NEW YORK CITY TAX APPEALS TRIBUNAL

In the Matter of	:	
VCP One Park REIT LLC, VCP One Park Parallel REIT LLC, and One Park Avenue Mezz Partners LLC	:	DECISION TAT (E) 14-26 (RP)
Petitioners.	:	

The Commissioner of Finance of the City of New York (Respondent) filed an exception to a Determination of an Administrative Law Judge (ALJ) dated January 24, 2017 (ALJ Determination), which cancelled Notices of Determination (Notices) issued by the New York City Department of Finance (Department) asserting New York City Real Property Transfer Tax (RPTT) against One Park Avenue Mezz Partners LLC (Parent),[1] VCP One Park REIT LLC (D-REIT) and VCP One Park Parallel REIT LLC (F-REIT). Parent, D-REIT and F-REIT were, respectively, the grantor and grantees in a transfer that occurred on March 1, 2011 (Transfer). Each of the Notices asserted RPTT in the principal amount of $10,790,844.83 plus interest against one of D-REIT, F-REIT and Parent (Petitioners).

Petitioners were represented by Joseph Lipari, Esq., and Lary S. Wolf, Esq., of Roberts & Holland, LLP. Respondent was represented by Andrew G. Lipkin, Esq., Senior Counsel, New York City Law Department. Under 20 RCNY §1-09(f), Tribunal

[1] Except as otherwise noted, the ALJ's Findings of Fact, although paraphrased and amplified herein, generally are adopted for purposes of this Decision. Certain Findings of Fact not necessary to this Decision have not been restated and can be found in the ALJ Determination. The Parties submitted a Stipulation of Facts with exhibits and a Supplemental Stipulation of Facts with exhibits (collectively the Stipulation). However, the Parties merely stipulated to the authenticity of the various documents and, apart from the procedural facts of the matter, did not stipulate to any of the facts directly related to the transaction at issue. The terminology for the various entities generally follows the terminology used in the Transaction Agreement by and among MHP One Park Member LLC, VCP One Park REIT LLC, and VCP One Park Parallel REIT LLC, dated February 17, 2011, Stipulation, exhibit E (Transaction Agreement).

Rules of Practice and Procedure, the Parties agreed to have this matter determined by the ALJ on submission without the need for appearance at a hearing. Oral argument before the Tribunal was held on August 16, 2017.

Before the Transfer, Parent was owned 80% by BA One Park Avenue LLC and 20% by MHP One Park Member LLC. Parent owned 100% of One Park Avenue Senior Mezz Partners LLC (Company), which owned 100% of One Park Avenue Partners LLC (Owner), which owned a fee interest in the real property located at One Park Avenue in Manhattan, Block 888, Lot 1 (Property). Parent transferred 100% of the membership interests in Company to D-REIT and F-REIT (collectively Grantees). Grantees are both Delaware limited liability companies formed on February 28, 2011. Each elected to be taxed as a real estate investment trust (REIT) under Internal Revenue Code §856(c)(1).

On February 28, 2007, Parent borrowed $32.6 million from Bank of America N.A. (Junior Mezz Loan). On the same date, Company borrowed $75.45 million from Bank of America N.A., Citicorp North America, Inc. and RXR 1 Park Mezz Investor LLC (Senior Mezz Loan). Owner was the borrower on a mortgage loan of $375 million dated as of February 28, 2007 from Bank of America N.A. secured by the Property (Mortgage).

The Closing Statement dated as of March 1, 2011[2] (Closing Statement) includes as exhibit B a recitation of the steps in the transaction as follows:

> "On the day prior to Closing:
>
> . . .
>
> "[Grantees] acquired undivided interests in the entire . . . Junior Mezz Loan and the entire . . . Senior Mezz Loan by paying $16,027,213.60 of cash. . . .
>
> . . .
>
> "At the Closing:
>
> "4. Parent . . . transfers its interest in the Company to the [Grantees], in repayment of the . . . Junior Mezz Loan. The . .

[2] Stipulation, exhibit T.

. Senior Mezz Loan is satisfied simultaneously with the transfer.

"5. In addition, Parent . . . receives (a) $2,250,000 of cash in the aggregate from the [Grantees], (b) $2,250,000 in the aggregate of 7% non-voting preferred shares in the [Grantees], and (c) 10% profits shares in each of the [Grantees] having an aggregate value of $1,125,000."

Immediately after the transaction, Company continued to own 100% of the interests in Owner, which continued to own 100% of the Property.[3]

The estimated market value of the Property on the Notice of Property Value dated as of January 15, 2011 issued by the Department was $240,568,000 (Estimated Market Value).

Petitioners timely filed a RPTT return (RPTT Return) reporting on line 11 of Schedule 1 – Details of Consideration, total consideration of $240,568,000[4] and, on Line 12 of Schedule 2, total tax due of $2,999,582.25. Lines 1 through 9 of Schedule 1 show no additional amounts. The RPTT Return reported the transaction as exempt to the extent of 5% as a mere change of form of ownership without a change in beneficial ownership under Administrative Code of the City of New York (Administrative Code) §11-2106.b.8. The tax due was calculated applying the RPTT tax rate applicable to a qualifying REIT transfer as defined in Administrative Code §11-2102.e(2) (REIT Transfer) of 1.3125% to the remaining 95% of the reported consideration.

[3] Owner subsequently contributed the Property to a new wholly-owned limited liability company.

[4] Stipulation, exhibit B. The Worksheet for Conditions l(a) and l(b) (REIT Worksheet) on page 12 of the RPTT Return lists total consideration of $5,625,000. The Department's audit workpapers, submitted as Stipulation, exhibit V contains copies of multiple RPTT returns, one of which has a REIT worksheet reporting consideration as $240,568,000. The difference between that RPTT return and the RPTT Return (submitted as Stipulation, exhibit B) was not explained. The ALJ concluded that the RPTT Return (submitted as Stipulation, exhibit B) should be viewed as the return filed for purposes of his Determination. Given that one of the copies of the RPTT Return included in exhibit V shows a date stamp from the City Register of March 16, 2011 and the Notices all show a filing date of March 16, 2011, we agree that Stipulation, exhibit B should govern.

On the REIT Worksheet, Petitioners reported $5,625,000 on line 1, which is required to be the sum of lines 1, 2, 7, 8, 9 and 10 from Schedule 1 – Details of Consideration. The REIT Worksheet reported $3,375,000.00 on lines 2.e and 2.g as the value of REIT shares received, and reported $2,250,000 on line 3, which is line 1 multiplied by 40%. Line 2.d of the REIT Worksheet was marked "N/A" and every other line was filled in with a "0".

The Department audited the RPTT Return.

On September 26, 2013, during the audit, Petitioners submitted a revised "Schedule 1 – Details of Consideration"[5] on which it reported cash of $2,250,000 on line 1, the $375,000,000 unpaid principal amount of the Mortgage on line 3, $15,977,000 as the amount of other liens on property on line 6, $3,375,000 as the value of shares of stock or partnership interest received on line 7, and total consideration of $240,568,000, the Estimated Market Value, on line 11. The amount reported as the value of other liens is described as the amount paid to retire the Junior Mezz Loan and the Senior Mezz Loan, which had an aggregate face value of $108,050,000.

The Department determined that the Transfer did not qualify as a REIT Transfer. The Department computed RPTT due using the tax rate of 2.625% applicable to transfers of nonresidential properties where the consideration is $500,000 or more. The Department computed taxable consideration of $525,349,603.14, based on a sale of the Property on March 1, 2007 for $550 million plus RPTT paid by Grantees of $2,999,582.25, less the 5% exemption for a mere change in form of ownership without a change in beneficial ownership, resulting in tax at 2.625% of $13,790,427.08. After crediting Petitioners' payment of $2,999,582.25, the Department asserted additional tax due of $10,790,844.83.

[5] Stipulation, exhibit V at 384-85.

In determining whether the value of the REIT interests received equaled at least 40% of the equity interests in the Property transferred, the Department used Petitioners' value for consideration, $5,625,000, and added the RPTT paid by Grantees of $2,999,582.25 for a total of $8,624,582.25. The Department then compared this with the value of the shares in Grantees received, $3,375,000, resulting in a ratio of 39.13%. Because that ratio was less than 40%, the Department concluded that the Transfer did not qualify for the reduced RPTT rate.

Respondent issued the Notices dated July 18, 2014. The Explanation of Adjustment(s) on the Notices states that the lower rate for a REIT Transfer was not applied because all of the requirements of Administrative Code §11-2102.e were not met.[6]

Petitioners contend that all requirements for a REIT Transfer have been met and that the RPTT as shown on the RPTT Return and paid by Petitioners was correct.[7]

Respondent asserts that a "transfer of an equity interest in real property which has no value [cannot] qualify as a REIT Transfer."[8] Respondent further asserts that Grantees' payment of the RPTT should be added to the consideration and, finally, that the ALJ did not properly consider the nature of the interests in Grantees received in determining the portion of the consideration represented by REIT shares. Respondent contends that based on the foregoing, the Transfer does not qualify as a REIT Transfer because all of the requirements of Administrative Code §11-2102.e were not met.

Administrative Code §11-2102.e(1) provides that for transfers qualifying as REIT Transfers, the RPTT is computed at half of the otherwise applicable rate. Administrative Code §11-2102.e(2) provides in relevant part:

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[6] The Explanation of Adjustment(s) incorrectly refers to Administrative Code §11-2103.e.
[7] Brief of Petitioners in Opposition to Respondent's Exception (Petitioners' Br.) at 8-9.
[8] Respondent's Brief (Respondent's Br.) at 1.

"(2) For purposes of this subdivision e, a real estate investment trust transfer shall mean (A) any deed or other instrument or transaction conveying or transferring real property or an economic interest therein to a real estate investment trust as defined in section eight hundred fifty-six of the internal revenue code (a "REIT") or to a partnership or corporation in which a REIT owns a controlling interest immediately following the transaction;

"(B) . . . Notwithstanding the foregoing, a transaction described in the preceding sentence shall not constitute a real estate investment trust transfer unless (i) it occurs in connection with the initial formation of the REIT and the conditions described in subparagraphs (C) . . . are satisfied. . . .

"(C) The value of the ownership interests in the REIT, or in a partnership or corporation in which the REIT owns a controlling interest, received by the grantor as consideration for such conveyance or transfer must be equal to an amount not less than forty percent of the value of the equity interest in the real property or economic interest therein conveyed or transferred by the grantor to the grantee and such ownership interests must be retained by the grantor or owners of the grantor for a period of not less than two years following the date of such conveyance or transfer. . . . The value of the equity interest in such real property or economic interest therein shall be computed by subtracting from the consideration for the conveyance or transfer of the real property or economic interest therein the unpaid balance of any loans secured by mortgages or other encumbrances which are liens on the real property or economic interest therein immediately before the conveyance or transfer. . . . In the case of a transfer of an economic interest in real property, such amount to be subtracted is equal to the sum of the following amounts: (i) a reasonable apportionment to the interests in real property owned by the entity of the amount of any loans secured by encumbrances on the ownership interests in the entity which are being conveyed or transferred and (ii) the amount of any loans secured by mortgages or other encumbrances on the real property of the entity multiplied by the percentage interest in the entity which is being conveyed or transferred."

In the present case, the only requirement for a REIT Transfer that Respondent asserts has not been met is the requirement that REIT interests received must equal at least 40% of the equity interests in the property or economic interest in property conveyed (40% Test).

The statute provides that the equity interest is determined by subtracting from the consideration received a portion of the encumbrances on the property or economic interests transferred and multiplying the balance by 40%. Therefore, the starting point for determining whether the 40% Test is met is to determine the amount of consideration for the Transfer.

Administrative Code §11-2101.9 defines "Consideration" as:

> "The 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 other encumbrance, whether or not the underlying indebtedness is assumed."

Administrative Code §11-2102.e provides:

> "(3) For purposes of determining the consideration for a real estate investment trust transfer taxable under this subdivision e the value of the real property or interest therein shall be equal to the estimated market value as determined by the commissioner of finance for real property tax purposes as reflected on the most recent notice of assessment issued by such commissioner, or such other value as the taxpayer may establish to the satisfaction of such commissioner."

Petitioners assert that the above paragraph (3) supersedes the general definition of consideration contained in Administrative Code §11-2101.9 and that it should be read as meaning that, in the case of a qualifying REIT Transfer, the consideration is equal to the estimated market value on the Notice of Property Value. We disagree.

In general, where the legislature intends one specific provision of a statute to supersede or override another generally applicable provision, that intent is made clear by the use of a phrase starting with the word "notwithstanding" or words to that effect. Administrative Code §11-2102.e, itself, contains two such provisions including "e. (1) Notwithstanding anything contained in this section. . . ." and "(B) . . . Notwithstanding the foregoing, . . ." Rather than using similar language, Administrative Code §11-2102.e(3) starts "For purposes of determining the consideration . . ." suggesting that it was not intended to supersede or override the general definition of consideration in Administrative Code §11-2101.9.

The essential wording of Administrative Code §11-2102.e(3) relevant to this case is as follows: "For purposes of determining the consideration for a real estate investment trust transfer . . . the value of the real property or interest therein shall be equal to the estimated market value. . . ." Petitioners would have us read this sentence as "the consideration for a real estate investment trust transfer shall be equal to the estimated market value." Petitioners' reading ignores the initial phrase "for purposes of determining the consideration" and renders the phrase "the value of the real property or interest therein" superfluous.

McKinney's Statutes §231 provides: "In the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning." This principle has been applied by the New York State Tax Appeals Tribunal in interpreting tax statutes. (*Matter of Felmont Oil Corp.,* 1996 WL 272340 [NY St Div of Tax Appeals DTA Nos. 802433 and 804887, May 9, 1996], *affd* 235 AD2d 184 [3d Dept 1997], *appeal dismissed* 91 NY2d 921 [1998].) Thus we must consider whether it is "practicable" to give meaning to all of the language in Administrative Code §11-2102.e(3). To do so, we must examine whether under the statute and other authorities "the value of the real property or interest therein" is ever taken into account "for purposes of determining the consideration."

We need look no further than Administrative Code §11-2102.d, which states: "In the case of a transfer of an economic interest in any entity that owns assets in addition to real property or interest therein, *the consideration subject to tax shall be deemed equal to the fair market value of the real property or interest therein* apportioned based on the percentage of the ownership interest in the entity transferred." [Emphasis added.] This provision was amended in 2003 to read as quoted above. The prior version, which was in effect when Administrative Code §11-2102.e was first enacted in 1994, read:

> "If a transaction subject to the taxes imposed by this section includes assets in addition to real property or interest therein, and there is no apportionment made . . . of the consideration for such real property or interest and such assets, the tax shall be on that part of the total consideration which the value of the real property or interest therein bears to the value of all such assets, including such real property. . . ."

Both versions look at the value of the real property in determining taxable consideration. It is notable that the provision as amended in 2003 states that "the consideration subject to tax shall be deemed equal to the fair market value of the real property. . . ." Thus when the legislature meant that consideration should be equal to the value of the real property, it said so expressly and used language different from that in Administrative Code §11-2102.e(3). Petitioners concede that "the entities owned no material assets other than the Property"[9] so Administrative Code §11-2102.d has no application in this case.

Looking further, there are provisions in the Department's rules relating to the RPTT, 19 RCNY ch. 23 (RPTT Rules) that also use the value of the property in determining consideration. RPTT Rule §23-03(e)(1)(i) provides: "A conveyance of realty to a corporation in exchange for shares of its capital stock is subject to tax. The consideration for the realty is deemed to be equal in value to the greater of the fair market value of the realty conveyed or the amount of any mortgage, lien or other encumbrance

[9] Petitioners' Br. at 5.

on the realty." RPTT Rule §23-03(e)(3)(i) contains a comparable rule for transfers to partnerships.

Finally, RPTT Rule §23-07 provides:

> "Where the consideration includes property other than money, it is presumed that the consideration is the value of the real property or interest therein. Where the consideration is measured by the fair market value of realty, it is presumed that the fair market value is not less than twice the assessed valuation of the realty on the assessment roll of the City at the time of delivery of the deed, or the transfer of the controlling economic interest. These presumptions prevail until the contrary is established and the burden of proving the contrary is on the party seeking to rebut the presumption."

These provisions make it clear that there are instances where the consideration is measured in whole or in part by the value of the property conveyed. Again, where it is intended that the consideration be *equal to* the value of the property, that intention is clearly expressed in the statutory or regulatory language.

It is clear that there are circumstances under which in "determining the consideration for a real estate investment trust transfer . . . the value of the real property or interest therein" would be relevant. The provisions governing REIT Transfers clearly contemplate a transfer of property or interests therein to a REIT in exchange for REIT shares, a transaction governed by RPTT Rule §§23-03(e)(1)(i) or 23-03(e)(3)(i).[10]

Petitioners have not asserted that the RPTT Rules are not a valid interpretation of the law. Nor have Petitioners cited any legislative history or other authority that suggests that Administrative Code §11-2102.e(3) was intended to be read as Petitioners would have us do.[11] New York City Information Bulletin No. 94-1, (June 28, 1994) submitted

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[10] A REIT can be formed as a corporation or partnership and, therefore, the receipt of REIT shares as consideration for a transfer of real property would be governed by RPTT Rule §§23-03(e)(1)(i) or 23-03(e)(3)(i).

[11] During the audit, Petitioners' representative submitted a letter dated July 10, 2014 to the Department, Stipulation, exhibit V at 172, in which the representative referred to a previous case during the litigation of which the administrative law judge purportedly advised the Department's representative that he did not agree with the Department's interpretation of the statute, although it is not entirely clear what statutory provision the administrative

by Petitioners[12] states: "For purposes of determining consideration for a REIT Transfer, the value of real property is equal to the estimated market value as determined by the Department of Finance and as reflected on the most recent notice of assessment issued by the Department." The instructions for the REIT worksheet similarly provide "Where the value of the underlying property transferred or interest therein is used in determining the consideration for a REIT Transfer, you may, but are not required to, report as the value of the real property or interest therein . . . the estimated market value as determined by the Department. . . ."[13] Rather than supporting Petitioners' interpretation of Administrative Code §11-2102.e(3), these documents merely paraphrase the statutory language.

We, therefore, reject the interpretation of Administrative Code §11-2102.e(3) proffered by Petitioners and adopted by the ALJ and, instead, apply the statute to the Transfer so as to give meaning to all of its language.

Applying Administrative Code §11-2102.e(3) as written, if the Property or the interests in Company were transferred to Grantees solely in exchange for REIT shares, under RPTT Rule §§23-03(e)(1)(i) or 23-03(e)(3)(i), the consideration would be equal to the greater of the Estimated Market Value or the aggregate amount of the Mortgage and other encumbrances. However, Parent transferred its interest in Company to Grantees for more than just REIT shares so we must look beyond RPTT Rule §§23-03(e)(1)(i) and 23-03(e)(3)(i).

Administrative Code §11-2101.9 defines "Consideration" as:

> "The 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

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law judge was specifically referring to. There is no documentation of that statement and no determination was issued in that matter. An off-the-record, undocumented statement of an administrative law judge never articulated in a published determination or affirmed on appeal has no probative value whatsoever.

[12] Stipulation, exhibit V at 174-76.

[13] Stipulation, exhibit V at 188.

obligation. It shall also include the amount of any mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed."

As described in Exhibit B to the Closing Statement:

"At the Closing:

"4. Parent . . . transfers its interest in the Company to the [Grantees], in repayment of the . . . Junior Mezz Loan. The . . . Senior Mezz Loan is satisfied simultaneously with the transfer.

"5. In addition, Parent . . . receives (a) $2,250,000 of cash in the aggregate from the [Grantees], (b) $2,250,000 in the aggregate of 7% non-voting preferred shares in the [Grantees], and (c) 10% profits shares in each of the [Grantees] having an aggregate value of $1,125,000."

In the course of the audit, Petitioners submitted a revised Schedule 1 – Details of Consideration that included:

Cash	$2,250,000
Unpaid principal of pre-existing mortgage(s)	$375,000,000
Amount of other liens on property	$15,977,000
Value of shares of stock or partnership interest received	$3,375,000

Those amounts total $396,602,000.

Petitioners described the "Amount of other liens on property" as the amount paid by Grantees to the holders of the Junior Mezz Loan and the Senior Mezz Loan to retire those loans. We disagree with that treatment. As is clear from the Closing Statement, Parent transferred its interest in Company "in repayment of the . . . Junior Mezz Loan" and "The . . . Senior Mezz Loan [was] satisfied simultaneously with the transfer." Under Administrative Code §11-2101.9, consideration includes "the cancellation or discharge of an indebtedness or obligation." The aggregate outstanding amount of the Junior Mezz Loan and Senior Mezz Loan was $108,050,000.[14] Because those loans were discharged

[14] There is no evidence in the Record that the outstanding principal amount of the Junior Mezz Loan or the Senior Mezz Loan was less than the face amount at the time of the Transfer. See Transaction Agreement, exhibit U at U-4.

or cancelled in exchange for the interests in Company transferred, that amount should be included in the measurement of consideration, bringing the total to $488,675,000.[15] (*See Matter of Union Carbide Chemicals & Plastics Co. Inc. v Tax Appeals Trib. of the State of N.Y.*, 213 AD2d 807 [3d Dept 1995], *appeal dismissed* 85 NY2d 1031 [1995], *appeal denied* 86 NY2d [1995][the amount of a mortgage included in consideration under the former New York State Gains Tax is the face amount and not its current value].)

Next we turn to Respondent's assertion that the amount of RPTT paid by Grantees should be included in consideration under RPTT Rule §23-02 Consideration (2). As we have already concluded, Administrative Code §11-2102.e(3) does not supersede the general rules for determining consideration. Therefore, we agree with Respondent that the RPTT paid by Grantees should be taken into account. Where the grantee pays the RPTT due, RPTT Rule §23-02 Consideration (2) requires a tentative tax calculated on the reported consideration to be added to the reported consideration in determining the final taxable consideration and the actual RPTT due.[16] Assuming for purposes of this calculation that the Transfer qualifies as a REIT Transfer so that the applicable RPTT rate is the 1.3125% rate applicable to qualifying REIT Transfers, the RPTT on the consideration of $488,675,000 determined above, as reduced by the 5% mere change exemption to $464,241,250, would be $6,093,166.41.[17] Based on Grantees' agreement to pay the RPTT due,[18] RPTT Rule §23-02 Consideration (2) requires us to add that amount to the consideration before the exemption, $488,675,000, bringing the total to $494,768,166.41.

We must now apply the 40% Test to that amount. Administrative Code §11-2102.e(2)(C) provides:

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[15] $2,250,000 + $375,000,000 + $108,050,000 + $3,375,000 = $488,675,000.

[16] The RPTT Rule also would take into account New York State Real Estate Transfer Tax (NYS RETT) paid by Grantees. The amount of any NYS RETT paid by Grantees is not evident from the Record. The Recording and Endorsement Cover Page submitted shows no amount for NYS RETT. Stipulation, exhibit B. The copy of the Recording and Endorsement Cover Page included in the audit workpapers shows NYS RETT of $0. Stipulation, exhibit V, p 5.

[17] $464,241,250 x 1.3125% = $6,093,166.41.

[18] Stipulation, exhibit E, §4.5(c).

> "The value of the equity interest in such real property or economic interest therein shall be computed by subtracting from the consideration for the conveyance or transfer of the real property or economic interest therein the unpaid balance of any loans secured by mortgages or other encumbrances which are liens on the real property or economic interest therein immediately before the conveyance or transfer. . . . In the case of a transfer of an economic interest in real property, such amount to be subtracted is equal to the sum of the following amounts: (i) a reasonable apportionment to the interests in real property owned by the entity of the amount of any loans secured by encumbrances on the ownership interests in the entity which are being conveyed or transferred and (ii) the amount of any loans secured by mortgages or other encumbrances on the real property of the entity multiplied by the percentage interest in the entity which is being conveyed or transferred."[19]

As 100% of the interests in Company were transferred to Grantees and, as noted above, Company owned no material assets apart from its interests in Owner, which owns no assets other than the Property, no further apportionment is necessary.

To apply the 40% Test, we must reduce the consideration determined above, $494,768,166.41, by the amount of the Mortgage, which was secured by the Property immediately before the Transfer ($375,000,000), and by the outstanding amounts of the Junior Mezz Loan and Senior Mezz Loan, which appear to have been secured by interests in Company or Owner and indirectly secured by the Property immediately prior to the Transfer ($108,050,000).[20] The balance is $11,718,166.41. Forty percent of that amount is $4,687,266.56. Petitioners' valuation of the interests in Grantees received by Parent is only $3,375,000. Therefore, the 40% Test is not satisfied. As a consequence, the

[19] We note that the calculation of the value of the equity interest in the property provided for in Administrative Code §11-2102.e(2)(C) requiring the subtraction from consideration of the amounts of loans secured by the property or interests therein further supports our conclusion that such amounts are includible in consideration for a REIT Transfer.

[20] Stipulation, exhibits J and L.

Transfer does not qualify as a REIT Transfer and the RPTT due on the Transfer must be calculated at the otherwise applicable 2.625% rate.[21]

Having concluded that the 40% Test is not met in this case, it is unnecessary for us to address Respondent's assertion that a transfer cannot qualify for the reduced RPTT rate applicable to a REIT Transfer where the value of the equity interests is zero or Respondent's argument regarding the nature of the interests in Grantees received by Parent.

We disagree with Respondent's calculation of consideration in the Notices. The starting point is consideration as we have calculated it above and not an alternative market value of the Property as determined by the Department. In addition, the payment by Grantees of the RPTT must be included in consideration using the calculation called for in RPTT Rule §23-02 Consideration (2), not merely by adding the $2,999,582.25 paid by Grantees to the consideration.

Based on the foregoing, the ALJ Determination is reversed and the Notices are modified as provided herein.[22] Commissioner Frances J. Henn did not participate in this Decision.

Dated: February 16, 2018
New York, NY

/s/
Ellen E. Hoffman
President and Commissioner

/s/
Robert J. Firestone
Commissioner

[21] The RPTT at 2.625% on the revised consideration of $464,241,250 ($488,675,000 less the 5% exemption) would be $12,186,332.81. Because that amount is required to be paid by Grantees, it must be added to the consideration of $488,675,000 under RPTT Rule §23-02 Consideration (2). The result is $500,861,332.81. The RPTT due on that amount after the 5% exemption would be $12,490,229.49 ($500,861,333 x 95% x 2.625%). We note that the RPTT due as calculated above would be less than the principal amount of RPTT asserted in the Notices. After subtracting from the recalculated RPTT due of $12,490,229.49, the $2,999,582.25 already paid, the balance due would be $9,490,647.24, not the $10,790.844.83 asserted in the Notices.

[22] *See* note 21 *supra*. We have considered all of the other arguments of the Parties and find them unpersuasive.