NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition	:	
	:	ORDER & DETERMINATION
of	:	
	:	TAT(H) 20-8(RP)
PATRICK McCAULEY	:	
	:	

Chu-Fong, A.L.J.:

Patrick McCauley filed a petition for a hearing ("Petition") with the New York City ("City") Tax Appeals Tribunal ("Tribunal"), which challenged a determination of additional real property transfer tax ("RPTT") due for a transfer on May 17, 2017.

Pursuant to the Tribunal's Rules of Practice and Procedure ("Rule[s]" or "20 RCNY"), on June 21, 2021, the Commissioner ("Movant") of the City Department of Finance ("DOF") moved for summary determination. 20 RCNY § 1-05(d). Movant was represented by Christopher J. Long, Esq., an Assistant City Corporation Counsel. With the notice of motion, Movant filed a memorandum of law, and an affirmation with attached exhibits. Christopher P. Nalley, Esq., represented Petitioner. On July 26, 2021, Petitioner filed a combined affidavit and memorandum of law opposing the motion with an attached exhibit. On September 27, 2021, Movant filed a reply memorandum of law.

Based upon the motion papers, the undersigned renders the following order and determination granting the motion.

ISSUE

Whether summary determination should be granted because there are material facts in dispute and, as a matter of law, the facts require a determination in the Movant's favor.

FINDINGS OF FACT

Giving all reasonable inferences in Petitioner's favor, the undisputed material facts are as follows:

1. Prior to May 17, 2017, Petitioner owned real property located in the borough of Staten Island with the identifier of block 254, lot 61 ("Property").

2. The Property covered two separate street and postal addresses: 625 and 627 Metropolitan Avenue, Staten Island, NY 10301.

3. According to the City Department of Buildings (DOB), each street address has a semi-detached two-family residential dwelling.

4. Prior to May 17, 2017, on the transfer date, and through to the present, the Property was used as two separate two-family dwellings, and not a single four-family dwelling. Each dwelling was used as a rental apartment.

4. Prior to May 17, 2017, on the transfer date, and through to the present, the Property bears the tax classification of Tax Class 2A.

5. Tax Class 2 contains residential and mixed-use rental properties, cooperatives, and condominiums. Tax Class 2A is a subset that contains residential properties that have four to six residential dwellings.

6. There is no indication that Petitioner ever filed an Application for Correction challenging the Property's classification as a 2A property with the City Tax Commission.

7. On May 17, 2017, Petitioner transferred the property to "Catherine Murray or LLC of which she is a part" for the sale price of $903,000.

8. On June 30, 2017, Petitioner filed a RPTT return indicating that the Property was transferred on "6-21-2017." Under "type of property," Petitioner listed that the Property was a "1-3 family house." Petitioner calculated the tax due using the rate of 1.425%, which applies for properties with one to three family dwellings.

9. On November 4, 2019, DOF issued a notice of deficiency (NOD) indicating that there was unpaid RPTT due on the Property's transfer.

10. The NOD indicates that the 1.425% rate was incorrect because the consideration exceeded $500,000 and the Property was not a "1-3 family house." DOF recalculated the RPTT due at the applicable rate of 2.625% and asserted the remainder due, plus applicable interest, in the NOD.

11. On or about February 20, 2020, Petitioner challenged the NOD by filing the Petition. He seeks relief from the additional assessed RPTT because he believes the tax classification to be erroneous and inconsistent with the actual, legal usage of the Property.

12. On June 21, 2021, Movant filed his motion for summary determination. With the notice of motion, the Movant included a memorandum of law, as well as a schedule of exhibits.

POSITIONS OF THE PARTIES

Movant argued in favor of summary determination because all material facts have been established and the law requires a ruling it his favor. He argues that the Property was properly classified as a Class 2A and because the consideration exceeded $500,000.00, the 2.625 percent rate applies. Movant characterized Petitioner's argument as a challenge to the Property's classification in 2017, which is improper because the exclusive remedy rested with the City Tax Commission, not this Tribunal. Citing Finance Letter Ruling (FLR) #03-4805 (June 25, 2003),[1] Movant argues that the tax classification, rather than the certificate of occupancy submitted by Petitioner, controls for RPTT purposes. There being no facts in dispute, Movant therefore requested judgment in his favor.

Petitioner argued against summary determination because, he argues, the 1.425 percent rate should apply because the Property has two two-family dwellings on it, not a four-family dwelling. He noted that the Property has two separate street addresses, and the dwellings are legally used as two two-family dwellings and concludes that the classification is incorrect. Petitioner differentiated the instant case from that in FLR #03-4805 by the fact that the Property was used solely for residential purposes. He cited to the examples provided in 19 RCNY §23-03(b)(1) for the position that use must be considered in making a tax classification. Petitioner argued that a factual question exists because the Property's use as two separate two-family dwellings is essential to determining whether the tax classification is correct. As such, Petitioner requested that

[1] The parties have cited this as "FLR #3034805-021"; however, DOF appears to have designated this ruling as FLR #03-4805.

summary determination be denied, and that the case be calendared for a hearing.

Movant disagreed with Petitioner's assertions. In his reply brief, he reiterated that no material questions of fact exist. He contends that Petitioner's interpretation lacks merit because it runs contrary to the City Charter provisions limiting real property classification challenges. Movant also argues that Petitioner's misinterpretations of the RCNY do not qualify as material facts sufficient to defeat a motion for summary determination.

CONCLUSIONS OF LAW

A. Section 1.05(d) of the Rules provides that any party may make a motion for summary determination. The motion must be supported by an affidavit, copies of relevant pleadings, and "any other available proof." Rules §1-05(d)(1). The relevant section states:

> "The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party." *Id.*

The section further states: "The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact." *Id.* Before this Tribunal, the standards for summary determination mirror those of a motion for summary judgment pursuant to CPLR 3212(b). *Matter of Steuben DelShah, LLC, et al.*, City Tax Appeals Tribunal, TAT(E)12-12(RP) et al., June 24, 2019, 2019 WL 4248583.

Summary determination is the "procedural equivalent of a trial." *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 (2d Dept 1989). This undermines the notion of a "day in court," and must be used sparingly. *Wanger v Zeh*, 45 Misc2d 93 (1965), *affd* 26 AD2d 729 (3d Dept 1966). It is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." *Moskowitz v Garlock*, 23 AD2d 943 (3d Dept 1965); *see Daliendo v Johnson*, 147 AD2d 312 (2d Dept 1989). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied. *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968).

To defeat the motion, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial on the merits. CPLR 3213(b); *Zuckerman v City of New York*, 29 NY2d 557, 562 (1980); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Proof offered by the opponent of the motion, including that offered through affidavits, must be accepted as true and considered in a light most favorable to the opposing party. *Museums at Stony Brook; Matter of Alvord & Swift v Mueller Constr. Co.*, 46 NY2d 276, 282 (1978). "[O]nly the existence of a *bone fide* issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978). The opponent's burden cannot be met by merely repeating allegations in the pleadings. *Indig v Finkelstein*, 23 NY2d 728, 729 (1968).

B. The initial question is whether Movant has established entitlement to judgment as a matter of law. Herein, the

question is whether he has successfully established that the higher RPTT rate is due on the subject transfer.

City Administrative Code (Admin. Code) §11-2102 imposes the RPTT "on each deed at the time of delivery by a grantor to a grantee when the consideration for the real property and any improvement thereon (whether or not included in the same deed) exceeds twenty-five thousand dollars." Admin. Code §11-2102(a). The applicable rate depends upon whether Admin. Code §11-2102(a)(9)(i) or (ii) governs the sale:

> "[W]ith respect to conveyances made on or after August first, nineteen hundred eighty-nine . . . the tax shall be at the following rates:
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> (i) at the rate of one percent of the consideration for conveyances of one, two or three-family houses . . . where the consideration is five hundred thousand dollars or less, and at the rate of one and four hundred twenty-five thousandths of one percent of the consideration for such conveyances where the consideration for such conveyances where the consideration is more than five hundred thousand dollars, and
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> (ii) at the rate of one and four hundred twenty-five thousandths of one percent of the consideration with respect to all other conveyances where the consideration is five hundred thousand dollars or less, and at the rate of two and six hundred twenty-five thousandths of one percent where the consideration for such conveyances is more than five hundred thousand dollars.

Interpreting this statutory scheme requires giving effect to the legislative intent. *See e.g., 1605 Book Ctr. v Tax Appeals Trib. Of State of N.Y.*, 83 NY2d 240, 244-245 (1994), *cert denied* 513 US 811 (1994). "[W]hen the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (citations omitted). *Matter of New York State Assn. of Counties v Axelrod*,

213 AD2d 18, 24 (1995), *lv dismissed* 87 NY2d 918 (1996). Insofar as any ambiguity may exist within the statutory framework of the RPTT, it must be construed in favor of Petitioner:

> "A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax." *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 (1976), *rearg denied* 37 NY2d 816 (1975), *lv denied* 338 NE2d 330 (1975); *see e.g., Matter of Building Constr. Assn. v Tully*, 87 AD2d 909, 910 (3d Dept 1982).

The plain language of Admin. Code §11-2102(a)(9) unambiguously establishes a series of rates for conveyances of real property in the City. This section makes no reference to a property's tax classification under the RPTL in setting the various RPTT rates. Section 11-2102.a(9) sets a 1 percent rate for transfers of properties with one, two, or three-family dwellings and considerations of less than $500,000. A rate of 1.425 percent applies to either transfers of properties which have one, two, or three family dwellings with considerations of $500,000 or more, or transfer of properties with more than three family dwellings with considerations of less than $500,000. Finally, a rate of 2.625 percent applies to all transfers of other properties.

C. Turning to the transfer of the Property, the record establishes that none of the conditions for a lower rate applied. The consideration exceeded $500,000. The Property did not have one, two, or three family dwellings, but two two-family dwellings, which totaled four family dwellings. As none of the conditions for a lower rate was present, Movant correctly

determined the transfer was subject to the rate of 2.625 percent and, therefore, is entitled to judgment as a matter of law.

Petitioner's opposing legal argument fails to compel a different result.[2] Construed most favorably towards Petitioner, he argues that the lower RPTT rate applies because transferring a property with two two-family dwellings does not equal the transferring a property with a more-than-three-family dwelling, i.e., four family dwelling. However, his citations do not support this interpretation. The cited FLR is not binding upon this Tribunal,[3] and even if it were, it answers only the question of whether tax classification takes precedence over a certificate of occupancy.[4] Similarly, the examples in the cited regulation, 19 RCNY 20-03(b)(10), address residential versus commercial use for classification purposes at the time of the conveyance.

Neither citation has any bearing on the instant matter. There is no question regarding the commercial or residential use of the Property. Indeed, the parties agree that the two two-family dwellings were used for residential purposes at the time of the conveyance. Rather, the question is whether conveying a single property that contains two two-family dwellings is a transfer of more than three family dwellings. The only rational way to interpret the language of the Admin. Code § 2102.a is to

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[2] To the extent that Petitioner requests reclassification of the Property, Movant correctly noted that this Tribunal cannot grant such relief because real property tax classification issues are beyond its limited subject matter jurisdiction. RPTL §706; *Level 3 Comm. v Jiha*, 162 AD3d (1st Dept 2018); *Emunim v Fallsburg*, 78 NY2d 194, 204 (1991); *Niagara Mohawk Power Corp. v City School Dist.*, 59 NY2d 262 (1983).

[3] 19 RCNY § 16-05(a); City Charter 168.d; 20 RCNY §1-12(e)(2).

[4] FLR #03-4805 addressed whether the transfer of a "Class A-1" property was subject to the lower tax rate of 1.425 percent despite the certificate of occupancy declaring the building to be a single-family residence with an attached doctor's office. DOF determined that the tax classification controlled for RPTT purposes.

answer in the affirmative. Put alternatively, two plus two must equal four.

D. Petitioner's remaining arguments fail to raise a material factual issue requiring a hearing. "When a party fails to submit factual evidence or reveal its proof as differing from the moving party's facts, the motion for summary judgment may be granted." *Tucker v Tucker*, 116 Misc2d 76, 78 (Sup Court, Queens County 1982 *citing Arrants v Dell Angelo*, 73 AD2d 633 [2d Dept 1979]).

Petitioner relies upon the undisputed facts among the parties but claims that a hearing is necessary to determine how he used the Property. This argument must be rejected because his use has no bearing on the fact that on the transfer date, the Property was a single tax lot that had four family dwellings upon it. Accordingly, Petitioner has failed to carry his burden of establishing that a material factual question exists.

E. Petitioner's remaining arguments have been considered and rejected.

F. Movant's motion for summary determination is granted. The petition of Patrick McCauley is denied. The Notice of Determination, dated November 4, 2019, is sustained.

DATED: New York, NY
March 2, 2022

/s/
Alexander Chu-Fong
Administrative Law Judge