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Court Decisions Extend Chicago's Transfer Tax Ordinance to Cover Mortgage Assignment: Seyfarth Shaw

Earlier this month, in a case of first impression, the Circuit Court of Cook County, Illinois in the consolidated cases of *City of Chicago v. KTCP 225, LLC*, Case No. 13 L 050290, and *City of Chicago v. Horizon Group XXI, LLC*, Case No. 13 L 050291 (the “KTCP/Horizon Cases”), reviewed and analyzed the Chicago Real Property Transfer Tax Ordinance (the “Ordinance”) to determine whether one who purchases a loan and mortgage through an assignment of mortgage acquires a “beneficial interest in real property” such that the parties are subject to transfer taxes on the assignment, and further whether the transaction qualifies under Exception C of the Ordinance, which exempts from taxation the granting of mortgages. Just last week the Circuit Court of Cook County again addressed these issues in *Halsted West v. City of Chicago*, Case No. 11 CH 19010, consolidated in the *City of Chicago v. Elm State Property and Halsted West*, Case Nos. 14 L 050273 and 14 L 050274 (the “Halsted West Cases”).

Although there are parts of the court’s opinions with which we take exception, the purpose of this memorandum is to report not to present a critical analysis. While a trial court’s decision is of limited precedential value and is subject to appeal, the tenor of the City’s litigation position and the court’s decisions cannot be ignored.

The Ordinance

The Ordinance in relevant part provides that “a tax is imposed upon the privilege of transferring title to, or *beneficial interest in*, real property located in the city.” (Emphasis added.) The Ordinance does not define “beneficial interest in real property,” but provides examples of what qualifies, “including, but not limited to:” a beneficial interest in an Illinois land trust, a lessee interest in a ground lease that provides for a term of 30 or more years, and controlling interest in a real estate entity. However, the Ordinance contains numerous exemptions. Prior to May 8, 2013, Exemption C of the Ordinance exempted from tax “[t]ransfers in which the deed, assignment or other instrument of transfer secures debt or other obligations.”

Although not germane to the cases in question, note that, under a May 8, 2013 amendment to the Ordinance, Exemption C applies to “[t]ransfers in which the deed, assignment or other instrument of transfer secures debt or other obligations; *provided, however, that any transfer must be to a mortgagee or secured creditor.*” (Emphasis added.) In addition to the revision of Exemption C, the Ordinance as amended defines a “mortgagee” and “secured creditor” as “a lender, such as a bank, credit union, mortgage company or other person who acquires a mortgage or other instrument of transfer *primarily for the purpose of securing a loan, and not primarily for the purpose of acquiring the real property or beneficial interest in real property* that is the subject of the mortgage or other instrument of transfer.” (Emphasis added.)

The Cases

In the KTCP/Horizon Cases, the court recited facts that had the taxpayers entering into deed-in-lieu

of foreclosure (DIL) agreements before the mortgages were assigned (and received the borrowers' deeds contemporaneously with the mortgage assignments), and ruled that: (1) assignments of mortgages did convey a "beneficial interest in real property"; (2) the assignment and DIL transactions in this case cannot be separated when applying Exemption C; (3) the assignments of mortgage did not secure debt, and therefore the taxpayers did not qualify for Exemption C.

The first ruling would put all mortgage transactions under the Ordinance, subject to the availability of an applicable exemption. The court concluded that "if a mortgage was not a 'beneficial interest in real property' then the inclusion of the C Exemption...would be superfluous." The court held that since legislation must be interpreted to avoid making a provision superfluous, a mortgage must be a beneficial interest: "[s]ince mortgage liens are not actual title, they must be beneficial interests in real property."

The second ruling, that the assignments of mortgages and deeds must be considered together would seem to be limited to the facts of the case wherein the two parts of the transaction (mortgage assignment and deed) were expressly linked and simultaneous.

The court's third ruling, that the transactions were not entitled to Exemption C, will engender the most uncertainty. The court acknowledges that the granting of a mortgage as security for debt was exempt under Exception C, but reasoned that the assignment of a mortgage did not secure a debt or obligation (the requirement for Exemption C) but rather was a "transfer of debt": "...the Assignments conveyed rights to immediate possession and did not secure debt or other obligations." Perhaps the opinion can be limited to its narrow facts based on the court's own conclusion that due to the express ties between the mortgage assignments and the deeds, there was no debt existing at that time: "the Assignments conveyed rights to immediate possession and did not secure debt."

In the Halsted West Cases, the opinion is devoid of any discussion about the linking of the assignment of mortgage and deeds-in-lieu of foreclosure either in the facts or the legal analysis and thus would appear to broaden even further the taxability of mortgage assignments. In ruling that the mortgage assignments were taxable under the Ordinance, the court simply reiterated its earlier opinion that an assignment of a mortgage constituted a transfer of a beneficial interest in real property and that while Exemption C exempted mortgages from the transfer tax, it does not exempt assignments of mortgage:

"The Assignments are transfers of an instrument, which instrument is a transfer that secures debt or other obligations. The Assignments themselves are not instruments of transfer which secure debt. They are an assignment of a document which assigns a lien to secure debt. The Assignments did not secure anything, they simply transferred rights. There was no amount loaned in exchange for the Assignments. Therefore, by the plain meaning of the C Exemption, the Assignments are not exempt as they do not secure debt or other obligations. The Assignments did not secure debt between Taxpayers and the original mortgagees."

In the Halsted West Cases, the court makes no mention of DIL agreements, but recites, without connecting the fact to its argument, that deeds to the taxpayers from the borrowers were delivered many months after the mortgage assignments.

Conclusion

If nothing else, the rulings show the direction of the City's litigation posture in similar cases. At worst, the cases make taxable the numerous mortgage assignments made each year where the underlying collateral is Chicago real estate. At its most favorable to taxpayers, perhaps the cases can

be limited to the narrow facts wherein there are both mortgage assignments and deeds in-lieu of foreclosure.

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