

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
INDIAN HEAD ASSOCIATES	:	DECISION
for Revision of a Determination or for Refund of Real	:	DTA No. 813069
Estate Transfer Tax under Article 31 of the Tax Law.	:	
	:	

Petitioner Indian Head Associates, 1455 Veterans Memorial Highway, Hauppauge, New York 11788, filed an exception to the determination of the Administrative Law Judge issued on September 14, 1995. Petitioner appeared by Gleich, Siegel & Farkas (Stephan B. Gleich, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioner filed a brief in support of its exception and in reply to the Division of Taxation's brief in opposition. Oral argument was heard on February 8, 1996.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner DeWitt took no part in the consideration of this decision.

ISSUE

Whether the Division of Taxation properly calculated the consideration given by petitioner for real property acquired in a foreclosure sale for purposes of computing petitioner's real estate transfer tax liability.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Indian Head Associates, a partnership, held a second mortgage (on which the defaulting mortgagor owed \$4,635,193.10 as of May 31, 1993) that was secured by commercial/industrial property located in Kings Park, Town of Smithtown, Suffolk County.

Petitioner commenced an action to foreclose its mortgage, and a Judgment of Foreclosure was granted on October 6, 1993 ordering the sale of the subject Long Island property at public auction.

Petitioner was the highest bidder at the foreclosure sale held on January 5, 1994, purchasing the property for the sum of \$1,000,000.00. Petitioner acquired the property subject to a pre-existing first mortgage, held by an individual identified as Milton Siegel, with \$480,000.00 remaining due on an original principal of \$600,000.00.

The Judgment of Foreclosure granted on October 6, 1993 also decreed that:

"[Petitioner] may apply at the foot of this judgment, after sale, pursuant to the provisions of Section 1371 of the Real Property Actions and Proceedings Law for judgment against the defendants for such deficiency, if any, to which the Court shall deem the plaintiff to be entitled."

However, it does not appear that petitioner obtained a deficiency judgment for the remaining \$3,635,193.10 owed on the mortgage against the defaulting mortgagor.

Petitioner by its partner, Henry Taca, filed a Combined Real Property Transfer Gains Tax Affidavit and Real Estate Transfer Tax Return (Form TP-584) received by the Division of Taxation ("Division") on February 3, 1994 on which petitioner reported the conveyance of the subject Long Island property pursuant to the foreclosure sale. Schedule E of Form TP-584 instructed the taxpayer to calculate the consideration subject to tax by adding "[t]he amount of foreclosure judgment or price bid by grantee, whichever is higher" to the amount of any pre-existing mortgage or lien. In accordance with this instruction, petitioner added the amount of the foreclosure judgment of \$4,635,193.10 to the amount of the pre-existing mortgage remaining on the property of \$480,000.00, arriving at a total of \$5,115,193.10. Petitioner paid real estate transfer tax of \$20,462.00 (\$2.00 for each \$500.00, or fractional part of consideration, i.e., $\$10,231.00 \times \$2.00 = \$20,462.00$).

Petitioner filed a real estate transfer tax claim for refund (Form TP-592.2) seeking a refund of \$14,540.77 based upon its contention that tax should be calculated on its bid of \$1,000,000.00, the approximate fair market value of the Long Island property, plus the amount of the pre-existing mortgage of \$480,000.00, which totals \$1,480,000.00. Real estate transfer tax of \$5,920.00 would be due on such reduced consideration of \$1,480,000.00 (\$2.00 for each \$500.00 or fractional part of such consideration, i.e., $\$2,960.00 \times \$2.00 = \$5,920.00$). Petitioner explained in its refund claim that:

"[t]he transfer tax on Indian Head's transfer should be based on the fair market value of the property at the time of the transfer, not on the totally unrelated value ascribed to the foreclosure judgment."

Petitioner pointed to the definition of "consideration" for real property gains tax purposes in support of its contention that the fair market value of the Long Island property should have been used.

The Division denied petitioner's claim for refund in a letter dated June 14, 1994, providing the following explanation:

"It is the New York State Department of Taxation and Finance's policy as reflected in the instructions [of the tax forms] that when real property is being conveyed pursuant to a mortgage foreclosure and the successful bidder is the mortgagee . . . the consideration is equal to the amount of judgment in foreclosure or the bid price, whichever is higher, plus the amount of any other pre-existing mortgages . . . remaining on the property after the conveyance.

"In addition . . . the definition of 'Consideration' applicable to [real property gains tax] does not apply to [real estate transfer tax]."

OPINION

In the determination below, the Administrative Law Judge held that a plain reading of Tax Law § 1401(d), which defines the term "consideration" for purposes of the real estate transfer tax, supports the Division's calculation of the consideration given by petitioner for the property acquired in the foreclosure sale. The Administrative Law Judge found that, there being no evidence of petitioner's obtaining a deficiency judgment for the amount remaining outstanding on the mortgage, the amount of the indebtedness cancelled was \$4,635,193.10, and the Division correctly determined that the consideration subject to transfer tax was the amount

of the judgment in foreclosure of \$4,635,193.10, plus the amount of the pre-existing mortgage of \$480,000.00, which totals \$5,115,193.10.

On exception, petitioner continues to argue that there is no statutory basis for the Division's interpretation of Tax Law § 1401(d) to mean that, in a foreclosure sale, consideration is measured by the higher of the bid price or the amount of the judgment in foreclosure. Petitioner maintains that the correct measure to use is the fair market value of the property at the time of the foreclosure sale. In support of this position, petitioner cites to the definition of consideration contained in Tax Law § 1440(1), which relates to the real property transfer gains tax (hereinafter "gains tax"), and also to a gains tax advisory opinion. The use of the gains tax definition of consideration is proper in this situation, petitioner argues, because, in the absence of statutory language to support the Division's interpretation, resort to this alternate definition is a logical and realistic approach.

The Division, on the other hand, maintains that in this case there was a mortgage foreclosure which resulted in the cancellation of an indebtedness totalling \$4,635,193.10. Applying the statute to this set of facts should result in a finding that the Division properly determined the correct consideration.

Tax Law § 1401(e) defines a conveyance for purposes of the real estate transfer tax as "the transfer or transfers of any interest in real property by any method, including . . . mortgage foreclosure" Tax Law § 1402(a) imposes the transfer tax on each conveyance of real property when the consideration exceeds \$500.00. Tax Law § 1401(d) defines "consideration," in part, as follows:

"the price actually paid or required to be paid for the real property or interest therein . . . 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, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to" (emphasis added).

We affirm the determination of the Administrative Law Judge. There is no dispute that the transaction in issue was subject to the transfer tax. The only question is whether the Division's calculation of the consideration upon which the tax was based was proper. As the

Administrative Law Judge pointed out, a plain reading of the statute supports the Division's calculation of the consideration. Reducing this case to its essentials, there was a mortgage foreclosure which resulted in the cancellation of an indebtedness of \$4,635,193.10. Tax Law § 1401(d) provides that consideration "shall include the cancellation or discharge of an indebtedness or obligation." Thus, directly applying the statute to this factual context leads to the result that the proper measure of the consideration is the amount of the indebtedness cancelled (\$4,635,193.10), plus the amount of the pre-existing mortgage (\$480,000.00). There is no dispute as to the inclusion of the latter amount.

Petitioner's arguments for using the fair market value of the property at the time of the sale as the measure of consideration are completely without merit. Nowhere in the transfer tax statutes is there any support for the use of fair market value as a valid means of measurement. Petitioner's argument that the gains tax statutes should be used to arrive at a means of measurement of consideration is equally unavailing. This Tribunal has previously held in Matter of 61 East 86th St. Equities Group (Tax Appeals Tribunal, January 21, 1993) that:

"We disagree with petitioner's contention that the structure of the transfer tax may be relied on to interpret the structure of the gains tax. First, the two taxes are set out in different parts of the Tax Law -- Article 31 contains the real estate transfer tax and Article 31-B contains the gains tax. Thus, we find it inappropriate to imply any correlation between the two Articles absent an express statement by the Legislature that the two are related."

There is, therefore, no basis to rely on the gains tax definition of consideration in this case. Moreover, as explained above, the transfer tax statute provides a definition of consideration which is directly applicable to the facts present in the instant matter (see, Tax Law § 1401[d]).

There was some discussion both below and on exception about the impact of the presence or absence of a deficiency judgment in this case. Since the facts show that there was no deficiency judgment obtained, the question of what the impact of such judgment would have been is irrelevant and beyond the scope of this analysis. For the same reason, any discussion of the impact of an unrelated third party's purchase of the property at the foreclosure auction rather than the mortgagee is also irrelevant. The Division has now promulgated regulations covering

both of these situations and a wide variety of other circumstances applicable to foreclosure sales (see, 20 NYCRR 575.11[a][3]). Again, none of these circumstances is present in the factual context of this case and any discussion of them would be irrelevant and superfluous.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Indian Head Associates is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Indian Head Associates is denied.

DATED: Troy, New York
December 26, 1996

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner