

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

LAMPARELLI CONSTRUCTION COMPANY, INC. :	DECISION
	DTA NO. 819886
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Period December 21, 2001.	:
	:

Petitioner Lamparelli Construction Company, Inc., 590 Kennedy Road, Cheektowaga, New York 14227, filed an exception to the determination of the Administrative Law Judge issued on June 30, 2005. Petitioner appeared by Lavin & Kleiman, PC (John J. Lavin, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly determined that petitioner was not entitled to a continuing lien deduction pursuant to Tax Law § 1402(a) for the conveyance resulting from a foreclosure of four townhouses from one grantor to one grantee, where the consideration was equal to the mortgage indebtedness on the property.

FINDINGS OF FACT

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

On December 21, 2001, a transfer of real property occurred between Carl P. Paladino, referee, as grantor, and Lamparelli Construction Company, Inc. (“petitioner”), as grantee. The property conveyed consisted of four townhouses located at 4293, 4295, 4297 and 4299 Tisbury Lane, Hamburg, New York.

On February 28, 2002, a Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate, Form TP-584, was filed reporting the conveyance between the referee, Carl P. Paladino, and petitioner. The Condition of Conveyance, as reported on the return, was a conveyance pursuant to or in lieu of foreclosure or enforcement of a security interest. The amount of consideration reported for the conveyance totaled \$2,914,275.44. Petitioner claimed a Continuing Lien Deduction in the amount of \$2,914,274.44 and reported taxable consideration in the amount of \$1.00.

The Division of Taxation (“Division”) performed an audit of the Real Estate Transfer Tax Return and determined an additional amount of tax was due for the conveyance at issue. The Division reasoned that as the conveyance consisted of four single-family dwellings rather than a conveyance of a single-family dwelling, petitioner was not entitled to exclude from the consideration received the value of any lien or encumbrance remaining on the property at the time of the conveyance. On January 22, 2004, the Division issued to petitioner a Notice of Determination assessing real estate transfer tax in the amount of \$11,658.00, plus penalty and interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by reviewing the statutory language which provides for the imposition of real estate transfer tax and the statutory definition of *conveyance*. Based upon the relevant sections of the Tax Law, the Administrative Law Judge concluded that the transfer at issue constituted a single conveyance of four townhouses and not a transfer of a one, two or three family house as argued by petitioner. The Administrative Law Judge also rejected petitioner's assertion that the conveyance was a transfer of an individual residential condominium unit or interest therein as required for entitlement to the continuing lien deduction provided for in Tax Law § 1402(a)(A).

The Administrative Law Judge held that the conveyance involved a transfer of an undivided interest in four townhouses, the consideration of which necessarily includes the amount of the preexisting mortgages, liens or encumbrances. The Administrative Law Judge rejected petitioner's argument that it received property with a value of zero. The Administrative Law Judge emphasized that consideration for the purposes of the real estate transfer tax includes the amount of any mortgage, purchase money mortgage, lien or other encumbrance whether or not the underlying indebtedness is assumed or taken subject to (*see*, Tax Law § 1401[d]). Lastly, petitioner stated that it was not liable for the real estate transfer tax since there was impending litigation involving an entity with an additional mortgage on the property which may result in petitioner's divestiture of any interest in the property. The Administrative Law Judge determined this argument was without merit noting that the date of the conveyance occurred on December 21, 2001 and that petitioner was the grantee. Thus, the Administrative Law Judge

pointed out that regardless of another mortgagor foreclosing on the mortgage does not change the fact that at the time of conveyance, petitioner was the transferee pursuant to foreclosure.

ARGUMENTS ON EXCEPTION

In its exception, petitioner argues the conveyance herein was not a mortgage foreclosure, but rather, a foreclosure upon a mechanics lien. Petitioner states that a court appointed referee sought to convey the property to petitioner for \$1.00 and that petitioner did not assume the existing mortgage on the property. Thus, petitioner asserts that it did not receive anything of value upon which a tax can be imposed.

The Division states that the Administrative Law Judge properly determined that the conveyance at issue consisted of a single conveyance of four townhouses pursuant to foreclosure for a consideration that was \$500,000.00 or more. Thus, the Division agrees with the Administrative Law Judge that petitioner is not entitled to the continuing lien deduction on this conveyance as petitioner may not exclude the value of any lien or encumbrance remaining thereon at the time of the transfer. Accordingly, the Division respectfully requests that the determination of the Administrative Law Judge be sustained.

OPINION

Tax Law § 1402(a) imposes real estate transfer tax:

on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) a conveyance of a one, two or three-family house and an individual residential condominium unit, or interest therein; and (B) conveyances where the consideration is less than five hundred thousand dollars, the consideration for the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of conveyance.

As set forth in the determination below, the term *conveyance* is defined in Tax Law § 1401(e) as “the transfer or transfers of any interest in real property by any method, including but not limited to . . . mortgage foreclosure, [and] transfer in lieu of foreclosure” Tax Law § 1401(d) provides a definition of *consideration*, in pertinent part, as:

the price actually paid or required to be paid for the real property or interest therein It shall include the cancellation or discharge of any 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.

At this point in the proceedings, there does not appear to be any dispute that this conveyance is not the conveyance of a one, two or three-family house or a conveyance of an individual residential condominium unit. What is at the focus of this matter is the value of the consideration received for the transfer of the four townhouses. Petitioner argues in its exception that “[t]hough statutorily defined, consideration cannot be so limited” (Petitioner’s exception, ¶ 10).

We agree with the Administrative Law Judge that the consideration for the conveyance was \$2,914,275.44 which includes the amount of any preexisting mortgages, liens or other encumbrances remaining on the property of \$2,914,274.44 and the amount of foreclosure judgment in the amount of \$1.00. Thus, it fails to qualify for a continuing lien deduction under both subparagraphs (A) and (B) of section 1402(a) of the Tax Law.

We also reject petitioner’s argument that it received property of zero value and, thus, the conveyance should not be subject to real estate transfer tax. As set forth in the statute quoted above, consideration includes: “the cancellation or discharge of an indebtedness or obligation.

It also includes the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to.”

Thus, we affirm the determination of the Administrative Law Judge for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lamparelli Construction Company, Inc. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Lamparelli Construction Company, Inc. is denied; and
4. The Notice of Determination dated January 22, 2004 is sustained.

DATED: Troy, New York
May 25, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/Robert J. McDermott
Robert J. McDermott
Commissioner