so control the amount of money flowing to the corporation and the ability of Trump 4 to mortgage the Property without the consent of DHCR and utilize the proceeds from the mortgage.