

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

In the Matter of the Petition

of

GEORGE S. WIGGAN

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DETERMINATION

TAT(H) 10-14 (RP)

Gallancy-Wininger, A.L.J.:

Petitioner, George S. Wiggan, 130-12 233rd Street, Rosedale, New York, filed a Petition for Hearing with the New York City (City) Tax Appeals Tribunal (Tribunal) requesting a redetermination of a deficiency of City Real Property Transfer Tax (RPTT) under Chapter 21 of Title 11 of the City Administrative Code (Administrative Code) with regard to a transfer of real property (Transfer) known as 13 St. Felix Street, Brooklyn, New York, 11217, Block 2097, Lot 31 (Property) that occurred on March 8, 2007 (Transfer Date).¹

Petitioner appeared pro se. The Commissioner of Finance (Respondent) was represented by Martin Nussbaum, Esq., Assistant Corporation Counsel.

A Hearing was held on September 12, 2012, at which time evidence was admitted, testimony was taken and stipulated exhibits were submitted.

Petitioner requested an extension of time to submit a Post-Trial brief which was originally due on October 29, 2012. An extension was granted to December 7, 2012. Notwithstanding such extension of time, Petitioner did not submit a Post-Trial brief.

¹ The Petition was filed on June 4, 2010.

Respondent submitted a letter dated January 3, 2013 summarizing Respondent's legal position.

ISSUES

I. Whether the Transfer from Petitioner's wife Jerrilyn Wiggan (Mrs. Wiggan) to Petitioner was exempt from RPTT because Petitioner was already legal or equitable co-owner of the Property.

II. Whether Mrs. Wiggan was a mere nominee or agent of Petitioner for the purpose of acquisition of the Property and the Transfer was a transfer from a nominee or agent to a principal.

FINDINGS OF FACT

1. The Property located at 13 St. Felix Street in Brooklyn is a residential property with four dwelling units.

2. The Property was purchased by Mrs. Wiggan in her name alone on May 2, 2005.

3. Although the Property was purchased by Mrs. Wiggan, Petitioner testified that he and his wife intended that the Property would be owned by both of them jointly.

4. Petitioner did not submit a copy of the contract of sale with the previous owner.

5. The down payment was provided by a check drawn on a retirement account in the name of Petitioner's wholly-owned corporation because Petitioner and his wife lacked sufficient

personal funds to provide the down payment.²

6. Petitioner took various steps towards, and incurred expenses in connection with, the acquisition of the Property such as engaging an alarm company to inspect the alarm at the Property and obtaining insurance coverage for the Property.³

7. Petitioner was unable to attend the closing because he had to go to Florida to attend to his ill mother. The Petition states that the seller refused to grant any further extensions of the closing. However, Petitioner testified at the Hearing that the closing could have been postponed.⁴ Petitioner provided no explanation as to whether title to the Property could have been acquired in the name of both Petitioner and Mrs. Wiggan by means of Petitioner providing Mrs. Wiggan or another individual with a power of attorney for such purpose.

8. Mrs. Wiggan was represented by counsel at the closing. In order to finance the acquisition, Mrs. Wiggan gave a mortgage (the Mortgage) in the principal amount of \$805,000 to IndyMac Bank, F.S.B. (IndyMac), as lender.

9. After Mrs. Wiggan's acquisition, the former owner, as well as several tenants, remained in possession of the Property. Litigation was commenced to remove the former owner.

10. Petitioner testified that he and Mrs. Wiggan did not believe that there was any urgency in transferring the Property to

² Tr at 20; tr at 23-24.

³ Attached to the Petition (Respondent's exhibit B) are copies of invoices to Petitioner from (i) Elite Burglar Alarms and (ii) Allstate Indemnity Company. A subsequent invoice from Allstate Indemnity Company was issued to Mrs. Wiggan.

⁴ Tr at 25.

both of their names. Moreover, they were focused on the litigation involving the former owner.

11. The tenants made their rent checks payable to Petitioner (rather than to Petitioner and his wife), in order to facilitate depositing the checks with only one person's endorsement. Rent checks were deposited into an account in Petitioner's name. If tenants needed repairs, they would call Petitioner. Petitioner assumed day to day responsibility for maintenance and such items as cleaning and monitoring the heating system. Insurance premiums were paid by Petitioner from a joint account.

12. Although Petitioner testified that he made the Mortgage payments with respect to the Property, checks in payment of the Mortgage were not drawn on an account in Petitioner's individual name or on an account in the names of Petitioner and Mrs. Wiggan. Instead, Mortgage payments were made by checks drawn on the account of two corporations owned by Petitioner.⁵

13. There was no written agreement between Petitioner and Mrs. Wiggan establishing a relationship of principal and agent with respect to the Property or otherwise characterizing their relationship vis à vis the Property.

14. On the Transfer Date, Mrs. Wiggan transferred title to the Property by quitclaim deed from her name alone, to herself and

⁵ Three checks attached to Respondent's exhibit B that were made payable to IndyMac were drawn on the account of Preferred Equity Solutions Corp. and were signed by Petitioner. A fourth check, also made payable to IndyMac, was drawn on the account of MTGXACT. A check to American Express was likewise drawn on the account of MTGXACT. The addresses of MTGXACT and Preferred Equity Solutions Corp. appearing on such checks is 1147 E. 92nd Street, Brooklyn, New York 11236. While there was no testimony to such effect, it is possible that Mortgage payments were, at least in part, defrayed by the rent received from tenants at the Property.

Petitioner. Petitioner and Mrs. Wiggan were represented by counsel on the Transfer Date. Contemporaneously with the Transfer Date, the Mortgage was refinanced to obtain a lower interest rate and to increase the principal amount to \$840,000.

15. On the Transfer Date, Petitioner and Mrs. Wiggan executed a New York City Real Property Transfer Tax Return that described the Transfer as "arms-length" and as being supported by "0" consideration.

16. On September 9, 2009, the Department issued a Notice of Determination to Petitioner asserting a Real Property Transfer Tax deficiency in the principal sum of \$5,735.63 plus interest computed to October 9, 2009 in the amount of \$1,283.33. A late filing or payment penalty was asserted in the amount of \$487.53 for a total deficiency of \$7,506.49. The principal amount of the asserted deficiency (*i.e.*, \$5,735.63) reflected a 1.425% tax on \$402,500 or one-half of the original principal amount Mortgage encumbering the Property.

17. The Notice of Determination set forth the following explanation of the deficiency:

A conveyance of real property subject to any indebtedness is not a gift to the extent of the indebtedness. . . .

Since the property conveyed was not a 1-3 family house, individual cooperative apartment or individual condominium unit, the taxable consideration was based on the interest transferred in the outstanding mortgage on the property at the time of transfer (\$402,500.00).

* * *

Real Property Transfer Tax Rules of City of New York [19 RCNY] 23-12 (b) (3).

STATEMENT OF POSITIONS

Petitioner asserts that he and Mrs. Wiggan jointly own the Property because of their marital relationship, that he has been an equitable owner of the Property since Mrs. Wiggan took title to the Property and, therefore there has been no transfer of an interest in the Property. In the alternative, Petitioner asserts that Mrs. Wiggan acted as agent or nominee for both of them in connection with the acquisition of the Property. Petitioner supports his position by asserting the facts that he and Mrs. Wiggan have been married for many years, that they intended to acquire the Property in both names, that they always regarded it as their joint property and that Petitioner provided the down payment from his business retirement account. Petitioner explained that as he was called away to attend to his mother, title to the Property was acquired in Mrs. Wiggan's name only. After Mrs. Wiggan acquired the Property, Petitioner collected the rents, deposited the rents into his bank account, paid the Mortgage, made repairs and handled the day-to-day maintenance of the Property.

Respondent asserts that the RPTT is a form-based tax assessed on deeds and that all deeds are taxable with certain exceptions. Respondent asserts that in the instant matter, Petitioner did not submit evidence of any written agreement that established beneficial ownership by Petitioner or an agency or nominee relationship between Petitioner and Mrs. Wiggan, as required by Rules of City of NY Real Property Transfer Tax (19 RCNY) § 23-05 (b) (7) (iii). Respondent further asserts that apart from Petitioner's testimony, Petitioner failed to submit evidence that during the period between the date that Mrs. Wiggan took title to the Property and the Transfer Date, that Petitioner and Mrs.

Wiggan held themselves out as the owners to all third parties. Respondent finally asserts that normal marital commingling of funds does not establish an agency relationship which can alter title to real property for the purposes of RPTT.

CONCLUSIONS OF LAW

The RPTT is imposed by Administrative Code § 11-2102.a. which provides as follows:

A tax is hereby imposed 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) exceed twenty-five thousand dollars.

Administrative Code § 11-2103 establishes a presumption that all deeds are taxable. Section 11-2103 states,

[w]here the consideration includes property other than money, it shall be presumed that the consideration is the value of the real property or interest therein. Such presumption shall prevail until the contrary is established and the burden of proving the contrary shall be on the taxpayer.

In order to promote certainty as to ownership of real property, both General Obligations Law § 5-703 and Real Property Law § 243 provide that an estate in real property (other than a lease for a term not exceeding one year) must be created in writing and be subscribed by the person from whom the estate or interest conveyed is intended to pass. Real Property Law § 244 provides that a grant takes effect so as to vest the estate or interest intended to be conveyed, only from its delivery. Accordingly, it

is the writing set forth in the deed that governs the ownership of real property. There are a few limited exceptions to the provisions of Real Property Law § 243 upon which a court may base a finding of equitable ownership in favor of a person who is not the record owner of real property. However, those exceptions are not applicable in this instance.⁶ This case concerns a transfer from a wife to herself and her spouse without the spouse giving the wife any money as consideration for the transfer. Accordingly, the transfer is a gift. (*Matter of Jungil Song*, TAT(E) 06-12(RP) [2008]).

Petitioner's position that he has always been a co-owner of the Property is complicated by the fact that the down payment was drawn on an account maintained by his corporation and the checks for the Mortgage were also drawn on corporate accounts rather than Petitioner's personal account. Petitioner is not entitled to pierce the corporate veil of the corporations of which he is the sole shareholder in order to establish that he provided an economic contribution to the acquisition and operation of the Property. (*Matter of Joseph Morris v New York State Department of Taxation and Finance*, 82 NY2d 135 [1993]). Accordingly, Petitioner failed to establish that he, in his individual capacity, provided any material economic contribution to the acquisition of the Property or payment of the Mortgage. Until the written conveyance from Mrs. Wiggan to Petitioner on the Transfer Date, Petitioner had neither a legal nor an equitable interest in the Property.

⁶ *E.g.*, a constructive trust or a purchase money resulting trust. Courts may impress a purchase money resulting trust when, in violation of a trust, the transferee has purchased property with the money of another person." (*Amusement Industry v Stern*, 786 FSupp2d 758 [SDNY 2011]). Courts may impose a constructive trust if there exists (i) a confidential or fiduciary relationship between the parties; (ii) a promise, express or implied; (iii) a transfer made in reliance on that promise; and (iv) unjust enrichment. (*Amusement Industry v Stern*). The elements of violation of a trust and unjust enrichment are not found in the instant matter.

Petitioner argues that the Property is owned jointly by Mrs. Wiggan and him based on their marriage contract. Marital property is a statutory concept established by Domestic Relations Law § 236 (Part B). The New York Court of Appeals, in *O'Brien v O'Brien* (66 NY2d 576 [1985]) citing *Florescue, Market Value, Professional Licenses and Marital Property: A Dilemma in Search of a Horn*, 1982 N.Y.St. Bar Assn. Fam.L.Rev. 13 [Dec.], notes that, "there is no common-law property interest remotely resembling marital property." Such concept is applicable in the context of certain matrimonial actions. (See *Hammer v Hammer*, 16 Misc2d 749 [1959], *appeal dismissed* 9 AD2d 748 [1st Dept 1959], *aff'd* 10 AD2d 557 [1st Dept 1960]). Accordingly, Petitioner was not, prior to the Transfer Date, an owner of the Property by virtue of the concept of marital property.

Since Petitioner was not a legal, equitable or beneficial owner of the Property prior to the Transfer Date, the question arises as to whether any exception to the application of the RPTT is applicable to the Transfer.

Administrative Code § 11-2106 sets forth a list of exemptions from the application of the RPTT. Exemptions from tax are to be strictly and narrowly construed. (*Grace v New York State Tax Commission*, 37 NY2d 193 [1975]); (*Matter of Old Nut Company, Inc. v New York State Tax Commission*, 126 AD2d 869 [3rd Dept 1987]). The burden of proof of entitlement to an exemption rests with the taxpayer. (*Matter of Mobil Oil Corp. v Finance Administrator of City of New York*, 58 NY2d 95 [1983]).

Administrative Code § 11-2106.b.7 provides that the RPTT shall not be applicable in the case of:

A deed, instrument or transaction conveying or transferring real property or an economic interest therein from a mere agent, dummy, straw man or conduit to his principal or a deed, instrument or transaction conveying or transferring real property or an economic interest therein from the principal to his agent, dummy, straw man or conduit.

19 RCNY 23-05(b)(7) sets forth certain examples of deeds, instruments and transactions to which this exemption applies. 19 RCNY 23-05(b)(7)(iii) sets forth an example of an exempt conveyance between a principal and its agent where:

"(A) a written agreement is entered into at the time of the transaction establishing such a relationship with respect to the realty or economic interest therein, (B) the purported agent functions as an agent with respect to the realty or economic interest therein for all purposes, and (C) the purported agent is held out as the agent and not the principal in all dealings relating to the realty or economic interest therein."

Petitioner and Mrs. Wiggan do not have a written agreement relative to the Property. Even if the lack of a written agreement were excusable in the context of a marriage, it cannot be said that in this instance, the agent held herself out as the agent for both herself and Petitioner in all dealings relating to the Property. Mrs. Wiggan executed and delivered the Mortgage to IndyMac in her name alone and obtained insurance coverage in her own name. Moreover, there is no evidence that IndyMac was aware of a principal/agent relationship. Further, the checks in payment of the Mortgage, were checks drawn on the accounts of two

corporations, rather than on an account which denominated Mrs. Wiggan as agent. There is no evidence that any actions taken by Mrs. Wiggan bound Petitioner (e.g., there is no evidence that Petitioner was an obligor under the Mortgage note given to IndyMac). Mrs. Wiggan did not act as agent in other respects: she did not collect the rents, she did not transmit the rents and there is no evidence that she held herself out to be the agent of both parties. See, e.g., (*Commissioner of Internal Revenue v Bollinger* 485 US 340, 108 [1988]).

Administrative Code § 11-2106.b.8 provides that the RPTT shall also not be applicable in the case of:

A deed, instrument or transaction conveying or transferring real property or an economic interest therein that effects a mere change of identity or form of ownership or organization to the extent that the beneficial ownership of such real property or economic interest therein remains the same. . . .

In this instance, the Transfer effected a change in the ownership of the Property and the exemption set forth in Administrative Code § 11-2106.b.8 is inapplicable.

The Transfer may not be construed as a transaction by a dummy, nominee or conduit and, the deed effecting the Transfer may not be construed as a correction deed. (*Matter of Targee Medical Associates*, TAT 92-1207 [1993]); (*Matter of Adolfo Welch*, (TAT 91-0628 [1993]); (*Matter of Lance Roberts*, TAT (H) 93-312 [1994]).

Administrative 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 encumbrance, whether or not the underlying indebtedness is assumed. [Emphasis added.]

In the case of a transfer of real property,⁷ RPTT is due on the consideration pertaining to the value of the Property transferred and includes a proportionate share of the outstanding mortgage indebtedness at the time of the transfer. (*Matter of Pate*, TAT 92-0113 [1993]); (*Matter of De Lillo*, TAT(H) 93-2343(RP) [1988]); (*Matter of Dalia Horowitz*, TAT(H) 96-77(RP) [2001]); (*Matter of Jungil Song*), each of which pertained to intra-family transfers subject to mortgage indebtedness.

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner is liable for RPTT on the March 8, 2007 transfer computed on the consideration of \$402,500, representing one-half of the value of the Mortgage, as Petitioner failed to prove either that (i) Petitioner had any legal or beneficial interest in the Property prior to such date, or (ii) that Mrs. Wiggan acted as an agent for herself and Petitioner on the First Acquisition Date.

⁷ Under certain circumstances, where the property transferred is a one, two or three-family house, Administrative Code § 11-2102.f. permits the exclusion of outstanding mortgage indebtedness from the amount of consideration on which the RPTT is based.

The Petition of George S. Wiggan is denied and Notice of Determination dated September 9, 2009, is sustained.

DATED: May 20, 2013
New York, New York

Jean Gallancy-Wininger
Administrative Law Judge