

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROCKAWAY REALTY ASSOCIATES, L.P.	:	DETERMINATION
	:	DTA NO. 820481
for Revision of a Determination or for Refund of	:	
Mortgage Recording Tax under Article 11 of the	:	
Tax Law with Reference to an Instrument Recorded	:	
on July 19, 2004.	:	

Petitioner, Rockaway Realty Associates, L.P., c/o ISJ Management, 110 West 34th Street, New York, New York 10001, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on July 19, 2004.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated October 21, 2005 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, by its representative Matthew Hearle, Esq., filed an affirmation in opposition to the Division's motion on November 21, 2005, which date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Where real property covered by a mortgage is situated in more than one county, whether the mortgage recording tax on such mortgage is properly apportioned based on the relative assessed values of such real property or whether such apportionment should be based on the relative market values of the real property by applying the appropriate equalization rates to the respective assessed values.

FINDINGS OF FACT

1. Petitioner, Rockaway Realty Associates, L.P., is the owner of property commonly known as the Five Towns Shopping Center, located at 253-00 Rockaway Boulevard, Woodmere, New York (“the premises”). The premises are also known as Nassau County Section 39, Block 626, Lots 21, 24 and 25 and Queens County Block 13895, Lot 80 and Block 13907, Lots 60 and 101.
2. The majority of the premises lies in Nassau County and a small portion of the premises lies in Queens County.
3. On or about June 30, 2004, petitioner executed a mortgage in favor of North Fork Bank in the amount of \$12,924,614.71, which mortgage was contemporaneously consolidated with a pre-existing mortgage recorded against the premises. More succinctly, on June 30, 2004 petitioner refinanced a mortgage in the amount of \$12,924,614.71 on the premises.
4. In conjunction with the filing of the mortgage, petitioner paid a mortgage recording tax of \$355,426.88 on July 19, 2004.
5. Petitioner apportioned and calculated the tax it was required to pay in order to record the mortgage based on the relative assessed values of the premises in Queens County and Nassau County.

6. The assessed value of the portion of the premises located in Queens County was \$966,150.00 and the assessed value of the portion of the premises located in Nassau County was \$453,760.00.

7. Nassau County and Queens County use different equalization rates. Specifically, at the time the subject mortgage was recorded, the equalization rate for Nassau County was one percent, while the equalization rate for Queens County was 45 percent.

8. Applying the equalization rates to the assessed value of the premises in each county results in a market value of \$2,147,000.00 for the portion of the premises in Queens County and \$45,376,000.00 for the portion of the premises in Nassau County.

9. Based upon the assessed values of the premises, approximately 68 percent of the premises lies in Queens County and about 32 percent of the premises lies in Nassau County.

10. Based upon the market value of the property, determined by the application of the respective equalization rates to the assessed values, approximately 4.5 percent of the premises lies in Queens County and 95.5 percent of the premises lies in Nassau County.

11. Nassau County and Queens County assess mortgage recording taxes at different rates. At the time the subject mortgage was recorded, the recording tax rate in Nassau County was one percent, while the recording tax rate in Queens was 2.75 percent.

12. In December 2004, petitioner filed a claim for refund of mortgage recording tax paid in conjunction with the filing of the subject mortgage. In its claim petitioner sought refund of \$246,814.20 of the tax paid upon recording.

13. Petitioner's refund claim was premised on an apportionment of tax based on the relative market values of the real property.

14. By letter dated January 13, 2005 the Division of Taxation (“Division”) denied petitioner’s claim in full.

15. As part of its motion papers, the Division submitted the affirmation of its representative, Michelle M. Helm, dated October 21, 2005. By such affirmation, the Division conceded, for purposes of the instant motion, all factual assertions contained in petitioner’s refund claim and petition.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be

drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

C. In the instant matter, the Division has conceded, for purposes of the instant motion, all factual assertions in petitioner's refund claim and petition (*see*, Finding of Fact "15").

Accordingly, there are no facts in dispute and it is appropriate to resolve this matter by summary determination.

D. Article 11 of the Tax Law imposes excise taxes on the recording of mortgages on real property situated in the State of New York. The taxes imposed under Article 11 include the basic tax (Tax Law § 253[1]), the special additional tax (Tax Law § 253[1-a]), the additional tax (Tax Law § 253[2][a]) and the New York City tax (Tax Law § 253-a). While the tax is imposed on the privilege of recording the mortgage, the basis for computation of the tax is the amount of principal debt or obligation secured by the mortgage at the date of execution (*see, e.g.*, Tax Law § 253[1]). The tax is payable on the recording of the mortgage and is payable to the recording officer of the taxing district where the real property or any part thereof is located (Tax Law § 257).

E. Where the real property covered by a mortgage is situated in New York State but in more than one tax district, Tax Law § 260 provides that the Division of Taxation "shall apportion the tax paid on such mortgage between the respective tax districts upon the basis of the relative assessments of such real property as the same appear on the last assessment-rolls."

With respect to the New York City mortgage recording tax, Tax Law § 253-a provides that where property covered by a mortgage subject to such tax is situated within New York State but both within and without New York City, the amount of tax due and payable to the City shall be determined in a manner similar to that prescribed in Tax Law § 260 as quoted above.

F. In the instant matter, the apportionment of the tax paid on recording of the subject mortgage was based upon the relative assessed values of the premises in Queens County and Nassau County. This method of apportionment is expressly provided for in Tax Law § 260 and was explicitly affirmed by the Court of Appeals in *Matter of Long Island Lighting Company v. State Tax Commn.* (45 NY2d 529, 410 NYS2d 561) as follows:

We hold that the New York City mortgage recording tax with respect to a mortgage covering real property located both within and without the city was properly determined by the State Tax Commission on the basis of the relative assessments of such property as they appeared on the respective assessment rolls, without adjustment for differences in equalization rates (*id.*, 410 NYS2d at 562).

G. Petitioner concedes that the statutory interpretation utilized in calculating the tax paid with the recording of the mortgage is consistent with the Court's holding in *Long Island Lighting Company*. Nevertheless, petitioner contends that given the wide variance in equalization rates between Queens County and Nassau County and the resulting wide variance in market value between the respective Queens County and Nassau County portions of the premises, the computation of the tax as assessed and paid is irrational and unreasonable. Petitioner asserts that an adjustment using the appropriate equalization rates to reflect market value is necessary for an appropriate and fair assessment of tax.

Petitioner's contention is rejected. As noted, *Long Island Lighting Company* squarely addressed the issue presented herein, that is, whether equalization rates should be applied to reflect real value in the apportionment of mortgage recording tax between New York City (Queens) and Nassau County. In reaching its conclusion, the Court addressed the fairness issue, noting the Legislature's "very nearly unconstrained authority in the design of taxing impositions" and further noting that "fairness and equity are not the principal criteria against which the validity of tax statutes is to be determined," but that the production of "optimum

revenue” may have been the objective (*id.*, 410 NYS2d at 563-564). The Court also noted that the method of apportioning the tax was in conformity with Tax Law §§ 260 and 253-a and observed that the “Legislature could easily have provided for incorporation of the equalization concept in the determination of the recording tax if it had chosen to do so” (*id.*, 410 NYS2d at 564). The Court thus considered and rejected the use of equalization rates in the calculation of mortgage recording tax liability.

H. Petitioner also notes, correctly, that Article 11 permits the use of appraisals and fair value of property to determine proper recording tax liability under certain circumstances.

Specifically, the second sentence of Tax Law § 260 provides as follows:

If, however, the whole or any part of the property covered by such a mortgage is not assessed upon the last assessment-roll or rolls of the tax district or districts in which it is situated, or is so assessed, as a part of a larger tract, that the assessed value cannot be determined, or if improvements have been made to such an extent as materially to change the value of the property so assessed, the tax commission may require the local assessors in the respective tax districts, or the mortgagor, or mortgagee, to furnish sworn appraisals of the property in each tax district, and upon such appraisals shall determine the apportionment.

Tax Law § 260 also provides a method of apportionment when the real property covered by a mortgage is partly within the State and partly without the State. Such method of apportionment is based upon a determination of the net value of the mortgaged property within the State and the net value of the entire mortgaged property.

Petitioner asserts that the foregoing provisions support the use of equalization rates and market value to determine proper tax liability in the instant matter. This assertion is without merit. These provisions provide alternative methods of apportionment under certain specific circumstances, none of which are present herein. Under the instant circumstances, as discussed

previously, Tax Law § 260 expressly directs the apportionment of tax “upon the basis of the relative assessments” of the property as they appear “on the last assessment-rolls.”

I. Petitioner also contends that summary determination is inappropriate because an issue of fact is present in the instant matter. Specifically, petitioner claims a hearing is necessary to present evidence as to whether there has been a change in the subject premises making reliance on the assessment rolls inappropriate or unreliable. As noted previously, Tax Law § 260 provides for an alternative method of apportionment using appraisals “if improvements have been made to such an extent as materially to change the value of the property.”

Petitioner’s contention is rejected. “To defeat a motion for summary judgment the opponent must produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173, *citing Zuckerman v. City of New York, supra*). Here, petitioner has offered no proof regarding any changes or improvements to the premises. Indeed, neither the refund claim nor the petition make any reference to any such changes or improvements.

J. The petition of Rockaway Realty Associates, L.P. is denied and the Division of Taxation’s denial of petitioner’s refund claim, dated January 13, 2005, is sustained.

DATED: Troy, New York
December 29, 2005

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE