

April 16, 2009

**In Re: Philip McFillin Docket Nos: 36RTMERZZ9892
Joseph Tropea 36RTMERZZ9893
Louis Orocofsky 36RTMERZZ9894**

STATEMENT OF RECORD:

1. Philip McFillin, Joseph Tropea, and Louis Orocofsky (hereafter "Petitioners") each filed a petition for appeal with the Tax Review Board on August 14, 2006 requesting review of assessments for Realty Transfer Tax for the 2005 tax year.
2. The petitions were consolidated for purposes of the Tax Review Board administrative review process.
3. A public hearing before the Tax Review Board was held on July 29, 2008 following which the Board took the matter under advisement pending submission of additional documents by Petitioners.
4. On December 9, 2008, the Tax Review Board announced its decision to abate only the penalties accrued against Petitioners Realty Transfer Tax delinquencies.
5. Petitioners have appealed to the Philadelphia Court of Common Pleas.

FINDINGS OF FACT:

1. The Realty Transfer Tax assessments at issue arose from the 2005 deed transfers on the properties known as 812 Swanson St., 814, Swanson St. and 818 Swanson St., all located in Philadelphia, Pa.
2. At the time of the Tax Review Board hearing:
Petitioner Philip McFillin had tax principal due of \$641.71, with interest due of \$237.43 and penalty due of \$393.05, for a total of \$1,272.19.
Petitioner Joseph Tropea had tax principal due of \$12,073, with interest due of \$4,467.01, and penalty due of \$7,394.71, for a total of \$23,934.72.
Petitioner Louis Orocofsky had tax principal due of \$12,249, with interest due of \$4,164.66, and penalty due of \$7,043.18, for a total of \$23,456.84.
3. Petitioners were involved in the purchase of an undeveloped lot on the 800 block of Swanson St. in Philadelphia, Pa. Title to the undeveloped lot was purchased by Swanson Views, LLC (hereafter "Swanson"), set up by Petitioners and several others with the intention that it be a Straw Party. It was their intention that Swanson take title as a Straw Party to the undeveloped land and later transfer to each individual member a developed unit of the original parcel. As the nominal owner, Swanson would purchase and develop the property to the specifications of the 5 individuals who would each then receive a unit with a house designed to their specifications. In addition, there was a 6th lot that they expected would be sold to a disinterested buyer with any profit divided among the principals.
4. Petitioners structured the transactions in this fashion because they determined it was cost effective to negotiate the purchase and development of the land as one unit rather than individual units.
5. Swanson paid Realty Transfer Tax at the time it purchased the property.
6. According to Petitioner McFillin, who testified that he acted as the managing partner of Swanson, it was formed to act as a straw party to facilitate the financing and development activities for the owners who included the 3 Tax Review Board petitioners plus 2 others.

7. In its entirety, the transaction encompassed what came to be 6 separate parcels from the one site: 810 Swanson St., 812 Swanson St., 814 Swanson St., 816 Swanson St., 818 Swanson St., and 820 Swanson St.
8. After the straw party agreement was executed, the 5 beneficial owners, including the 3 petitioners, each selected the specific parcel they would eventually take title to when the houses were constructed. There would then be the 6th property that they would sell to an outside party.
9. Petitioner McFillin chose 814 Swanson St.
Petitioner Tropea chose 812 Swanson St.
Petitioner Orocofsky chose 818 Swanson St.
10. During the construction period, the individuals were able to have their specific homes customized to their specifications and personally paid for upgrades and extras. Each of the individuals contributed various amounts of money, as needed, to finance items for their particular homes that the overall financing package did not cover.
11. At the completion of construction, the individual lots were transferred to the specific individuals, some with their wives, who took title to their chosen lots.
12. The 6th lot remained undeveloped and was eventually purchased by Petitioner McFillin.
13. No transfer tax was paid when the units were transferred from Swanson to the individual, final owners.
14. The Straw Party agreement did not state that the second transfers would be to anything or anyone other than the 5 named principals as a group, and that the principals would each take title to individual parcels separate from each of the other principals. It did not specify the intentions of the principals beyond the original purchase of the undeveloped parcel.
15. There were 4 financially contributing principals to Swanson: the 3 petitioners and Joseph Byrne. The 5th named principal, Kevin Creedon, did not contribute financially to the Straw Party. The 4 contributing principals took 25% ownership interests in Swanson, each contributing \$100,000 to the project so that Swanson could purchase the property and secure development financing.
16. The 6th lot, which was purchased but not assigned to a specific principal, was eventually purchased by Petitioner McFillin, in addition to the original lot he chose to have developed for himself. McFillin paid Realty Transfer tax when he took title to this lot.
17. Although listed as a principal, Kevin Creedon did not financially contribute initially to the Straw party because he did not intend to participate in the proceeds from any subsequent sale of or profit from the extra lot.

CONCLUSIONS OF LAW:

The Philadelphia Code Chapter 19- 1403 provides for the imposition of the Realty Transfer Tax from “(e)very person who transfers ownership of real estate situate within the City or who makes, executes, delivers, accepts or presents for recording any document or in whose behalf any document is made, executed, delivered, accepted or presented for recording, or who accepts ownership of real estate situate within the City...”.

There are certain excluded transactions and The Philadelphia Code Chapter 19-1405(11) lists as allowable exclusions to the Realty Transfer Tax certain transactions where a straw party is a principal or party to the transaction.

Unfortunately for the petitioners in this circumstance, the document that was meant to create the straw party transaction and the Realty Transfer Tax exclusion failed, thus creating grantor-grantee situations for the various lots being transferred and Realty Transfer Tax liabilities for those transactions.

They took undivided 1/5 interests in the whole property as principals of the straw party. They needed to disburse he same way. Splitting the parcel into 5 or 6 separate properties and transferring each to one individual does not fit the straw party concept since original straw party agreement did not say that’s what they were going to do.

In actuality, the principals took title to 810-820 Swanson St. as tenants in common, each having a 20% interest in the undeveloped properties. When 4 of the principals transferred their interest in one of the units to the 5th principal, Realty Transfer Tax was due on the value of the 80% being transferred to the grantee/principal. This type of transaction does not fall within any exclusions from the tax. The agreement created the 5 principals, as a group, to be the Straw Party thus requiring the transfer out of the Straw party to be to the 5 principals as a group, to maintain the Straw party fiction. When the transfers out were made to individuals, the Straw Party was not the grantee to the transactions

While Petitioner McFillin testified as to how the parties determined the final distribution, the written agreement is binding and any verbal, side agreements about the property distribution would not be legally relevant in this matter.

To have met their objective, the straw party agreement would have had to include a specific detail of how the property was to be distributed by the Straw Party for the benefit of its principals.

The document entered into by the parties was insufficient to create the transactions that would fall within the exclusion to the Realty Transfer Tax. It named all the principals as parties to the Straw party and described the transactions to be the acquisition of the entire parcel “for and on behalf of the owners” and that “upon demand of Owners,...Straw prty will convey to title to Premises to *Owners* or such grantee as shall be designated by Owners.” (emphasis added) (Paragraph 3, Straw party Agreement).

The document does not state that the intention of the principals was to do anything other than purchase the property for and on behalf of the 5 principals as a whole group.

The decision of the Tax Review Board was to deny the petition with respect to the tax principal and abate the penalty, provided Petitioners each paid their remaining balance due within 30 days, absent the present appeal.

Concurred:

Monique DeLapenha, Esq., Chair
T. David Williams, Esq.
Joseph Ferla
LaVon Wells-Chancy, CPA