

**NEW YORK CITY TAX APPEALS TRIBUNAL  
ADMINISTRATIVE LAW JUDGE DIVISION**

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**In the Matter of the Petition**

**Of**

**JUNGIL SONG**

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**DETERMINATION**

**TAT (H) 06-12 (RP)**

Murphy, A.L.J.:

Petitioner, Jungil Song, filed a Petition, dated March 6, 2006, requesting redetermination of a deficiency of New York City (the "City") Real Property Transfer Tax (the "RPTT") with respect to the April 4, 2002 transfer (the "Transfer") of 136-80/82 39<sup>th</sup> Avenue, Queens, New York (the "Property").

Pursuant to Section 1-09(f) of the City Tax Appeals Tribunal (the "Tribunal") Rules of Practice and Procedure (the "Rules"), on October 17, 2007, the undersigned granted the written request of Nathaniel M. Swergold, Esq., the representative of Petitioner, and George P. Lynch, Esq., Assistant Corporation Counsel, the representative of the City Commissioner of Finance (the "Commissioner" or the "Respondent") that this matter be determined on submission without the need for an appearance at a hearing. On November 9, 2006, Respondent submitted certain documentary evidence and, on November 13, 2006, Petitioner submitted additional documentary evidence. On December 18, 2006, Petitioner submitted Proposed Findings of Fact and Proposed Conclusions of Law. Petitioner filed a Brief in support of his position on June 8, 2007 and Respondent filed a Brief in support of her position on August 9, 2007. In a letter dated October 12, 2007, Petitioner informed the undersigned that he would not be submitting any other written

arguments. Accordingly, pursuant to Rules Section 1-12(e)(1), the parties were informed that the record in this matter was closed on October 15, 2007.

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**ISSUE**

Whether consideration subject to tax under the RPTT includes the amount of a proportionate share of an underlying mortgage when real property is transferred as an intra-family gift.

**FINDINGS OF FACT**

1. The Property is a commercial building located at 136-80/82 39<sup>th</sup> Avenue, Flushing, Queens County, New York, Section 25, Block 4980, Lot 37.

2. The Property originally was conveyed to Petitioner, individually, by deed from SHLP Associates, on or about May 27, 1993. The representatives for the parties agree that a City RPTT Return was filed for this May 27, 1993 transfer and that the reported consideration for this transfer was \$1,600,000. This transaction is not in issue.

3. From May 27, 1993 to April 4, 2002, the Property was subject to mortgages held by Korea Commercial Bank of New York, which subsequently became known as Hanvit America Bank.

4. On December 10, 2001, Petitioner entered into a Mortgage and Agreement of Consolidation, Modification and Extension of Mortgage with Hanvit America Bank with respect to the Property in the principal amount of \$1,300,000 (the "2001 Mortgage"). The 2001 Mortgage was comprised of a \$521,082.58 pre-existing mortgage debt

and an additional loan in the amount of \$778,917.42.

5. As a condition of the 2001 Mortgage, Hanvit America Bank required Petitioner's spouse, Sook Ja Song, to execute an unconditional guaranty of the debt (the "Guaranty"). Sook Ja Song signed the Guaranty on December 10, 2001 and it was in full force and effect on April 4, 2002.

6. On April 4, 2002, by deed, Petitioner transferred his individual ownership of the Property to joint ownership by himself and his wife, Sook Ja Song (the "Transfer"). The deed recording the Transfer bears the notation "Family Transfer No Consideration."

7. Petitioner filed a City RPTT Return (the "Return") with respect to the Transfer on May 17, 2002. The Return indicated that Petitioner was the Grantor and that Petitioner and his wife, Sook Ja Song, were the Grantees. On the Return the parties stated that there was no consideration for the transfer; that it was a "[G]ift transfer subject to indebtedness;" and that no RPTT was due.

8. On August 4, 2004, Respondent issued a Notice of Tax Due with respect to the Transfer to Petitioner, as Grantor. Respondent applied the tax rate to consideration of \$650,000 which represented one-half of the \$1,300,000 mortgage indebtedness encumbering the Property on the date of the Transfer. RPTT was computed against the taxable consideration for a tax due of \$17,062.50.

9. On November 23, 2004, Petitioner notified the Department that he disagreed with the proposed adjustment. Petitioner submitted to Respondent an "Affidavit in Connection with No Consideration Transfer" and affirmed that "the ground upon which

the claim of no consideration is based is that the said conveyance was an 'intra family' [sic] transfer without consideration from the grantor, as husband, to the grantees, as husband and wife." Petitioner further affirmed that the Transfer was "made solely as a gift."

10. On March 18, 2005, Respondent issued a Notice of Determination to Petitioner, asserting RPTT due on the Transfer in the amount of \$17,062.50, interest computed to March 31, 2005 of \$3,449.63, and a late payment penalty of \$682.50, for a total due of \$21,194.63.<sup>1</sup>

11. On or about June 16, 2005, Petitioner filed a request for Conciliation Conference with respect to the Notice. A Proposed Resolution was issued to Petitioner which sustained Respondent's determination. Petitioner disagreed with the Proposed Resolution and, on December 8, 2005, the Director of the Department of Finance's Conciliation Bureau issued a Conciliation Decision upholding the Notice.

12. Petitioner filed a Petition with the Tribunal which was received on March 10, 2006, requesting redetermination of the Deficiency.

13. On May 12, 2006, Respondent served an Answer to the Petition.

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<sup>1</sup> The Audit File included copies of two (2) Notices of Determination of RPTT due on the transfer, one issued to Petitioner and one issued to Petitioner and his wife.

## STATEMENT OF POSITIONS

Petitioner asserts that the Transfer was without consideration, either as (1) a gift or (2) an intra-family transfer and, therefore, was exempt from imposition of the RPTT. In the alternative, Petitioner argues that the deed evidencing the Transfer was a correction deed not subject to RPTT. Respondent argues that there was taxable consideration for the Transfer to the extent of 50% of the outstanding mortgage encumbering the Property.

## CONCLUSIONS OF LAW

Transfers of real property by deed are subject to the City RPTT where the consideration exceeds \$25,000. Code §11-2102(a). The tax is imposed on the consideration for the transfer which generally is the "price actually paid or required to be paid" for the real property. Code §11-2101.9. A transfer of real property without consideration (for example, as a gift) is generally not subject to imposition of the City RPTT. See, 19 RCNY §23-03(j)(1).

The Code specifically provides, however, that taxable consideration includes "the amount of any mortgage, lien or other encumbrance . . ." on the real property transferred. Code §11-2101.9. *Matter of Rosina Pate*, TAT No. 92-0113, 93-1 N.Y.T.C. (NYC Tax Appeals Tribunal, March 19, 1993) (transfer of two-thirds interest from mother to daughters); *Matter of William C. Horner, et al.*, TAT(E) 96-57(RP); TAT(E) 96-61(RP) (NYC Tax Appeals Tribunal, June 30, 1998) (transfer from joint tenants, husband and wife, to wife).<sup>2</sup> See, also, *Matter of Philip and Ruth Barash*, TAT(H)96-

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<sup>2</sup> As of 1997, when a 1-3 family house is transferred, the amount of a continuing lien is not included as consideration subject to RPTT. Laws 1997. Ch. 314. The present case, however, involves the transfer of commercial property.

121(RP) (NYC Tax Appeals Tribunal ALJ Determination, August 18, 1997) (transfer from wife to herself and husband); *Matter of Dalia Horovitz*, TAT(H)96-77(RP) (NYC Tax Appeals Tribunal, ALJ Determination, July 31, 2001) (transfer of 49% property interest as gift from husband to wife).<sup>3</sup> RPTT Rules Section 23-02 contains the same provision requiring imposition of RPTT to the extent of the outstanding mortgage or lien. 19 RCNY §23-02(1).

There is no question that Petitioner intended to transfer an interest in the Property to his wife for no additional consideration. However, where the transferred real property is subject to a continuing underlying indebtedness, City Code and regulatory provisions specifically impose a transfer tax on the otherwise nontaxable transaction. Code §11-2101.9; 20 RCNY §23-02(1).

On April 4, 2002, when Petitioner transferred title to the Property from himself to himself and his wife, a mortgage encumbered the Property in the amount of \$1,300,000. For purposes of the RPTT, this mortgage represents the "consideration" upon which the RPTT is imposed. Following the transfer, Petitioner jointly owned the Property with his wife. Where one spouse/grantor transfers real property to himself and his spouse as grantees, for RPTT purposes, it is a transfer of an undivided one-half interest in the real property. As only a one-half interest in the Property was transferred, the RPTT liability is computed against a basis of one-half of the mortgage debt or \$650,000. *See, Barash, supra.*

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<sup>3</sup> While NYC Administrative Law Judge determinations are not precedential, they may be considered. *See, United Features Syndicate*, TAT(E) 93-95(GC) (NYC Tax Appeals Tribunal, August 4, 1997).

Finally, Petitioner argues that the deed reflecting the Transfer (granting title to himself and his wife) was a "correction deed" and therefore the Transfer is not subject to RPTT. To qualify, Petitioner must establish that his wife should have been included on the 1993 deed because she had all the benefits and burdens of ownership of the Property at that time. In such instance, the subsequent deed would be a "correction deed" as it would simply have rectified an incorrect representation. See, *Matter of Lance Roberts*, TAT(H)93-31(RP) (NYC Tax Appeals Tribunal, ALJ Determination, March 31, 1994). On the facts presented, however, Ms. Song had neither the benefits nor the burdens of ownership prior to the Transfer. The deed under review, therefore, represents a transfer separate and apart from the 1993 transaction in which Petitioner originally obtained the Property. The deed reflecting the Transfer was not a correction deed.

All other arguments raised by the parties have been considered and are rejected.

**ACCORDINGLY**, Petitioner Jungil Song is liable for RPTT on the Transfer computed against a consideration of \$650,000, representing one-half of the mortgage encumbering the Property at the time of transfer. The Petition is denied and the Notice of Determination, issued on March 18, 2005, is sustained.

DATED: January 15, 2008  
New York, New York

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ANNE W.MURPHY  
Administrative Law Judge

