

# TAKE JUDICIAL NOTICE

## Tricky Transfer Tax Transactions

**September 30, 2011**

### Foreclosures

- NYC RPT is paid on the bid amount  
See NYC RPT instructions page 15 Schedule A (attached)
- NYS TP 584 is paid on the judgment amount provided the grantee from the referee is the mortgagee or nominee. If the grantee is an unrelated party to the mortgagee, regardless of whether the debt is recourse or nonrecourse, the tax is paid on the bid price.  
Where the debt is recourse and the grantee is the mortgagee or nominee, the tax is paid on the fair market value for either case liens remaining on the property in the consideration.

### Deeds in Lieu of Foreclosure

- NYC RPT treats a conveyance by a defaulting mortgagor to the mortgagee as follows: Tax is calculated on the outstanding principal balance, and any unpaid interest. It is not relevant that the mortgagor is personally liable or whether the mortgage is satisfied of record or if it survives the delivery of the deed. In order to preserve the mortgage, nonmerger language must be recited in the deed.
- NYS TP584 The identical rules apply at the State level as at the City level.

### Bankruptcy Transfers

- NYC RPT A transfer made pursuant to a confirmed plan of reorganization as provided under 11 U.S.C. section 1146 (c) is exempt from the NY City transfer tax. Bankruptcy proceedings carried out under Chapter 7 (liquidations) are not subject to the requirements that a plan be confirmed, and as a result transfers by a Chapter 7 Trustee are taxable.
- NYS TP584 All conveyances given pursuant to the Federal Bankruptcy Act are exempt. No distinction between chapters is made. In the Picadilly case, the State of Florida, using NY City's reasoning concerning the requirement of a confirmed plan before the U.S. Supreme Court, was successful in collecting transfer tax, despite an order from the bankruptcy court. NY has not announced any change in policy since Picadilly was decided.

See Page 2 Part 1 Instructions for TP584.1 (attached)

### Purchaser Pays Tax

- NYC RPT – This is known as the “bulk up”
- NYS TP584  
And it is a two-step process.
  1. Calculate the City and State transfer tax in the normal way.
  2. Add the amount of those taxes to the consideration and then calculate the City and State tax to be paid on total.

Of course, these are not the only complications in a veritable mine field of traps. Even these have been explored on the surface. If you have a unique or confusing transfer tax issue, call the legal department at Judicial Title.

## Instructions

### Purpose of Form TP-584.1

This form must be completed and filed with Form TP-584 for all conveyances that are pursuant to or in lieu of foreclosure or any other action governed by the Real Property Actions and Proceedings Law and for conveyances pursuant to a secured party's enforcement of a lien or other security interest, except for such conveyances where part of the debt is recourse and part of the debt is nonrecourse (see Schedule E), for conveyances that consist in whole or in part of a mere change of identity or form of ownership or organization (see Schedule F), and for conveyances for which a credit will be claimed for tax previously paid (see Schedule G).

### Specific Instructions

#### Schedule E

For purposes of Schedule E, **continuing liens** are liens or encumbrances that after the conveyance, remain either on the real property, the shares of stock in the cooperative housing corporation and/or proprietary lease(s) or the ownership interest in the entity, depending on whether the conveyance is the type described in Part I, II, III or IV of Schedule E.

Pursuant to section 575.11(a)(2)(ii) of the real estate transfer tax regulations, a debt is **recourse debt** to the extent that, as of the date of conveyance, the grantor or a person related to the grantor, including any guarantor, bears the economic risk of loss for the debt beyond any loss attributable to the value of the property securing the debt.

A grantee is **related** to the mortgagee or lienor to the extent that the mere change of identity or form of ownership exemption, as provided in section 1405(b)(6) of the Tax Law, would apply to a conveyance by the mortgagee or lienor to the grantee.

Where the grantee is the mortgagee or lienor, as in the type of conveyances described in Parts I and II or the secured party, as in the type of conveyances described in Parts III and IV, or its agent, nominee or an entity wholly owned by such mortgagee, lienor or secured party, Schedule E may be used only if the debt, including continuing liens, is either **all recourse** or **all nonrecourse**. If the debt is not either all recourse or all nonrecourse, do not use Schedule E. Attach a separate schedule setting forth the method of computation.

#### Part I

**Line 1** — If real property is being conveyed pursuant to a mortgage foreclosure or any other action governed by the Real Property Actions and Proceedings Law and the grantee is the mortgagee or lienor, its agent, nominee or an entity wholly owned by the mortgagee or lienor, enter the amount of judgment of foreclosure or the bid price, whichever is higher. The amount of judgment of foreclosure includes any interest accrued through the date of transfer.

If the grantee is a person unrelated to the mortgagee or lienor, regardless whether the debt is recourse or nonrecourse, enter the bid price.

If the grantee is an entity partially owned by the mortgagee or lienor and partially owned by a person unrelated to the mortgagee or lienor, enter the sum of (1) the amount of judgment of foreclosure or the bid price, whichever is higher, multiplied by the percentage that represents the mortgagee's or lienor's beneficial interest in the grantee and (2) the bid price multiplied by the percentage that represents the unrelated person's beneficial interest in the grantee.

For this computation, the grantee is deemed to be the party who ultimately acquires the real property as a result of a mortgage foreclosure sale.

**Example:** X, a mortgagee, has the highest bid at a foreclosure sale. X assigns the bid to an unrelated third party, Z, who ultimately acquires the property. Z is the grantee. The consideration for the conveyance of the real property is the bid price paid by Z to the referee.

**Line 2** — Enter the amount of any continuing liens. Do not include the amount of any liens or encumbrances included on line 1.

**Line 3** — Add lines 1 and 2. If debt is **nonrecourse** or if the grantee is a person unrelated to the mortgagee or lienor, skip line 4 and enter the line 3 amount on line 5.

**Line 4** — Where the debt is **recourse debt** and the grantee is the mortgagee or lienor, its agent, nominee or an entity wholly owned by the mortgagee or lienor, enter the fair market value of the real property.

Where the grantee is an entity partially owned by the mortgagee or lienor and partially owned by a person unrelated to the mortgagee or lienor, if the percentage that represents the mortgagee's or lienor's beneficial interest in the grantee multiplied by the sum of the higher of the judgment of foreclosure or bid price and any continuing liens, exceeds the fair market value of the real property multiplied by such mortgagee's or lienor's percentage, enter the sum of (1) the fair market value of the real property multiplied by the percentage that represents the mortgagee's or lienor's beneficial interest in the grantee, and (2) the bid price plus continuing liens multiplied by the percentage that represents the unrelated person's ownership interest in the grantee.

**Line 5** — If debt is recourse, enter line 3 or line 4, whichever is lower. If debt is nonrecourse or if the grantee is a person unrelated to the mortgagee or lienor, enter the amount from line 3. This is the amount of consideration to be entered on Form TP-584, Schedule B, Part I, line 1.

Attach a copy of the referee's report of sale, if available.

#### Part II

**Line 6** — If real property is being conveyed to a mortgagee or lienor, or its agent, nominee or an entity wholly owned by the mortgagee or lienor, in lieu of

an action to foreclose a mortgage or lien, enter the unpaid balance of the debt secured by the mortgage or lien. The unpaid balance of the debt includes the principal, interest and other accruals secured by the mortgage or lien.

**Line 7** — Enter the amount of any continuing liens. Do not include the amount of any liens or encumbrances included on line 6.

**Line 8** — Add lines 6 and 7. If debt is **nonrecourse**, skip line 9 and enter the line 8 amount on line 10.

**Line 9** — Where the debt is **recourse**, and the grantee is the mortgagee or lienor, its agent, nominee or an entity wholly owned by the mortgagee or lienor, enter the fair market value of the real property.

**Line 10** — If debt is recourse, enter the amount from line 8 or line 9, whichever is lower. If debt is nonrecourse, enter the amount from line 8.

**Line 11** — Enter any other amount paid by the grantee to the grantor for the real property.

**Line 12** — Add lines 10 and 11. This is the amount of consideration to be entered on Form TP-584, Schedule B, Part I, line 1.

#### Part III

**Line 13** — Where the conveyance is to a secured party, or its agent, nominee or an entity owned by the secured party, who is enforcing a lien, security interest or other rights on or in shares of stock in a cooperative housing corporation and/or associated proprietary lease(s), enter the unpaid balance of the debt secured by the pledge of the shares of stock in the cooperative housing corporation and/or associated proprietary lease(s). The unpaid balance of the debt includes the principal, interest and other accruals secured by the pledge of the shares and/or associated proprietary lease(s).

**Line 14** — Enter the amount of any continuing liens, security interests or other obligations remaining on the shares of stock in the cooperative housing corporation and/or associated proprietary lease(s) after the conveyance. Do not include the amount of any liens, security interests or other obligations included on line 13.

**Line 15** — Add lines 13 and 14. If debt is **nonrecourse**, skip line 16 and enter the line 15 amount on line 17.

**Line 16** — Where the debt is **recourse** and the grantee is the secured party, or its agent, nominee or an entity wholly owned by the secured party, who is enforcing a lien, security interest or other rights on or in shares of stock in a cooperative housing corporation and/or associated proprietary lease(s), enter the fair market value of the shares of stock in the cooperative housing corporation and/or associated proprietary lease(s).

**Line 17** — If debt is recourse, enter the amount from line 15 or line 16, whichever is lower. If debt is nonrecourse, enter the amount from line 15.

**Line 18** — If the conveyance is the original conveyance of shares of stock in a cooperative housing corporation by the cooperative corporation or cooperative plan sponsor, or the subsequent conveyance of stock in a cooperative housing corporation for a unit other than an individual residential unit, enter the pro rata portion of the total amount of any liens or encumbrances that remain on the real property of the cooperative housing corporation after the conveyance. The pro rata portion is determined by multiplying the total unpaid principal of the mortgage by a fraction, the numerator of which is the number of shares of stock in the cooperative housing corporation being conveyed in connection with the transfer of the proprietary lease(s) and the denominator is the total number of shares of stock in the cooperative housing corporation.

**Line 19** — Enter any other amount paid by the grantee to the grantor for the conveyance.

**Line 20** — Add lines 17, 18 and 19. This is the amount of consideration to be entered on Form TP-584, Schedule B, Part I, line 1.

#### Part IV

**Line 21** — If the conveyance is to a secured party, or its agent, nominee or an entity owned by the secured party, who is enforcing a lien, security interest or other rights on or in shares of stock, partnership interests or other instruments (i.e., the transfer or acquisition of a controlling interest in an entity with an interest in real property), enter the unpaid balance of the debt secured by the pledge of the ownership interest in the entity. The unpaid balance of the debt includes the principal, interest and other accruals secured by the pledge of the ownership interest.

**Line 22** — Enter the amount of any other liens, security interests or other obligations remaining on the ownership interest in the entity after the conveyance. Do not include the amount of any liens, security interests or other obligations included on line 21.

**Line 23** — Enter the amount of any liens or encumbrances remaining on the real property of the entity multiplied by the percentage in the entity being transferred or acquired.

**Line 24** — Enter the amount of any other debt or obligation of the entity multiplied by the percentage in the entity being transferred or acquired. Do not include the amount of any other debt or obligation of the entity included on line 23.

**Line 25** — Enter any other amount paid by the grantee to the grantor for the conveyance.

**Line 27** — Enter the apportionment of line 26 to the interest in real property owned by the entity. The apportionment is determined by multiplying line 26 by a fraction, the numerator of which is the fair market value of the real property

**LINE 8 - CREDIT**

a. **Liquidations** - If a purchaser acquires a controlling economic interest in a corporation, partnership, association, trust or other entity owning real property in a transaction subject to the Real Property Transfer Tax and within 24 months of such acquisition the entity owning the real property or interest therein is liquidated and the real property or interest therein is conveyed to the purchaser of the controlling economic interest, a credit is available against the transfer tax due on the liquidation in the amount of the transfer tax paid with respect to the original acquisition of the controlling economic interest. In no event shall this credit be greater than the tax payable upon the conveyance in liquidation.

b. **Original Co-op Transfer** - In the case of the original transfer of cooperative housing corporation stock by a cooperative corporation or cooperative plan sponsor in connection with the grant or transfer of a proprietary leasehold, a credit is allowed for a proportionate part of the amount of any tax paid upon the conveyance to the cooperative housing corporation of the land and building or buildings comprising the cooperative dwelling or dwellings. This credit applies only for original transfers of stock by the cooperative housing corporation or cooperative plan sponsor. It does not apply to taxable resales of cooperative housing corporation stock.

No credit is allowed for any tax paid more than 24 months prior to the date on which occurs the first in a series of transfers of shares of stock in the initial offering of cooperative housing corporation shares.

Attach a detailed schedule to support the credit claimed on this line.

**LINE 10 - INTEREST**

If the tax is not paid on or before the due date (determined without regard to any extension of time), interest must be paid

on the amount of the underpayment from the due date to the date paid. For information as to the applicable rate of interest call (718) 935-6000.

**LINE 11 - PENALTIES**

- a) If you fail to file a return when due, add to the tax 5% for each month or partial month the form is late up to 25%, unless the failure is due to reasonable cause.
- b) If you fail to pay the tax shown on the return by the prescribed filing date, add to the tax (less any payments made) 1/2% for each month or partial month the payment is late up to 25%, unless the failure is due to reasonable cause.
- c) The total of the additional charges in a) and b) may not exceed 5% for any one month.

**LINE 13 - FILING FEE**

Pursuant to Subdivision 3 of Section 333 of the NYS Real Property Law, all RPT forms filed on or after July 1, 1991 must be accompanied by a \$25.00 fee. No form will be accepted without the fee.

**SCHEDULE 3**

If this transaction includes more than one grantor or grantee, complete this schedule and provide the requested information for all such grantors or grantees that are not listed on page 1 of this form. For any grantee and grantor that is a partnership, provide the requested information for each general partner. If this transaction includes more than one grantee or grantor and any of them is a partnership, attach a separate schedule 3 for each grantee or grantor providing the information for each general partner.

**SCHEDULE A**

**Line 2d**

If bid price is paid in cash, enter here and on Schedule 1, line 1. If other than cash, enter here and on the appropriate line on Schedule 1.

**Line 2f**

Enter remaining mortgages, liens or encumbrances here and on Schedule 1, line 3, 4, 5, 6 or 10 as appropriate.

**SCHEDULE C**

**Line 4**

Enter remaining mortgages, liens or encumbrances here and on Schedule 1, line 3, 4, 5, 6 or 10 as appropriate.

**SCHEDULE D**

In a liquidation, the measure of the tax is the greater of fair market value or consideration. The greater of fair market value or consideration, and the applicable rate of tax are determined separately for each parcel of real property or economic interest in a parcel of real property that is distributed in a liquidation. If this transaction involves the distribution in liquidation of more than one such parcel or economic interest, complete a separate Schedule D for each such property or interest. Attach additional schedules 1 and 2 as necessary. (See §23-03 (g) of the rules of the City of New York for examples of calculation of the tax base in liquidations.)

**SCHEDULE F**

**Line 8**

If you received other property in exchange for the real property or interest therein that was transferred to the business entity, enter the value of the other property here. If assets other than real property or interests therein were transferred to the business entity in connection with this transaction, the consideration received must be apportioned among the assets transferred. Attach schedule.

**SCHEDULE H**

If the entity named in A owns assets in addition to real property or interests therein you should make a good faith apportionment of the consideration, based on the relative fair market value of the real estate or interests therein and the other assets. See Administrative Code §11-2102 (d) and §23-02 of the rules of the City of New York, Definition of Consideration, Paragraph 3. Apportioned consideration should be entered on Schedule 1 on appropriate lines.

If the entity named in A owns more than one parcel of real property or economic interest therein, the consideration and the

tax, because the contract required that the exempt seller pay the tax.

The Ministry's application for a refund was rejected on the basis that the payment was voluntary. Although the Determination did not say this, the exempt seller should not be permitted to shelter the non-exempt buyer by paying the tax. Similarly, the State appears to be circumventing the Treaty by shifting the tax to the buyer, thereby increasing the sum paid by the buyer because of the seller's exemption. The Administrative Judge addressed this point: the Vienna Convention stated that the mission's exemption did not apply to taxes payable by persons contracting with the mission. This is not the clearest of conclusions.

#### [b] IDA Transactions

- (b) The following are examples of conveyances which are not subject to the real estate transfer tax:
  - (1) A conveyance of real property by the beneficiary of the industrial development agency (IDA) financing to the IDA, in connection with the receipt of such financing is not subject to tax.
  - (2) A conveyance of real property by the IDA, as grantor, to the beneficiary of the IDA financing, as grantee is not subject to tax.

[20 N.Y.C.R.R. 575.11(b).]

See also Appendix A, § A3.05[b] and *Advisory Opinion*, dated July 26, 2001, TSB-A-01(7)R. See *In the Matter of Lighthouse Lanes, LLC*, discussed in § 9.03 for a case where the attempt to obtain an IDA exemption was not successful.

#### § 5.11 Examples of Taxable Transfers

The following are examples set forth in 20 N.Y.C.R.R. 575.11 of conveyances which are subject to the real estate transfer tax:

- (1) A conveyance in exchange for other property is taxable. If the other property is real property or an interest therein, the tax will apply to both conveyances.
- (2) A conveyance by a defaulting mortgagor to the mortgagee in exchange for a cancellation of the mortgage debt is subject to tax. (The consideration in such case is the amount of the unpaid mortgage debt plus unpaid accrued interest.) [Plus the amount of any liens on the premises prior to sale and remaining after sale.]
- (3) A conveyance pursuant to a foreclosure or execution sale is subject to tax.

*Matter of MJF ASSOCIATES, Tax Appeals Tribunal, April 30, 2003, TAT (E) 93-2266 (RP) 20002 N.Y. Tax LEXIS 111, the Tax Appeals Tribunal stated: "A party seeking to establish the FMV of property for purposes of computing the RPTT without a formal appraisal does so at its peril. An appraisal properly performed and documented would clearly be given much weight by this Tribunal." In MJF ASSOCIATES, it was reasonable for the appraiser to discount a purchase money mortgage to arrive at a sales value, but not to reduce by carrying costs and to increase by rental value. The discount was twenty percent plus a twelve percent per annum reduction for a six-year marketing period.*

Suppose the seller of a residence elects not to deliver a disclosure statement and to allow a \$500 credit. Is the taxable consideration reduced? Unclear, and not worth the consequences if a deficiency is claimed. See Karl B. Holtzshue "Property Condition Disclosure Act: First Case Has Right Result for Wrong Reasons," *New York Real Property Law Journal*, Winter/Spring 2003, Vol. 31, No. 1, p. 5.

### § 1.03 Examples of Taxable Transfers

"Where the transfer of a controlling economic interest involves more than one parcel of real property, the applicable rate is determined based upon the consideration apportioned to each parcel." [Rule 23-03(c).] The example given is a corporation owning two parcels, one of which is worth \$400,000 and the other worth \$600,000. The stock of the corporation is sold for \$1,000,000. The tax is calculated at 1.425% on \$400,000 and 2.625% on \$600,000.

The Regulations list examples of conveyances subject to tax:

The following are examples of situations in which the tax applies: (Any reference made to a deed or conveyance includes a transfer of an economic interest in realty.)

- (1) A conveyance by a defaulting mortgagor to the mortgagee. The tax is computed on the amount of the outstanding mortgage debt and unpaid accrued interest. The tax applies without regard to whether the mortgagor is personally liable for the mortgage debt or whether the mortgage is cancelled of record.
- (2) Deeds given by referees, receivers, sheriffs, etc., for realty sold under foreclosure or execution. The tax is computed on the amount bid for the property, senior liens not cancelled by the sale, and advertising expenses, taxes and other costs paid by the purchaser, whether the purchaser is the mortgagee, judgment creditor, or other person.
- (3) A conveyance of realty from one spouse to the other pursuant to