

NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition : DETERMINATION
:
of : TAT (H)18-18(RP)
:
Jacob and Anita Penzer :
Foundation, Inc. :
:

Jacob and Anita Penzer Foundation, Inc. (Petitioner) filed a petition for hearing (Petition) dated August 3, 2018 with the New York City (City) Tax Appeals Tribunal (Tribunal). It contests a conciliation decision upholding a disallowance of a claim for refund of City Real Property Transfer Tax (RPTT) in the amount of \$727,352.50.

The Petition alleges that Petitioner is a tax-exempt organization, recognized as such by Internal Revenue Code §501(c)(3) and City Administrative Code (Code) §11-2106.b(2), that is a 33-1/3% partner in a partnership that sold real property and paid RPTT on the transfer by deed in the amount of \$2,182,057.50. Based on its tax-exempt status, Petitioner claims a refund of its 33-1/3% share of the RPTT paid.

In lieu of an answer, the City Commissioner of Finance (Respondent) moved to dismiss the Petition pursuant to Tribunal Rules of Practice and Procedure (20 RCNY or Tribunal Rules) §1-05(b)(1)(vi). Respondent argued that the Petition fails to state a cause for relief because the entity which transferred the real property is not tax-exempt and accordingly there is no exemption from RPTT and no basis for a refund claim. Petitioner opposed the motion by submitting a response and memorandum of law, to which Respondent filed an affirmation in reply. On March 13, 2019, the Tribunal held oral argument and converted

the motion to dismiss to a motion for summary determination pursuant to Tribunal Rules §1-05(b)(2)(ii). At a telephone status conference on March 27, 2019, the parties advised that they had agreed to proceed pursuant to a stipulation in lieu of hearing pursuant to Tribunal Rules §1-09(f). On May 15, 2019, the parties submitted a Stipulation of Facts (Stipulation) and Exhibits A-O.

Petitioner was represented by Joseph Lipari, Esq., and Nancy Chassman, Esq., of Roberts & Holland, LLP. Respondent was represented by Andrew G. Lipkin, Esq., Senior Counsel with the City's Law Department.

For the reasons set forth below, the Petition must be dismissed. Petitioner did not pay the RPTT and therefore may not claim a refund. A transaction is not exempt from RPTT to the extent that a taxable entity is owned by a tax-exempt entity.

ISSUES

I. Whether Petitioner has standing to claim a refund of tax it did not pay.

II. Whether the Petition states a cause for relief, which turns on whether a taxable entity is subject to an exemption of RPTT to the extent it is owned by one or more tax-exempt entities.

FACTS

The Stipulation recites the following facts, which are accepted.

Petitioner was incorporated in the State of Florida on July 25, 1996. It received a determination letter dated January 31,

1997 from the Internal Revenue Service stating that it is an entity exempt from income tax pursuant to Internal Revenue Code §501(c)(3). Petitioner is a 33-1/3% partner in Ascot Properties Limited Partnership, a limited liability partnership (the Partnership), which is not exempt from RPTT.

On February 9, 2017, the Partnership sold by deed a parcel of real property (Property) located in the City for \$83,126,000, and paid RPTT in the amount of \$2,182,057.50.

Petitioner filed a claim for refund of \$727,352.50 (one-third of the tax paid) by letter dated June 30, 2017, which was the subject of a notice of disallowance dated December 14, 2017 issued by Respondent. Petitioner states that it filed a request for conciliation conference on February 8, 2018. Respondent issued a conciliation decision dated May 16, 2018, sustaining the notice of disallowance of the claim for refund.

Petitioner claims a partial RPTT exemption for the February 9, 2017 sale under Code §11-2106.b(2) because, at the time of the sale, it owned a 33-1/3% interest in the Partnership. It further alleges that it "is entitled to a refund of \$727,352.50 of NYC RPTT on the transfer of its economic interest in the Property."

In the Stipulation, the parties agreed that the RPTT had been paid by the Partnership, not Petitioner (Stipulation, ¶6). At a telephone status conference on June 4, 2019, the parties confirmed their agreement that there was no need for Respondent to file an answer in this case.¹

¹ Although the Charter of the City of New York §170.b and Tribunal Rules §1-04(b) indicate that an answer is required in every case, in fact none is expected where Respondent files a motion to dismiss. Tribunal Rules §1-05(a) permits a motion for an order that is appropriate in a proceeding governed by the New York State Civil Practice Law and Rules; CPLR Rule 320 permits either

POSITIONS OF THE PARTIES

Respondent argues that no exemption from RPTT is available where the transfer is by an entity which is not tax-exempt, regardless of whether its owners are tax-exempt. Respondent concedes that the Petitioner is exempt from RPTT, and that no RPTT would have been due if Petitioner had sold the Property.

Petitioner initially argued that there were issues of fact that precluded granting the motion. At the oral argument, however, it agreed that there are no issues of fact, and, as noted, submitted the Stipulation. It argues that the RPTT exemption for transfers by tax-exempt entities should be treated like the exemption for a mere change in form, and recognized to the extent that a seller is owned by a tax-exempt entity. It argues further that the transaction could have been structured so that the exemption would apply.

DISCUSSION

I. Standing Issue

Code §11-2108.a provides that a claim for refund of RPTT "may be made by the grantor, the grantee or other person who has actually paid the tax." RPTT Rule (19 RCNY) §23-14 (a) specifies who may apply for a refund of RPTT. It states,

an answer or a motion to dismiss in response to a complaint. Nor is an answer required where the motion to dismiss is converted to a motion for summary determination. Further, Tribunal Rule §1-09(f)(2), governing submissions without a hearing, requires Respondent to submit relevant documentary evidence and permits Petitioner "to submit documents in support of the petition," without reference to an answer. Here an answer would be superfluous as the parties have stipulated to the facts and delineated the legal issues and arguments.

"Persons who may apply. An application for refund or credit may be made by any one of the following persons, as the case may be:

- (1) The grantor, if he has paid the tax to the Commissioner of Finance;
- (2) The grantee, if he has paid the tax to the Commissioner of Finance;
- (3) Any other person who has actually paid the tax to the Commissioner of Finance."

The parties stipulated that the Partnership paid the RPTT (Stipulation, ¶6.) Petitioner does not have standing to assert a claim for refund of tax paid by another and the Petition must accordingly be dismissed.

II. Tax Exemption Issue

Code §11-2102.a imposes a tax on the transfer by deed of real property located within the City. Code §11.2102.b imposes a tax on "each instrument or transaction (unless evidenced by a deed subject to tax under subdivision a), at the time of the transfer, whereby any economic interest in real property is transferred by a grantor to a grantee, where the consideration exceeds twenty-five thousand dollars." Thus the tax on transfers of an economic interest applies only where there is no transfer by deed. An "economic interest in real property" is defined in pertinent part as "the ownership of an interest or interests in a partnership, association or other unincorporated entity which owns real property (Code §11-2101.6)."

This issue turns on whether an exemption from tax applies. In such cases, it is well established that the taxpayer has the burden of proving entitlement to the exemption:

"Exemption and deduction provisions are to be construed in favor of the taxing

authority (see *Matter of Mobil Oil Corp. v Finance Adm'r of City of N.Y.*, 58 NY2d 95, 99 [1983]), and the extent to which a deduction shall be allowed is a matter of legislative grace (*Matter of Royal Indem. Co. v Tax Appeals Trib.*, 75 NY2d 75, 78 [1989]) to which a taxpayer must prove entitlement (see *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975])." (*Matter of Citrin Cooperman & Co., LLP v Tax Appeals Trib. of City of New York*, 52 AD3d 228 [1st Dept, 2008]; see also, *Wegmans Food Markets, Inc. v Tax Appeals Trib. of the State of New York*, --NY3d-- , 2019 Slip Op 05184 [2019]).

Two provisions governing RPTT exemptions are at issue here. The first exempts tax-exempt entities from payment of the RPTT; the second exempts transactions to the extent that the beneficial ownership of the grantor and the grantee is the same.

Regarding the first exemption, Code §11-2106.b(2) provides in pertinent part that the RPTT shall not apply to

"[a] deed, instrument or transaction conveying or transferring real property or an economic interest therein by or to any corporation, or association, or trust, or community chest, fund or foundation, organized or operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph."

The parties agree that the Petitioner meets this definition, and that had the Petitioner conveyed real property by deed, the sale would be exempt from RPTT.

Petitioner relies by analogy on the provisions of the second exemption concerned here, Code §11-2106.b(8), which provides an exemption for 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 the beneficial ownership of such real property or economic interest therein remains the same" (Emphasis added.)

Respondent's RPTT Rule §23-05(b)(8) provides examples that make clear that in considering the mere change in form exemption, the ownership of the grantor and grantee is to be considered, and to the extent that beneficial ownership is the same before and after a transfer, the transaction is exempt from RPTT. For instance, if individuals A and B each own 50% of a property and transfer it to a partnership in which they are equal partners, there is no tax because they each have 50% beneficial ownership in the property both before and after the transfer (*id.*, Example A).

Petitioner posits that the exemption for transfers for tax-exempt entities is to be applied by considering the ownership of the entity selling or purchasing real property. Therefore, since a tax-exempt entity owned 33-1/3% of the Partnership making the sale, the RPTT should be reduced to this extent.

When construing a statute, courts are to discern and give effect to the legislature's intent. The starting point is the statute's language. The statute must be construed as a whole and its various provisions considered together and with

reference to each other (*Matter of Shannon*, 25 NY3d 345, 351 [2015]). Courts are to "give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and harmonizes all its interlocking provisions" (*Matter of Long v Adirondack Park Agency*, 76 NY2d 416, 420 [1990]).

Code §11-2106.b(2) is not susceptible to the interpretation urged by Petitioner. The provision, which like all exemptions, must be narrowly construed, provides an exemption for a transfer of real property or an economic interest therein to a tax-exempt entity meeting the qualifications of the statute. There is nothing to suggest that this provision applies to entities which are not themselves tax-exempt to the extent that they are owned by tax-exempt entities. In contrast, the mere change in form provision Petitioner relies on states that it applies "to the extent the beneficial ownership" of the real property or economic interest remains the same. Section 11-2106.b(2) does not contain language indicating that an exemption is to be granted to the extent that a tax-exempt entity owns an interest in either the grantor or grantee. The legislature demonstrably knew how to craft such language had it wanted to create such an exemption. Instead, the exemption requires that the grantor or grantee be a tax-exempt entity. Because the Partnership was not a tax-exempt entity, the exemption of §11.2106.b(2) is not available.

Petitioner's argument that it transferred an economic interest in Property is also rejected. Code §11-2102.b(1) imposes RPTT on a transfer of an economic interest only where the transfer is not evidenced by a deed subject to tax under §11-2102.a. Because the transfer here was by deed, the statute does not consider whether there was a transfer of an economic

interest and thus no economic interest in the Property was transferred for purposes of the RPTT. However, even if there were an interest of an economic interest, as discussed above, the exemption of §11.2106.b(2) is not available to an entity that is not tax-exempt.

For these reasons, the Petition is dismissed, and the Notice of Disallowance and the Conciliation Decision are sustained.

IT IS SO ORDERED.

Dated: July 31, 2019
New York, New York

 /s/
David Bunning
Administrative Law Judge