

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEAN A. ZINO TRUST	:	DETERMINATION
	:	DTA NO. 816405
for Revision of a Determination or for Refund of Real	:	
Property Transfer Tax under Article 31 of the Tax Law.	:	

Petitioner, Jean A. Zino Trust, 16159 Forest Oaks Drive, Fort Myers, Florida 33908, filed a petition for revision of a determination or for refund of real property transfer tax under Article 31 of the Tax Law.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 8, 1998 at 10:45 A.M., with all briefs to be submitted by February 23, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Anthony J. Addeo, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Laura J. Witkowski, Esq., of counsel).

ISSUES

I. Whether a conveyance of real property pursuant to a mortgage foreclosure is subject to the real estate transfer tax imposed by Tax Law § 1402 and the additional one percent tax imposed by Tax Law § 1402-a.

II. Whether the Division of Taxation properly determined 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

1. Petitioner, Jean A. Zino Trust ("Zino Trust"), owned real property located at No Number Meadow Lane, Mill Neck, New York. As described in a Real Property Gains Tax Affidavit, the property consisted of a one-to-three-family home and the land upon which it was situated.

2. Petitioner sold the aforementioned property to Gerald Kuhr and Lisa Kuhr for \$1,300,000.00.

3. Pursuant to the sale, petitioner held a \$1,000,000.00 mortgage on the property.

4. On or about September 24, 1993, petitioner commenced foreclosure proceedings against the mortgagors in the Nassau County Supreme Court. In accordance with the foreclosure proceedings, John C. DeLeonardis, Esq., was appointed as referee to ascertain and compute the amount due to petitioner as a result of the default.

5. The report of the referee, dated April 6, 1994, concluded that, as of February 28, 1994, petitioner was due \$1,102,762.33 in principal and interest on the mortgage.

6. On May 25, 1994, the Zino Trust obtained a Judgement of Foreclosure and Sale in the amount of \$1,102,762.33. On May 27, 1994, the judgement was entered in the Nassau County Clerk's Office. Pursuant to the judgement, Mr. DeLeonardis prepared a Notice of Sale stating that on July 12, 1994 the property would be sold on the front steps of the Nassau County Courthouse.

7. The judgement provided that if petitioner was the successful bidder at the public auction, it would not be required to pay the entire amount of the bid price in cash. Instead, the referee would execute and deliver to petitioner a deed for the premises upon payment to the referee of the statutory fee (pursuant to CPLR 8003), the expenses of the sale (including advertising expenses) and the amount of the taxes, assessments, water rates, sewer rents and interest or penalties due on the property. The judgement further provided that:

If the proceeds of the sale are insufficient to pay the total amount due to the [petitioner] as aforesaid, the [petitioner] shall recover from the Defendants Kuhr the whole deficiency or so much thereof as this Court may determine to be just and equitable of the residue of the debt remaining unsatisfied after the sale of the mortgaged premises and the application of the proceeds thereof, provided a motion for a deficiency judgment shall be made

8. The Zino Trust was the successful bidder at the public auction conducted by the referee. The bid price submitted by petitioner of \$1,102,762.33 was equal to the amount set forth in the judgement. As a result, there was no deficiency between the bid price and the amount of the judgement. The bid price included mortgage payments in arrears with interest as well as the expenses of maintaining the house such as taxes, fire insurance, lawn maintenance, fuel oil and electricity while the mortgagors lived in the house and petitioner could not have them removed.

9. On September 21, 1994, the referee conveyed the property by deed to the Zino Trust. Petitioner did not file real estate transfer tax forms or pay tax to the Division at the time of the conveyance.

10. After the foreclosure, the property was listed for sale with a real estate broker. Originally, the property was listed for sale at a price of more than \$1,000,000.00. No offers were received and petitioner found that it had to keep reducing the price because of the difficulty in

selling the property. After reducing the price to \$850,000.00, petitioner was able to sell the property to Gavin and Christine Pelling for \$790,000.00.

11. On or about June 10, 1996, petitioner filed a Combined Real Property Transfer Gains Tax Affidavit (form TP-584) and Real Estate Transfer Tax Return Supplemental Schedules (form TP- 584.1) regarding the foregoing conveyance with the Nassau County Clerk's Office. The version of the form TP-584.1 that was filed by petitioner on June 10, 1996 did not become effective until two months after the conveyance in question. On form TP-584, Schedule A, petitioner checked the box indicating that the transfer was a "[c]onveyance pursuant to or in lieu of foreclosure." On Schedule C of the same form, petitioner reported the amount of the consideration for the conveyance was \$1,102,762.33, the amount of tax due under Tax Law § 1402 was \$4,412.00 and the amount of additional tax due under Tax Law § 1402-a was \$11,027.62. On form TP-584.1, Part I, petitioner listed the amount of the foreclosure judgement or bid price as \$1,102,762.33. In addition, petitioner set forth the "consideration for conveyance" as \$1,102,762.33. Petitioner remitted \$15,442.00 in real estate transfer taxes upon the filing of the foregoing forms.

12. Petitioner subsequently filed a Real Estate Transfer Tax Claim for Refund in the amount of \$15,442.00. The refund claim asserted that the fair market value of the property should have been used to compute its real estate transfer tax liability for the conveyance, not the amount of the judgement in foreclosure that petitioner had previously set forth on its returns. Petitioner further claimed that the fair market value of the property was \$790,000.00. This figure was arrived at by using the amount received by petitioner when it sold the property to Gavin and Christine Pelling on July 26, 1996.

13. The Division issued a Notice of Disallowance, dated December 17, 1996, which denied petitioner's claim for refund.

14. In accordance with State Administrative Procedure Act § 307(1), the Division of Taxation's proposed findings of fact have generally been accepted and incorporated herein. It is noted that proposed finding of fact "16" was modified to accurately reflect the amount of tax reported due under Tax Law § 1402-a. Additional findings of fact were also made.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner asserted that the one percent tax should not be imposed on this transfer because the actual amount remaining on the note was less than one million dollars and that the judgement amount was more than one million dollars because of the expenses incurred for maintaining the premises while the defaulting mortgagor resided therein. Petitioner submits that the transfer tax was paid twice - once when the premises were sold to the Kuhrs and a second time when the property was transferred back to the trust.

16. In its brief, the Division of Taxation asserts that petitioner failed to establish that it is entitled to a refund of real estate transfer tax. In support of its position, the Division argued that a conveyance of real property pursuant to a mortgage foreclosure is subject to real estate transfer tax and that the Division properly determined the amount of the consideration given by petitioner pursuant to the mortgage foreclosure.

CONCLUSIONS OF LAW

A. Tax Law § 1402(a) imposes a real estate transfer tax on each conveyance of real property or interest therein when the consideration exceeds \$500.00. The tax is imposed at a rate of \$2.00 for each \$500.00 or fractional part thereof. An additional tax is imposed by Tax Law § 1402-a on the conveyance of residential real property or interest therein when the consideration

for the entire conveyance is \$1,000,000.00 or more. The additional tax is imposed at a rate of one percent of the consideration or part thereof attributable to residential real property. For purposes of the real estate transfer tax imposed by Tax Law § 1402, "conveyance" is defined at Tax Law § 1401(e) to mean:

"[T]he transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, *mortgage foreclosure*, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property" (emphasis added).

A plain reading of the foregoing section leads to the conclusion that the transfer of the property by mortgage foreclosure is subject to the real estate transfer tax (20 NYCRR 575.1(e)(1); ***Matter of Indian Head Associates***, Tax Appeals Tribunal, December 26, 1996, ***Matter of Net Realty Holding Trust***, Tax Appeals Tribunal, December 26, 1996). The original transfer of the property to Gerald Kuhn and Lisa Kuhn and the subsequent transfer by mortgage foreclosure were taxable events. Therefore, the imposition of the taxes upon the recording of the second deed did not constitute double taxation of a single transaction.

B. Tax Law § 1401(d) defines "consideration," for purposes of the foregoing sections, in relevant part, as follows:

'Consideration' means the price actually paid or required to be paid for the real property . . . 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).

Since the expenses incurred by petitioner to maintain the property constituted an indebtedness which was canceled or discharged, the Division properly concluded that the \$1,000,000.00 threshold for imposing the additional real estate transfer tax was also satisfied.

There is no basis for excluding the debt arising from maintaining the household. Therefore, since the consideration for the transfer of the residential real property exceeded \$1,000,000.00, the transfer was subject to the additional real estate transfer tax imposed by Tax Law § 1402-a.

C. The assertion in the refund claim that the fair market value of the property should have been used is rejected. The transfer tax statutes do not provide any support for the use of fair market value (*Matter of Indian Head Associates, supra; Matter of Net Realty Holding Trust, supra*).

D. In an apparent attempt to anticipate arguments which petitioner might raise in a reply brief, the Division's brief addresses a number of points which petitioner could have argued. Since petitioner did not file a reply brief, these points are now moot and will not be addressed.

E. The petition of Jean A. Zino Trust is denied.

DATED: Troy, New York
June 10, 1999

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE