

ISSUE

Whether Petitioner is liable for City RPTT due on the March 22, 2006 transfer by deed of the Property to 701 Caton Ave Realty LLC when the parties agreed in the Contract of Sale that 701 Caton Ave Realty LLC is responsible for paying RPTT due on the transaction.

FINDINGS OF FACT

1. Petitioner H-Run Realty Corp., 3707 15th Avenue, Brooklyn, New York, owned City real property located at 701 Canton Avenue in the Borough of Brooklyn, Block 5321, Lot 64.

2. The Property is described as "residential vacant land" on the City RPTT Return, the New York State ("State") Real Property Transfer Report, and other City recording documents.

3. The Property was sold by Petitioner to 701 Caton Ave Realty LLC ("Grantee") on March 13, 2006, pursuant to a Bargain and Sale Deed, for a consideration of \$6,554,475.00 ("Transfer"). Pursuant to the Contract of Sale ("Contract") between Petitioner and Grantee, the consideration was comprised of \$6,437,000.00 in cash and \$117,475.25 in State and City real property transfer taxes paid by Grantee.

4. Article 8 of the Contract provided that the Grantee "shall pay any applicable transfer tax."

5. On March 13, 2006, Petitioner and Grantee filed a City RPTT Return ("Return") with respect to the Transfer. The Return stated

that the Transfer was at arm's length and RPTT due was computed on the Return at an RPTT rate of 1.425% of the consideration for an RPTT payment of \$93,401.27. The payment was submitted with the Return.

6. In 2008 Respondent Department of Finance reviewed the Return and determined that Petitioner was liable for additional RPTT based on the application of an RPTT rate of 2.625% rather than 1.425%.

7. Respondent issued a Notice of Determination of RPTT due ("Notice") to Petitioner on March 5, 2008, asserting additional RPTT of \$80,681.36, with interest of \$17,197.05 computed to April 4, 2008. The Notice stated that the Property was "not a 1-3 family house, residential condominium unit or individual cooperative apartment" and therefore the adjusted RPTT due on the Transfer should be computed at the rate of 2.625% of the consideration, for a total RPTT due of \$174,082.63. The Department adjusted the RPTT due to \$93,401.27 RPTT paid with the Return, reflecting an adjustment of the consideration for the Transfer to \$6,631,719.25. This amount was a "gross-up of taxes for NYS and NYC that the grantee agreed to pay" which represented the increase in RPTT following application of the 2.625% rate.

STATEMENT OF POSITIONS

Petitioner states that pursuant to the Contract, Grantee is liable for all RPTT due and that since Grantee in fact paid RPTT with the filed Return, Grantee, and not Petitioner, is also liable for any additional RPTT which Respondent alleges is due. Respondent states that Code §11-2104 provides that Petitioner, as Grantor, is primarily liable for all RPTT due on the Transfer.

Respondent asserts that it is not a party to the Contract, and is therefore not bound by the parties' agreement with respect to payment of the RPTT.

CONCLUSIONS OF LAW

The RPTT is imposed on each transfer of real property by deed when the consideration is greater than \$25,000. Code §11-2102(a). For 2006 transfers of property other than one-, two- and three-family houses and individual residential condominium units, where the consideration for the transfer is greater than \$500,000, the applicable tax rate is 2.625% of the consideration. Code §11-2102(a)(9)(ii). The March 13, 2006 Transfer of the Property, residential vacant land, for consideration in excess of \$6,000,000 was subject to this 2.625% rate.

The Grantee paid RPTT of \$93,401.27 with the Return, representing application of a tax rate of 1.425% to consideration of \$6,554,475.25. Petitioner does not dispute that the correct tax rate is 2.625%. Documents submitted by Petitioner establish that the Property is residential vacant land, and is not the class of property subject to the lower rate imposed by Code §11-2101(a)(9). Neither does Petitioner dispute the amount of the consideration recalculated by the Department of Finance, \$6,631,719.25, which represents an increase in consideration due under the Contract by the amount of additional RPTT when the tax is calculated at the 2.625% rate.

Petitioner argues rather that it is not liable for the additional RPTT, as the terms of the Contract of Sale establish that the Grantee is the party required to pay all RPTT due on the Transfer.

Respondent may collect the RPTT from either party, but the tax may only be collected once. Code §11-2104. In the first instance, the Code provides that RPTT "shall be paid by the grantor . . . within thirty days after the delivery of the deed . . ." Code §11-2104. The Code further states that "[T]he grantee shall also be liable for the payment of such tax *in the event that the amount of tax due is not paid by the grantor or the grantor is exempt from tax.*" *Id.* [Emphasis supplied.] Therefore, Respondent is not required to pursue the grantee for RPTT due until at least the expiration of the thirty-day period following the transfer and non-payment by the grantor, or where it is established that the grantor is entitled to an exemption from RPTT. *Matter of Chaim Babad, Emanuel Steinmetz and Bernat Steinmetz*, TAT(E)94-111, *et al.* (City Tax Appeals Tribunal, December 5, 1997). Respondent may simultaneously issue Notices of Determination of RPTT due to the grantor and grantee. *Id.*

Respondent is authorized to review RPTT returns filed by taxpayers and to determine if there is additional RPTT owing on a transfer. Code §11-2107. Section 11-2107 specifically states that where Respondent finds additional RPTT due, "[N]otice of such determination shall be give to the person *liable for the tax.*" Code §11-2107. The grantor is the person liable for such additional RPTT. Code §11-2104. Where a grantor files a Petition for redetermination of additional RPTT asserted, the final fixing of tax due is suspended until the appeals process has been completed. Code §11-2107. Therefore unless and until after thirty days from the transfer of real property the grantor of the transaction fails to pay the RPPT due (or is exempt from payment), or fails to pay any additional RPTT subsequently finally assessed

following a determination by Respondent, the grantee is not liable for paying the RPTT.

Petitioner, as Grantor, remains the party liable for the additional RPTT asserted. The initial RPTT payment was made on the date of the Transfer, March 13, 2006. The additional RPTT asserted after the Respondent's audit, with respect to which a Petition has been filed, has not become final. Code §11-2107.

Respondent is not a party to the Contract of Sale between Petitioner and Grantee, and has no authority to enforce the provisions and/or to require Grantee to pay the additional RPTT assessed. Code §11-2104. It is not significant that Grantee made the original payment: the Grantor remains liable for the additional RPTT. Any contractual liability is as between the parties to the Contract of Sale. Respondent appropriately assessed Petitioner Grantor for the additional tax due.

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner is liable for additional RPTT due on the Transfer as asserted by Respondent following review of the Return, based on the application of a 2.625% rate against the consideration paid, as adjusted by Respondent. The Petition of H-Run Realty Corp. is denied and the Notice of Determination, dated March 5, 2008, is sustained.

DATED: March 17, 2011
New York, New York

Anne W. Murphy
Administrative Law Judge