NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petitions	:	**DETERMINATION**
of	:	**TAT(H)15-33(RP)**
	:	**TAT(H)15-34(RP)**
PARK CENTRAL HOTEL (DE) LLC, PCH TIC OWNER LLC, and PC FESTIVUS LLC	:	

Bunning, A.L.J.:

Petitioners filed petitions in these consolidated cases for redetermination of a deficiency (Petition) of New York City (City) Real Property Transfer Tax (RPTT) under Title 11, Chapter 21, of the City Administrative Code (Admin. Code). In two Notices of Determination (Notices) issued on June 25, 2015, the City Commissioner of Finance (Respondent) asserted deficiencies with respect to a transaction (Transaction) that occurred on December 29, 2011 (the Transfer Date).

The parties agreed pursuant to §1-09(f) of the City Tax Appeals Tribunal (Tribunal) Rules of Practice and Procedure (20 RCNY) to have this case determined on submission without a hearing. Petitioners and Respondent submitted a stipulation of facts, including exhibits, and filed briefs, the last of which was filed on May 13, 2021. Oral argument was held on July 22, 2021.

Joseph Lipari, Esq., of Roberts & Holland LLP, represented Petitioners, and Andrew G. Lipkin, Esq., Assistant Corporation Counsel of the City Law Department, represented Respondent.

ISSUE

The sole issue here is the amount of consideration to which the reduced rate of RPTT applies in a REIT transfer.

FINDINGS OF FACT

The parties stipulated to the following facts. Park Central Hotel (DE) LLC (Grantor 1) is a Delaware limited liability company. PCH TIC Owner LLC (Grantor 2, and collectively with Grantor 1, Grantors) is also a Delaware limited liability company.

PC Festivus LLC (Grantee) is a Delaware limited liability company wholly owned by LaSalle Hotel Operating Partnership, L.P. (LaSalle), which is a Delaware limited partnership.

LaSalle Hotel Properties (LHP), a Maryland real estate investment trust, was at the time of the Transaction a real estate investment trust (REIT) as defined in Internal Revenue Code section 856, and the general partner in LaSalle.

On the Transfer Date, La Salle issued 296,300 of its Class A Partnership Units of ownership to Grantors, who were admitted as limited partners of LaSalle. The partnership units issued to Grantors represented 0.4% of the ownership of LaSalle. LHP directly or indirectly owned the remaining 99.6% of LaSalle. The units issued to Grantors were convertible to a like number of shares of common stock of LHP after a minimum holding period.

In the Transaction, Grantor 1 and Grantor 2, respectively, transferred to Grantee, 49.012% and 50.988% (totaling 100%)

tenancy-in-common interests in the condominium unit known as the Hotel Unit located at 870 Seventh Avenue, New York, New York (the Property).

Before the Transaction, the Property was directly and indirectly encumbered by debt with a total balance (exclusive of current interest) of $465,792,818, which was the sum of the mortgage loan balance of $407,792,818 and the mezzanine loan balance of $58,000,000.

The mortgage loan balance of $407,792,818 consisted of $407,000,000 in principal and $792,818 in excess cash flow payments. The mortgage lender forgave $32,500,000 of the principal, agreeing to receive $375,292,818 in full payment of the mortgage loan (exclusive of current interest).

The mezzanine lender forgave $50,500,000 of the principal, agreeing to receive $7,500,000 in full payment of the mezzanine loan (exclusive of current interest).

The total balance of the mortgage and mezzanine loans as of the date of the Transaction was $382,792,818, which was the sum of the reduced mortgage loan balance of $375,292,818 plus the reduced mezzanine loan balance of $3,700,000.

In exchange for the Property, the Grantors received the $382,792,818 to pay off the mortgage and mezzanine loan balances and $13,441,833 for the equity in the Property.

The $13,441,833 of equity consideration was the sum of $8,000,100 of the $27 per unit value of 296,300 Class A partnership units in La Salle (145,223 units worth a total of

$3,921,021 to Grantor 1, and 151,077 units worth $4,079,079 to Grantor 2) plus $5,441,733 in cash ($2,667,102 to Grantor 1 and $2,774,631 to Grantor 2).

The value of $27 per partnership unit was determined under section 1.5(d) of the purchase and sale agreement for the Transaction. Under this provision, the per unit value was the greater of $27 or the average closing price of the stock of LHP for the 10 trading days prior to the Transfer Date. The average closing price for these 10 days was less than $27, so the per-unit value was $27.

Pursuant to section 1.5 and Schedule 1.5 of the purchase and sale agreement, in addition to $396,442,000 in consideration for the Property, Grantee agreed to pay $9,057,999 in additional consideration with respect to the personal property incident to the Property.

The aggregate consideration of $396,234,651 is reflected in the Notices of Determination: $194,202,527 with respect to Grantor 1 and $202,032,124 with respect to Grantor 2.

More than 40% of the equity consideration received by each of Grantor 1 and Grantor 2 was in the form of interests in an entity controlled by a REIT and therefore, the RPTT will be imposed at a rate equal to 50% of the otherwise applicate rate pursuant to Admin. Code section 11-2102(e)(1). Respondent waived the penalties asserted in the Notices.

The parties dispute the amount of consideration upon which the tax rate is computed.

The most recent Notice of Property Value for the Property at the time of the Transaction stated that the City Department of Finance estimated market value (EMV) of the Property was $105,808,170.

To the best of Grantors' and Grantee's knowledge, no appraisal or other valuation of the Property was obtained in connection with the Transaction.

Two RPTT returns (Form NYC RPT) were filed on January 18, 2012, one by each of the Grantors. The RPTT returns reported the EMV of the Property of $105,808,170 and reported that Grantor 1 had a 49.012% undivided interest in the Property and that Grantor 2 had a 50.988% undivided interest in the Property. These percentages were applied to the EMV to report taxable consideration of $51,858,700 for Grantor 1 and $53,949,470 for Grantor 2.

Respondent issued two Notices of Proposed Tax Adjustment(s) dated February 23, 2015, which state in pertinent part:

> "The consideration for a REIT transfer is equal to the Department of Finance Estimated Fair Market Value or other such value the taxpayer may establish to the satisfaction of the Commissioner of the Department of Finance as per NYC Administrative Code Section 11-2102.
>
> "Although the requirements were met to qualify as a REIT Transfer and the lower REIT tax rate of 1.3125% as per NYC Administrative Code Section 11-2102, the consideration for the REIT transfer was deemed to be based on the actual total consideration for the property as per the 12/29/11 Closing Statement and the

1/4/12 Purchase Price Allocation Report of $396,234,651."

The Notices of Proposed Tax Adjustment(s) multiplied the two ownership percentages by $396,234,651 to arrive at taxable consideration of $194,202,527.15 for Grantor 1 and $202,032,123.84 for Grantor 2.

Respondent issued the two Notices on June 25, 2015, repeating this language and the tax computations for the Grantors.

POSITIONS OF THE PARTIES

Petitioners argue that because the Transfer was a qualified REIT transfer, Admin. Code §11-2102.e.(3) provides that consideration is estimated market value. The *VCP One Park* case[1] does not govern here because it dealt with a transfer which was determined not to qualify as a REIT transfer. *VCP One Park* held that estimated market value is not relevant in determining whether a transaction qualifies as a REIT transfer. It is not reasonable to conclude that the EMV provision was only to apply in a few peculiar situations and not the majority of real property transfers to REITs.

Petitioners submit that when two statutes cannot otherwise be reconciled, the general statute yields to the specific statute. The Tribunal decided in *VCP One Park* that, as a general rule, the EMV provision does not apply to REITS because it is not prefaced by the word "notwithstanding." However,

[1] *Matter of VCP One Park REIT LLC*, TAT(E)14-26(RP) (City Tax App. Trib., Appeals Division, 2018), *aff'd*, 171 AD2d 632 (1st App. Div. 2019).

statutes need not include this word to create exemptions (see for example Admin. Code §§2102 and 2106).

Respondent counters that the Tribunal held in *VCP One Park* that §11-2102.e.(3) does not supersede the general definition of consideration found in §11-2101.9. As was the case in *VCP One Park*, consideration was more than just REIT shares, so the general rule of consideration in §11-2101.9 applies. The incentive to encourage REIT transfers is the reduced tax rate. Petitioners' contention that the legislature also intended to reduce the base on which the tax is imposed finds no support in the legislative history or the text of the statute.

Petitioners reply that the Tribunal did not decide the issue in this case. It decided only whether the transaction qualified as a REIT transfer. Having concluded that it did not, it necessarily did not determine how a qualified REIT transfer should be taxed. Respondent's argument renders the REIT transfer provision meaningless. The statute uses EMV as the measure of consideration unless the taxpayer chooses to establish a different value to the satisfaction of the Commissioner. The statute does not need to use the word "notwithstanding" to create an exception.

Respondent replies that the fundamental holding of *VCP One Park* is that §11-2102.e.(3) does not supersede the definition of consideration in §11-2101.9. It makes no sense to test for REIT qualification under §11-2101.9 and then use a different definition of consideration for calculating the tax. There is no support for the proposition that the legislature intended to provide an additional discount of the tax on top of the already discounted tax rate. Estimated market value is to be used only

in certain circumstances, but only when it is necessary, where there is no other value established for the property.

At oral argument, Respondent argued that "we have no idea, frankly, what the Legislature was thinking when they enacted this particular statute." (OA Transcript 9:21-24.) "We have no idea how sophisticated the Legislature's thinking was on this" (OA Transcript 15:17-19) and argued that because the word "notwithstanding" was used in other parts of the statute "where they intended to supersede other provisions and they didn't use it here . . . we have to believe that was intentional." (OA Transcript 29:6-10.)

CONCLUSIONS OF LAW

Statutory Framework and Related Authority

Admin. Code §11-2102.a provides for a tax on the transfer of real property. It provides different tax rates for different types of transfers. The RPTT is computed with respect to the consideration paid for the real property. Admin. 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."

Admin. Code §11-2102.e.(1) provides a special rule for qualifying REIT transfers. It states:

> "Notwithstanding anything contained in this section, the tax imposed under subdivisions a and b on any deed or other instrument or transaction conveying or transferring real property or an economic interest therein, that qualifies as a real estate investment trust transfer, as defined below, shall be imposed at a rate equal to fifty percent of the otherwise applicable rate."

The statute provides rules to determine whether the transfer qualifies for REIT treatment. One of the rules is that the REIT retain 40% of the net equity in the transferred property for two years (40% test). The parties have stipulated that this transaction qualifies as a REIT transaction.

Admin. Code §11-2102.e.(3) provides:

> "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."

Regarding the legislative history, section 5 of S.7559, introduced in the Senate on April 7, 1994, states:

> "[I]n the case of taxes imposed on any conveyance or transfer of any real property or an economic interest therein to an entity which is a real estate investment trust within the meaning of section 856 of the Internal Revenue Code or to an entity in which such a real estate investment trust owns a controlling

> interest: (A) the consideration or value of the economic interest or property conveyed or transferred, by reference to which such taxes are determined, shall be computed by valuing the real property at an amount equal to its market value as determined for purposes of computing real estate tax assessments; and (B) such taxes may be imposed at a rate not to exceed two thousand six hundred twenty five ten-thousandths of one percent."

A revised bill was introduced on May 3, 1994, containing language substantially the same as that found in the statute.

The VCP One Park Decision

Both parties rely on the decision in *Matter of VCP One Park REIT LLC*, TAT(E)14-26(RP)(City Tax App. Trib., Appeals Division, (2018), *aff'd*, 171 AD3d 632 (1St App. Div., 2019).

At issue before the Tribunal was what the measure of consideration was for purposes of the 40% test to determine eligibility for a REIT transfer. The Appeals Division reversed the ALJ Determination (TAT[H]14-26 [RP][City Tax App. Trib., ALJ Division, 2017]) to hold that the 40% test had not been met, and that the transaction did not quality as a REIT transfer. It then computed the amount of RPTT due.

It did not determine what the consideration would be if it had determined that it was a REIT transfer. To the extent that there is any doubt as to the scope of the holding, the First Appellate Department's opinion states in pertinent part:

> "That subsection [Admin. Code §11-2102(e)(3)] does not supersede Administrative Code § 11-2102 (e)(2)(C)'s specifications for the satisfaction of the 40% Test,

> including with respect to any specifications regarding the calculation of the consideration of the REIT interests received by the grantor for the conveyance or transfer or the total consideration for the conveyance or transfer received by the grantor, and petitioners fail to show that the Tribunal erred to the extent it applied the 40% Test under the terms of Administrative Code § 11-2102 (e)(2)(C) or in its calculation of the consideration subject to the RPTT rate of 2.625% applicable to the non-REIT transfer."

Yet, the Tribunal's decision contains some broader language. For example, Respondent relies on this language:

> "Petitioners assert that the above paragraph [§11-2102.e.] (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 Notice of Property Value. We disagree."

Therefore, it is necessary to discuss the relevant portions of the holding of *VCP One Park*. First, it held that "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 words "notwithstanding" or words to that effect." (Id at p. 8.) Indeed, at the oral argument, Respondent's counsel stated that if the word "notwithstanding" had been used in the statute, Petitioner's position would be correct and EMV would be the measure of consideration. (OA Transcript 20:6-17.)

Second, it held that the words "for purposes of determining the consideration for a real estate investment trust transfer . . . the value of the real property therein shall be equal to the estimated market value" are not the same as "the consideration

for a real estate investment trust transfer shall be equal to the estimated market value." This is because the former reading of the statute ignores the initial phrase "for purposes of determining the consideration" and renders superfluous the phrase "the value of the real property or interest therein." (Id. at p.8).

Third, it held that if the property is transferred solely in exchange for REIT shares, the consideration is equal to the greater of the EMV or the aggregate amount of encumbrances. However, if it is transferred for more than just REIT shares, then the general consideration provision of Admin. Code §11-2101.9 governs.

Discussion

The decision in *VCP One Park* did not decide this case. Having held that it was not a qualified REIT transfer, the Tribunal necessarily did not hold what the measure of consideration is in a REIT transfer.

When construing a statute, courts are to discern and give effect to the Legislature's intent. The starting point is the statute's language. The statute must be construed as a whole, and its various sections must be considered together with reference to each other. (*Matter of Shannon*, 25 NY3d 345, 351 [2015]). Courts are to "give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and harmonizes all its interlocking provisions." (*People v Iverson*, 37 NY3d 98, 102-03, (2021), citing *Matter of Long v Adirondack Park Agency*, 76 NY2d 416, 420 [1990]).

In *VCP One Park*, the Tribunal relied on McKinney's Statutes, §231, which 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 each a distinct and separate meaning." McKinney's Statutes offers other aids to statutory construction which are useful here. "The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction." (McKinney's Statutes §94.) "A statute or legislative act is to be construed as a whole and all parts of an act are to be read and construed together to determine the legislative intent." (McKinney's Statutes §97.) "Whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable." (McKinney's Statutes §238.)

The statutory scheme at issue is not complicated or difficult to construe. It provides for a tax on transfers of property and interests in real property. Admin. Code §11-2102.e. applies to transfers of real property that qualify as a "real estate investment transfer" as defined in Admin. Code §11-2102.e.(2). The parties agree that this transaction qualifies. Therefore, the provisions of Admin. Code §11-2101.e. apply to the transaction.

Among the provisions that apply here is Admin. Code §11-2102.e.(3):

> "For purpose of determining the consideration for a real estate investment trust 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 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."

Other than the *VCP One Park* decision, no authority has been submitted by the parties, or found by the undersigned, that suggests the Legislature adopted the talismanic meaning to the word "notwithstanding" ascribed to it by Respondent. There is no authority supporting the proposition that the absence of this word in some parts of the statute was intentional. Indeed, at oral argument, Respondent conceded that the word "notwithstanding" was not necessary in an exemption statute where it was otherwise clear that an exemption from tax was being created. (OA Transcript 31:16-24.)

As noted, "The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction." (McKinney's Statutes §94.)

The principle of statutory construction which applies here is that whenever there are a general and a particular provision in the same statute, "a general provision of a statute applies only where a particular provision does not." (*People v. Mobil*

Oil Corp., 48 NY2d 192, 200 [1979] and cases cited therein.) Here, there is a general provision defining consideration (Admin. Code §11-2101.9), and a particular provision defining consideration in the case of qualified REIT transfers. (Admin. Code §11-2102.e.[3]). Since this is a qualified REIT transfer, the particular provision applies and EMV is the measure of consideration.

The statutory scheme does not impose other prerequisites to using EMV as the measure of consideration for REIT transfers. Nothing in the statute indicates that EMV is to be used only in particular circumstances, such as when the value of the property cannot otherwise be established. No language exists limiting EMV to a fallback position when the general rules for computing consideration do not yield a result. Indeed, if the legislature intended for such limitations to exist, there does not appear to be any reason that such a provision would exist only for qualified REIT transfers and not for all transfers.

In light of the decision in *VCP One Park*, holding that Admin. Code §11-2102.e.(3) does not apply to the 40% test to determine qualification for a REIT transfer, this is the only application left for this section of the statute. As noted, a statute is to be interpreted to give effect to each of its provisions.

Additionally, the statute at issue makes it clear that EMV is the default value for consideration, unless the taxpayer establishes another value to the satisfaction of the commissioner.

In this case the Notices acknowledged that:

> "The consideration for a REIT transfer is equal to the Department of Finance Estimated Fair Market Value or other such value the taxpayer may establish to the satisfaction of the Commissioner of the Department of Finance as per NYC Administrative Code Section 11-2102."

However, the Notices proceeded to state that "the consideration for the REIT transfer was deemed to be based on the actual total consideration . . . ." There was no basis to do this under the relevant statutes. The taxpayers did not attempt to establish a value other than EMV, and therefore EMV is the measure of consideration upon which the RPTT is to be computed.

For these reasons, the Petitions are granted and the Notices are cancelled.

IT IS SO ORDERED.

DATED: October 29, 2021
New York, New York

/s/
David Bunning
Administrative Law Judge