

deficiency asserted in the Notice (Petition).

On April 21, 2011, the Department filed its Answer to the Petition.

On or around April 11, 2014, the parties agreed pursuant to the Rules of Practice and Procedure of the Tribunal (20 RCNY) (Tribunal Rules) §1-09[f] to have this case determined on written submission without an appearance at a hearing.

On May 1, 2014, at the request of Petitioners, this matter was reclassified as a Petition to be heard by the Small Claims Unit of the Tribunal.

On or around December 19, 2014, Petitioners and Respondent submitted a stipulation of facts, which includes twelve exhibits (Stipulated Facts).

On February 23, 2015, at the request of Petitioners, and pursuant to Tribunal Rules §1-11[g], the matter was again reclassified to its original status as a Petition to be heard by an administrative law judge of the Tribunal.

On or around March 26, 2015, Petitioners filed a brief in support of Petitioners' legal position. On or around April 24, 2015, Respondent filed a reply brief in support of Respondent's legal position.

Former CALJ Anne W. Murphy, then presiding over the case, mailed a letter, dated April 27, 2015, to the parties inquiring

whether the parties intended to submit additional briefs. The letter also set forth the following submission schedule for additional briefing, if any: Petitioners' reply brief was due on May 15, 2015, and Respondent's sur-reply brief was due on June 5, 2015.

Respondent, copying Petitioners, sent a reply letter, dated May 7, 2015, to former CALJ Murphy. The reply letter states in relevant part: "[i]f Petitioner[s'] attorney submits a Reply [Brief], I will be submitting Respondent's Sur-Reply [Brief]. Thank you."

The Tribunal never received a reply letter, or any other communication regarding additional briefing, from Petitioners. Neither Petitioners nor Respondent filed any additional briefs in this case.

The Tribunal received a letter from Respondent dated August 26, 2019 (2019 Letter), requesting that the record in this case be closed and the case determined based on the previously filed stipulated facts, documents and written submissions.

All documents relevant to this case submitted on behalf of Petitioners, as of the date of this Determination, were submitted by and through Petitioners' representative, Carl Caller, Esq., of N.C. Caller, P.C.

All documents relevant to this Case submitted on behalf of Respondent, through the date of the 2019 Letter, were submitted by and through Respondent's then-representative, Amy H. Bassett,

Esq., Assistant Corporation Counsel of the City Law Department.

Following the retirement of former CALJ Muphy, this case was reassigned on February 1, 2022, to former Administrative Law Judge Alexander Chu-Fong. This case was again reassigned, on June 28, 2023, to the undersigned.

On July 20, 2023, the Tribunal received an email from Respondent's current representative, Adam C. Dembrow, Assistant Corporation Counsel for the City Law Department, reiterating Respondent's request that the record in this case be closed and the case determined based on the previously filed stipulated facts, documents and written submissions.

The Tribunal mailed a calendaring notice, dated August 11, 2023, to each of the parties of a virtual conference scheduled to be held on September 21, 2023, to discuss the status of the case. Additionally, an electronic calendar invite for the conference was sent to both parties. Petitioners failed to appear at the conference. Respondent appeared at the conference.

Subsequently, the undersigned sent two separate correspondences to Petitioners' representative, each copying Respondent's representative, via (i) a written letter dated September 27, 2023, and (ii) an email dated September 28, 2023. The correspondences stated that, unless the Tribunal received a written response by November 15, 2023, from Petitioners regarding Petitioners' intent to submit a reply brief, the record would be closed as of that date and the undersigned would render a determination based on the previously filed stipulated facts,

documents and written submissions. Petitioners' representative replied on September 28, 2023, via email, stating, in relevant part, that Petitioners' representative's office will be closed "for the holidays for most of the next two weeks" and that Petitioners' representative "will try to get back to [the undersigned] after that."

As of the date of this Determination, the Tribunal has not received any additional correspondence from Petitioners' representative.

The record in this case was closed as of November 15, 2023, and the undersigned has rendered the following Determination based on the previously filed stipulated facts, documents and written submissions.

ISSUE

Whether the mortgage at issue was originally placed on the Property, or materially altered, in anticipation the Conveyance, as to disqualify the amount of the outstanding mortgage from the continuing lien exclusion stated in Administrative Code § 11-2102.f and thus, require the amount of the outstanding mortgage as includable consideration subject to RPTT.

FINDINGS OF FACT

The relevant Stipulated Facts, although rephrased, have been adopted for purposes of this Determination. The facts are as

follows:

1. The Property is located at 1232 42nd Street, Brooklyn, New York.
2. Prior to December 18, 2002, the address of the Property was 1236 42nd Street, Brooklyn, New York, and the Property was known as Brooklyn, Block 5598, Lot 18.
3. The City's records indicate that a mortgage, with First Choice Development, LLC as the mortgagor and Petitioners as the mortgagee, in the amount of \$200,000, (Mortgage) was secured on March 30, 2001, against the Property.
4. On December 5, 2002, the Condominium Offering Plan for The 1232 42nd Street Condominium (Offering Plan) was accepted for filing. The Offering Plan was filed with respect to the conversion of the Property to condominium ownership.
5. On December 18, 2002, a declaration was issued establishing a plan for condominium ownership of the Property, and Lot 18 became three individual condominiums known as Lots 1501 through 1503.
6. On January 10, 2003, First Choice Development, LLC and Petitioners entered into a purchase agreement (Purchase Agreement) for Unit 3 (Brooklyn, Block 5598, Lot 1503) in the 1232 42nd Street Condominium, Brooklyn, New York.
7. As per the Purchase Agreement, the purchase price was reported as \$440,000, and the purchaser was responsible for the payment of the RPTT.
8. On July 11, 2007, the Mortgage of \$200,000 was assigned from Petitioners, as assignors, to Harei Lavam Associates LLC, as assignee (Assignment). Following the Assignment,

the Mortgage remained secured against the Property (which was known at the time of the Assignment as 1232 42nd Street, Unit 3, Brooklyn, NY 11219, Brooklyn, Block 5598, Lot 1503).

9. The Conveyance occurred on July 12, 2007, whereby Brooklyn, Block 5598, Lot 1503 was conveyed from First Choice Development, LLC, as grantor, to Petitioners, as grantee.
10. An RPTT Return with respect to the Conveyance was timely filed on August 9, 2007.
11. The date of transfer reported on the RPTT Return was July 12, 2007.
12. The condition of transfer reported on the RPTT Return was "[a]rms length transfer" and the percentage of interest transferred was 100 percent.
13. The type of property transferred as per the RPTT Return was "[i]ndividual residential condominium unit" and the type of interest transferred was "fee."
14. The amount reported as the amount of RPTT and/or other taxes or expenses of the grantor which are paid by the grantee on schedule 1, line 9, of the RPTT Return was zero.
15. The amount reported as total consideration on schedule 1, line 11, and on schedule 2, line 1 of the RPTT Return was \$440,000.
16. The amount reported as an excludible lien on Schedule 2, line 2, of the RPTT Return was \$200,000.
17. The amount of tax reported and paid was \$2,400.00 (\$240,000 * 1%) at a tax rate of 1%.

POSITIONS OF THE PARTIES

Petitioners assert that the amount of the Mortgage assigned in connection with the Conveyance of the Property qualifies for the Continuing Lien Exclusion and is therefore not subject to RPTT.

Petitioners further assert that the Mortgage was not placed on the Property in anticipation of the Conveyance, as (i) the Mortgage was placed on the Property more than six months prior to the Conveyance and remained thereon following the Conveyance, and (ii) the Assignment was "just a continuation of the original mortgage."

Petitioners argue that "an assignment of an existing mortgage, lien or encumbrance on the Property is not considered a placing of a mortgage [on] real property or interest there[o]n in connection with, or in anticipation of, the conveyance or transfer." Petitioners provide no authority or further explanation for this claim.

Respondent asserts that the Mortgage was placed on the Property in anticipation of the Conveyance, and therefore, the amount of the Mortgage does not qualify for the Continuing Lien Exclusion.

Respondent's assertion is comprised of two alternative and non-mutually exclusive arguments, either of which, if true, would necessitate a finding that the Mortgage was placed on the Property in anticipation of the Conveyance:

- (i) the circumstances and/or documents relating to the Mortgage indicate that the Mortgage was originally placed on the Property in anticipation of the eventual Conveyance of the Property, and
- (ii) at the time of the Assignment, the terms of the Mortgage were materially altered in anticipation of the Conveyance of the Property.

To buttress their position, Respondent further argues that the burden is on Petitioners to disprove both assertions.

CONCLUSIONS OF LAW

Administrative Code § 11-2102.a imposes a tax 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) exceeds twenty-five thousand dollars.

The term "consideration" is defined in Administrative Code § 11-2101.9 as "[t]he price actually paid or required to be paid for the real property or economic interest therein, without deduction for mortgages, liens or encumbrances It shall also include the amount of any mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed."

However, Administrative Code § 11-2102.f contains a limited exception for purposes of determining consideration with respect to a deed transferring title to, among other types of property, an individual residential condominium unit that is encumbered by a

mortgage (Continuing Lien Exclusion). Specifically, Administrative Code § 11-2102.f states the following:

"Notwithstanding any other provision of this chapter, in determining the tax imposed by this chapter with respect to a deed, instrument or transaction conveying or transferring a one, two or three-family house, an individual residential condominium unit, an individual residential cooperative apartment, or an interest therein, the consideration for such conveyance or transfer shall exclude, to the extent otherwise included therein, the amount of any mortgage . . . that existed before the delivery of the deed or transfer and remains thereon after the date of the delivery of the deed or transfer, other than any mortgage, lien or encumbrance placed on the property or interest in connection with, or in anticipation of, the conveyance or transfer. . . ."

Thus, to qualify for the Continuing Lien Exclusion, the Conveyance must have been of (i) one of the specified property types, such as an individual condominium unit, (ii) the relevant mortgage must have existed on the Property both before and after the Conveyance and (iii) the mortgage must not have been placed on the Property in connection with, or anticipation of, the Conveyance.

The burden of proof is on the Petitioners to establish "that a lien or encumbrance qualifies as an excludible lien . . ." (Rules of City of New York Real Property Transfer Tax (19 RCNY) (RPTT Rules) § 23-03[k][5]).

In the present matter, Respondent does not dispute that the transferred Property was an individual residential condominium unit. Respondent also does not dispute that the relevant mortgage

existed on the Property before the delivery of the deed and remained thereon after the date of the delivery of the deed.

However, Respondent asserts that the Mortgage was placed on the Property in anticipation of the Conveyance.

RPTT Rule § 23-03[k] contains the regulations promulgated by the Department that are applicable to the Continuing Lien Exclusion. Pursuant to the applicable regulations, a mortgage may be considered to be placed on a property in anticipation of a conveyance if either (i) the mortgage was "originally placed" on the property in anticipation of the conveyance or (ii) the terms of the mortgage were "materially altered" in anticipation of the conveyance (See RPTT Rules 23-03[k][3][i] and [iv]). If either scenario applies with respect to the Mortgage, then the amount of the Mortgage does not qualify for the Continuing Lien Exclusion.

"Originally Placed" Analysis

RPTT Rule 23-03[k][3][i] provides that a mortgage is considered originally placed on a property in anticipation of a conveyance if:

"(a) the documents relating to the mortgage, lien, encumbrance, the underlying indebtedness or the conveyance . . . indicate that the mortgage . . . is part of a plan to eventually convey the property . . . or (b) in the case of a mortgage . . . placed on the property within six months prior to the conveyance . . . , if all of the relevant facts and circumstances indicate that the mortgage . . . has been placed on the property . . . in anticipation of . . . the conveyance."

In the present matter, the Mortgage was placed on the Property on March 10, 2001, more than six years before the Conveyance, which is far longer than the six-month window applicable to a facts and circumstances inquiry under RPTT Rule 23-03[k][3][i]. While Respondent argues that the facts and circumstances indicate that the Mortgage was originally placed on the Property in anticipation of the Conveyance, an inquiry of the facts and circumstances in the present matter is not appropriate under RPTT Rule 23-03[k][3][i]. Rather, the Rule specifically reserves such an inquiry for mortgages placed on a property within six months of the relevant conveyance. Therefore, in the present case, the only appropriate inquiry under RPTT Rule 23-03[k][3][i] is whether the relevant documents indicate that the Mortgage was placed on the Property as part of a plan to eventually convey the Property.

The applicable regulations do not define a "plan" in this context, nor do the regulations list factors to determine whether the documents indicate such a "plan." However, RPTT Rule 23-03[k][6] provides several helpful illustrations:

"Illustration (vii): XYZ corporation purchases a one-family house in poor condition in 1998 for \$50,000 intending to renovate the house and offer it for sale. To pay for the renovation expenses, XYZ obtains a loan of \$300,000 secured by a mortgage on the house. **The mortgage loan agreement requires XYZ corporation to use its best efforts to sell the house following its renovation.** In 2002, XYZ corporation sells the house for \$500,000 to B, and B assumes the mortgage loan obligation at the same interest rate and for the same repayment term. **Because the documents relating to the conveyance indicate that the mortgage is placed on the property as part of a plan to eventually transfer the property, the mortgage is considered to have been placed on the property in anticipation of the conveyance** and is not

excludible from consideration as an excludible lien. The taxable consideration for the conveyance is \$500,000."

. . .

Illustration (ix): Individuals A and B own a three-family house as tenants in common subject to a \$300,000 mortgage held by bank X. The mortgage loan bears interest at 13 percent. In January, 1998 A sells his interest in the house to B for a cash payment of \$125,000 and subject to the existing mortgage. **A and B also enter into a written agreement that requires B to have the mortgage discharged by June, 1998.** In June, 1998, B pays bank X the remaining amount due on the mortgage loan and the mortgage is discharged. **Because the documents relating to the conveyance indicate that the discharge of the mortgage is part of a plan to convey the property,** under subparagraph (iii) of paragraph (3) of this subdivision, **the mortgage is considered to have been discharged in connection with the conveyance** and is not excludible from consideration as an excludible lien. The taxable consideration for the conveyance is \$275,000.

. . .

Illustration (xiii): XYZ Corp. acquires a residential apartment building in 1998 for \$2 million cash. In 2002, XYZ obtains a mortgage loan from bank A for \$1,750,000 to renovate the apartments pending a conversion of the building to cooperative ownership. **The terms of the \$1,750,000 loan agreement require XYZ to use its best efforts to file an offering plan by the end of 2003.** XYZ transfers the building to a cooperative housing corporation, C, and the offering plan becomes effective December 1, 2003. On January 15, 2004, pursuant to the offering, XYZ sells the stock and proprietary lease representing an apartment in the building for \$120,000. The proportionate amount of the \$1,750,000 mortgage on the building attributable to that apartment is \$70,000. The \$70,000 is not excludible from the consideration for the apartment **because the documents relating to the loan indicate that the loan was placed on the property in anticipation of the conversion of the building to cooperative ownership and the sale of apartments"** (emphasis added).

The above illustrations are the only examples included under the Continuing Lien Exclusion regulations of RPTT Rule 23-03[k] regarding documentary evidence of a "plan."¹

Similar to the facts in the present matter, Illustration (vii) discusses a situation where a mortgage agreement is entered into more than six months prior to the conveyance of the underlying property. The Illustration suggests that a requirement in the mortgage agreement for the mortgagor to sell, or use its "best efforts" to sell, the underlying property at a defined point in the future (e.g., after renovations are completed) indicates that the mortgage was part of a plan to eventually convey the property. In broader terms, the illustration suggests that a requirement in the relevant document to perform the relevant action within a defined period indicates that the action was part of a plan to eventually convey the property or interest therein.

Illustration (ix) interprets RPTT Rule 23-03[k][3][iii], rather than RPTT Rule 23-03[k][3][i]. RPTT Rule 23-03[k][3][iii] concerns a discharge, cancelation, or reduction in amount of a

¹ While Illustration(xiii) does not explicitly reference a "plan," the illustration interprets a document related to a mortgage loan that was issued more than six months prior to a conveyance of the underlying property. The Illustration concludes that "the documents relating to the loan indicate that the loan was placed on the property in anticipation of the conversion of the building to cooperative ownership and the [eventual conveyance of the property]." As discussed, under Rule 23-03[k][3][i], a mortgage is considered originally placed on the underlying property in anticipation of a conveyance or transfer where the relevant documents indicate that the mortgage was part of a plan to eventually convey or transfer the property. Accordingly, implicit in the ultimate conclusion that the document indicates that that the "loan was placed" on the property in anticipation of the conveyance of the property is an initial conclusion that the documents indicate that the mortgage loan was part of such plan.

mortgage, lien, or encumbrance, as opposed to the original placement of the mortgage, lien, or encumbrance on the property. Otherwise, the rules are substantially identical, including with respect to a reference to a "plan."

Illustration (xiii) interprets RPTT Rule 23-03[k][3][i] under different facts than Illustration (vii).

Each of Illustrations (ix) and (xiii) also suggests that a requirement in the relevant document to perform the relevant action within a defined period indicates that the action was performed in connection with, or anticipation of, the conveyance.

In the case of Illustration (ix), the relevant document is a written agreement, the relevant action is the procurement of a discharge of the mortgage and the defined period is by June, 1998.

In the case of Illustration (xiii), the relevant document is the loan agreement, the relevant action is for the mortgagor to use its best efforts to file an offering plan and the defined period is by the end of 2003.

The illustrations discussed above are consistent with each other, and the illustrations stand for the proposition that documentary evidence of a "plan", for purposes of RPTT Rule 23-03[k], entails (i) a requirement in the relevant document, (ii) to perform the relevant action (iii) within a defined period of time.

Restated for the specific purposes of RPTT Rule 23-03[K][3][i], as it applies to the present case: documentary

evidence of a plan entails (i) a requirement in the documents relating to the mortgage, lien, encumbrance, the underlying indebtedness or the conveyance (ii) to convey (or take a preliminary action towards conveyance, such as filing of an offering plan for a conversion to cooperative or condominium ownership), or to use best efforts to do so, (iii) within a defined period of time.

Petitioners are tasked with the burden of proving that the documents relating to the Mortgage, the underlying indebtedness or the Conveyance do not indicate that the Mortgage was part of a plan to eventually convey the Property. To meet this burden, Petitioners provided documentation relevant to the "originally placed" inquiry, including, among other items, the relevant mortgage agreement (Mortgage Agreement). Respondent has not identified any document relevant to the "originally placed" inquiry that was requested by Respondent, but not provided by Petitioners.

Furthermore, Respondent has not pointed to any provision in either the Mortgage Agreement, or any other relevant document provided by Petitioners, which required the mortgagor to convey, or use its best efforts to convey, the Property in connection with the placement of the Mortgage on the Property. Likewise, Respondent has not pointed to any provision in either the Mortgage Agreement, or any other document provided by Petitioners, that requires the mortgagor to enter into an offering plan or take other preliminary action to the Conveyance, or to use its best efforts to do so, in connection with the placement of the Mortgage on the Property.

Rather, in support of their assertion that the relevant documents indicate that the Mortgage was originally placed on the Property as part of a plan to eventually convey the Property, Respondent relies on a single provision in the Mortgage Agreement. The provision reads as follows:

"mortgagee shall release condominium units situated on this property at such time that [the borrower] conveys title to such units to bona fide purchasers; provided however that no release shall be given for . . . 2 . . . floor units until mortgage is discharged."

The quoted provision requires the mortgagee to release the condominium units in the event that title is conveyed. While the provision expressly anticipates the possibility of an eventual conveyance, the provision does not require the mortgagor to convey the Property (or take a preliminary action towards conveyance), or to use its best efforts to do so. Therefore, Respondent's assertion that the provision indicates that the Mortgage was placed on the Property as part of plan to eventually convey the Property effectively seeks to narrow the Continuing Lien Exclusion beyond the confines of the illustrations contained in the applicable regulations.

However, "[a] taxpayer has the right to rely upon the [g]overnment's [r]egulations and their published illustrations" and "[r]egulations having the force and effect of law are binding on tax officials, as well as taxpayers" (*Mutual Savings Life Insurance Co. v United States of America*, 488 F2d 1142, 1145 [5th Cir 1974], citing *Pacific Nat. Bank v Commr. Of Internal Revenue* 91 F2d 103, 105 [9th Cir 1937]).

A regulation is considered to have the full force and effect of law where the regulation is reasonably adapted to the enforcement of the relevant law and not in conflict with an express statutory provision (*Maryland Casualty Co. v United States*, 251 US 342, 349 [1920]). "The law is not different with respect to the rules and regulations of a department of a state government." *Id.* Neither Respondent, nor Petitioners, assert that the relevant regulations are not reasonably adapted to the enforcement of the Administrative Code or inconsistent with the statutory provisions therein. The regulations, and illustrations therein, are binding on Respondent.

Respondent's assertion that the Mortgage Agreement indicates that the mortgage was placed on the Property as part of a plan in connection with the Conveyance is therefore misplaced, as it narrows the interpretation of the Administrative Code beyond the confines of the regulations. As the relevant documents do not indicate that the Mortgage was placed on the Property as part of such a plan, it is concluded that the Mortgage was not originally placed on the Property in anticipation of the Conveyance.

"Materially Altered" Analysis

RPTT Rule § 23-03[k][3][iv] provides that terms of a mortgage are considered materially altered in anticipation of the conveyance if:

"within six months prior to, or within three months following, the conveyance . . . (a) the identity of the mortgagee or holder of the lien or encumbrance has changed, and (b) there

has been a change of ten percent or more in the interest rate or repayment term remaining as of the date of the alteration with respect to the mortgage, lien, or other encumbrance, and the facts and circumstances indicate that the alteration is . . . in anticipation of . . . the conveyance"

Thus, a mortgage is considered to have been materially altered in anticipation of a conveyance where the following three prongs are met:

- 1) Within the applicable time period, the identity of the mortgagee has changed;
- 2) Within the applicable time period, there has been a change of ten percent or more to either, or both, of the interest rate or remaining term; and
- 3) The facts and circumstances indicate that the alteration is in connection with, or in anticipation of, the conveyance.

Here, it is not disputed that the identity of the mortgagee was changed from Petitioners to Harei Lavam Associates, LLC within six months prior to the Conveyance. Thus, the first prong has been met.

Skipping to the third prong: the identity of the mortgagee was altered from the grantee (i.e., Petitioners) on the day prior to the Conveyance. The timing of the alteration to the identity of the mortgagee from grantee, to Harei Lavam Associates, LLC, indicates that the alteration was made to enable Petitioners to finance the acquisition of the Property in a form that sought to avoid RPTT on the amount of the Mortgage. RPTT Rule § 23-03[K][2][i] provides that the Continuing Lien Exclusion is not

applicable to circumstances where the subject conveyance is made to a mortgagee. Consequently, if Petitioners, as grantee, remained also as mortgagee at the time of the Conveyance, the outstanding amount of the Mortgage would be taxable under the RPTT (RPTT Rule § 23-03[K][2]). Therefore, it appears that on the day prior to the Conveyance, the identity of the mortgagee was altered to avoid the applicability of RPTT Rule § 23-03[K][2]. As Petitioners have provided no alternative explanation for the alteration of the Mortgage, the totality of the facts and circumstances indicate that the alteration was made in anticipation of the Conveyance. Thus, the third prong has been met.

With respect to the remaining, second, prong, Respondent asserts that "Petitioners bear the burden of proof that there was no material change to the . . . the March 30, 2001 [mortgage note] and [the mortgage note at the time of the Assignment] and the notes have not been provided."

To clarify, the Stipulated Facts indicate the Mortgage was originally placed on the Property on March 30, 2011, and the terms of the Mortgage were altered only once within the six months prior to the Conveyance, which was on July 11, 2007. Therefore, the relevant inquiry is whether the July 11, 2007 alteration included a change of ten percent or more in either, or both, of the interest rate or remaining repayment term of the indebtedness underlying the mortgage.

While Petitioners provided the assignment agreement with respect to the Assignment (Assignment Agreement), the Assignment Agreement does not reference either the interest rate or the term

