

Real Estate Group

Legal Update

NEW JERSEY TAX COURT UPHOLDS REALTY TRANSFER FEE EXEMPTION FOR NOMINAL CORPORATE TRANSFERS

On October 30, 2009, the New Jersey Tax Court, in the matter of Mack-Cali Realty, LP, et al. vs. Clerk of Bergen County, et al., Tax Court of New Jersey Docket No. 000037-2008, granted Summary Judgment in favor of the Plaintiffs seeking an exemption from payment of the Realty Transfer Fee. The Plaintiffs were represented by Mark K. Follender, a partner with Scarinci Hollenbeck.

Contrary to the position urged by the Division of Taxation, the Court held that the State could not impose a blanket exclusion of corporate transfers from the statutorily-permitted exemption for transfers involving less than \$100. The result of the case avoided the payment of a deed recording fee of over \$190,000.

Background

In 1968, New Jersey adopted N.J.S.A. 46:15-1 et seq., ("Realty Transfer Fee" statute) which imposed a fee upon the recording of a deed. The fee was a percentage based on the actual consideration received by the grantor. A specific provision of the statute, however (N.J.S.A. 46:15-10 (a)), provided an exemption from payment of the fee for transfers involving consideration of less than \$100.00.

In the instant matter, the Plaintiff sought to transfer two parcels of real property from one corporately owned entity to two others under common control, and asserted that the transfer was for less than \$100.00. There was no mortgage encumbering the realty and the transfer was being performed for internal corporate purposes. Consistent with the past practice of 38 years, the Plaintiff prepared an affidavit of consideration asserting consideration of less than \$100 and properly expected to pay no realty transfer fee.

Upon presentation of the Deeds and Affidavit to the Bergen County Clerk's Office, the Deeds were rejected with a reference to a newly enacted regulation from the Division of Taxation (N.J.A.C. 18:16-6.1), asserting that no corporate to corporate transfer of real property, even though under common ownership, could occur without consideration. Given that the property was unencumbered by a mortgage, the Clerk advised that the realty transfer fee to be paid should be calculated upon the fully equalized assessed value of the property. The Clerk also asserted that, because the property was a commercial office building and subject to the mansion tax, a total fee in excess of two percent (2%) of the equalized assessed value of the real property was required and made a fee demand of over \$190,000.

In upholding the Clerk's conduct, the Division of Taxation reasoned that since there was no mortgage, the value of the consideration was indeterminable and therefore, the only proper measure of the value of the transaction was the fully equalized assessed value.

Tax Court Ruling

N.J.S.A.46:15-5(C) specifically defines "consideration" to include the balance of a mortgage encumbering real property. Earlier cases held that in a corporate to corporate transaction, where a mortgage is present, the tax is calculated only on the balance of the mortgage. Follender urged that the lack of an open mortgage should not redound to a recording party's detriment.

Based on the earlier decisions, the Tax Court rejected the State's arguments and sided with the Plaintiff, reasoning that the imposition of an exorbitant fee, on a transaction that involved no payment of money, specifically because there

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was no mortgage encumbering the property, created an inconsistency and anomaly not contemplated by the statute.

Significant Implications

The ruling of the Court has significant implications as it affects among other things commercial mortgage financing and proper estate planning.

In commercial financing, lenders frequently require that to be eligible for financing, a property must be held in a single asset or single purpose entity. If a corporate entity holds two or more parcels and desires to finance only one, it will most typically create a new entity and transfer for no consideration the identified parcel into the newly created entity. The State's position would require payment of a fee in such nominal transactions.

Similarly, in the absence of this ruling, a parent-controlled entity that may decide to contribute for no payment the real estate owned by that entity to a newly created entity for purposes of a family limited partnership or other valid estate planning vehicle, would again be required to pay a full realty transfer fee as though an actual sale had

occurred even though there was truly no consideration and no money changed hands. (Please note that in all of such instances, these illustrations contemplate there being no present mortgage encumbering the real property to be transferred.)

Accordingly, the ruling of Judge Pizzuto properly tracks the statute and the express intention of the legislature and clears the way for the recording of deeds without a realty transfer fee in nominal consideration corporate transactions.

If you would like us to answer any questions you have concerning this Legal Update, please do not hesitate to contact the Scarinci Hollenbeck attorney with whom you work.

Questions can also be directed to the author and attorney of record:

Mark K. Follender
(201) 896-4100
mfollender@scarincihollenbeck.com