

New York City Tax Appeals Tribunal

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: In the Matter of :
: : DECISION
JUNGIL SONG :
: : TAT (E) 06-12 (RP)
: Petitioner. :
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Jungil Song (“Petitioner”) filed an Exception to a Determination of an Administrative Law Judge (“ALJ”) dated January 15, 2008 (the “ALJ Determination”). The ALJ Determination sustained a New York City Real Property Transfer Tax (“RPTT”) deficiency asserted by the New York City Department of Finance (the “Department”) in connection with the April 4, 2002 transfer (the “Transfer”) of 136-80/82 39th Avenue, Queens, New York (the “Property”).

Petitioner appeared by Nathaniel M. Swergold, Esq. and the Commissioner of Finance of the City of New York (the “Commissioner”) appeared by Frances J. Henn, Esq., Senior Counsel, New York City Law Department. The parties did not request oral argument and both parties rely on the briefs they filed with the ALJ.

The Property, a commercial building, was originally conveyed to Petitioner individually, by deed, on or about May 27, 1993.¹ The Property was individually owned by

¹The ALJ’s Findings of Fact, although paraphrased, are generally 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.

Petitioner from May 27, 1993 to April 4, 2002, and was subject to mortgages held by Korea Commercial Bank of New York (later known as Hanvit America Bank).

On December 10, 2001, Petitioner borrowed an additional \$778,917.42 secured by a mortgage on the Property from Hanvit America Bank, which was consolidated with the existing mortgages of \$521,082.58 resulting in a single mortgage of \$1,300,000 on the Property (the “Mortgage”).

As a condition for making the loan, Hanvit America Bank required Petitioner’s wife, Sook Ja Song, to provide an unconditional guaranty of the Mortgage debt (the “Guaranty”). She executed the Guaranty on December 10, 2001, and it was in full force and effect on April 4, 2002.

By a deed dated April 4, 2002, Petitioner transferred his individual ownership of the Property to joint ownership by himself and his wife. Petitioner and his wife filed an RPTT return on May 17, 2002 with respect to the Transfer, which stated that Petitioner was the Grantor and that Petitioner and his wife were the Grantees. The return also stated that the Transfer was a “[g]ift transfer subject to indebtedness” and that no RPTT was due.

The Department issued a Notice of Determination dated March 18, 2005 (the “Notice”), asserting a RPTT deficiency of \$21,194.63 consisting of \$17,062.50 in principal plus a late payment penalty of \$682.50 and interest of \$3,449.63 computed to March 31, 2005. The Commissioner applied the RPTT tax rate of 2.625% to consideration of \$650,000, representing one-half of the Mortgage at the time of the Transfer. Petitioner requested a conciliation conference that resulted in a Conciliation Decision sustaining the Notice.

The ALJ sustained the Notice, concluding that the consideration subject to tax is one-

half of the Mortgage encumbering the Property. The ALJ also rejected Petitioner's claim that the deed reflecting the Transfer was a "correction deed," not subject to RPTT.²

Petitioner takes exception to the ALJ's treatment of one-half of the Mortgage on the Property as taxable consideration. Petitioner asserts that the Transfer was an intra-family gift not subject to the RPTT.

Petitioner advances two arguments in support of his position. Petitioner asserts that "consideration" for a contract has been judicially defined to mean "some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."³ Relying on that definition of consideration, Petitioner contends that he received no benefit, and his wife suffered no detriment, when he transferred to his wife one-half of the Property subject to the Mortgage because, as guarantor, she was personally liable for the Mortgage, both before and after the Transfer.

Petitioner also contends that New York City Administrative Code ("Code") §2101.9 defines "consideration" as "the price actually paid" for the real property (emphasis supplied). Petitioner argues that Code §2101.9 does not apply to the Transfer because it was a gift of property subject to a mortgage and, therefore, no price was "actually paid" by his wife.

The Commissioner argues that Code §2101.9 defines consideration to "include the amount of any mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed." She relies on decisions of this Tribunal holding that a conveyance

² In his Request for a Conciliation Conference, Petitioner made the alternative argument that the Transfer was a "correction deed." Petitioner did not raise the issue in his Exception and we will not address it in this Decision.

³Petitioner's Brief at 5.

of property subject to a mortgage is taxable regardless of the personal liability of the parties to the conveyance. Matter of William R. Horner, TAT (E) 96-57 (RP) (June 30, 1998); Matter of Rosina Pate, TAT No. 92-0113 (March 19, 1993); Matter of Charles Polis, TAT No. 91-0325 (August 21, 1992). Based on these decisions, the Commissioner asserts that the only fact relevant to determining whether the Transfer was taxable is the fact that the Property was subject to the Mortgage at the time of the Transfer.

The RPTT is imposed on transfers of real property by deed when the consideration exceeds \$25,000. Code §11-2102.a. The RPTT is imposed on the amount of the consideration for the transfer. Consideration is defined in Code §11-2101.9 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 encumbrance, whether or not the underlying indebtedness is assumed. (Emphasis added.)

Relying on that language, this Tribunal has consistently held that a transfer of property subject to a mortgage is taxable, regardless of the personal liability of the parties to the transfer. Horner, supra; Pate, supra; and Polis, supra. One-half the Mortgage is taxable consideration for the Transfer because it was a lien on the Property at the time of the Transfer, regardless of the fact that Petitioner's wife guaranteed the Mortgage prior to the Transfer,⁴ and regardless of whether any additional purchase price was paid for the Property

⁴Sook Ja Song's execution of the Guaranty four months before the Transfer does not help Petitioner's case, but suggests that her guarantee of the Mortgage was a *quid pro quo* for receiving an ownership interest in the Property and that the Transfer was not a gift.

pursuant to the Transfer.

Petitioner argues that the Mortgage cannot be included in consideration unless it was part of a purchase price paid for the Property.⁵ In Pate, *supra*, this Tribunal rejected this argument stating:

Nor can [taxpayer] reasonably argue that the characterization of a mortgage amount as “consideration” was intended by the statute to apply only where the mortgage is part of a greater price paid (and not where it is incidental to a gift), because the structure of the definition does not support such an interpretation. Thus, section 2101 defines consideration as “the price actually paid . . . ,” proceeding in a subsequent provision to emphasize that, “It shall also include the amount of any mortgage” The antecedent for “it” in the latter phrase is the term “consideration” itself, regardless of whether any other price is additionally paid.

Accordingly, the ALJ Determination is affirmed.

Dated: September 29, 2008
New York, New York

GLENN NEWMAN
President and Commissioner

ELLEN E. HOFFMAN
Commissioner

ROBERT J. FIRESTONE
Commissioner

⁵Petitioner’s Brief at 6.