STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

68 Technology Drive, LLC

v.

State of New Hampshire
Department of Revenue Administration

No. 09-E-0450

ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties are before the court on a *de novo* appeal of a decision by the respondent, the Department of Revenue Administration ("DRA or respondent"), imposing a tax on the transfer of property from Paul J. Parisi, III ("Mr. Parisi") to the petitioner, 68 Technology Drive, LLC ("68 TD or petitioner"). The parties filed a Stipulated Statement of Facts and Exhibits, and now move for summary judgment. The parties agree that there are no genuine issues of material fact in dispute, and thus, ask the court to decide the case on summary judgment grounds. For the following reasons, the court concludes that the petitioner is entitled to summary judgment.

A. Facts

The parties have submitted a stipulated statement of facts as well as joint exhibits (Doc. 12). The following facts are derived from the parties' stipulation. Prior to September 9, 2004, Mr. Parisi held title to a parcel of real estate consisting of an indoor sports complex on 16.2 acres in Bedford, NH (the "Property"). The

Property was encumbered by an outstanding mortgage and a local tax lien. (Ex. B, D & E.)

On or about September 7, 2004, Mr. Parisi formed 68 TD, for the purposes of owning sports related properties. (Ex. I.) He listed himself as the managing member. Id. By a deed dated September 9, 2004, and recorded at the Hillsborough County Registry of Deeds, Mr. Parisi transferred the Property to 68 TD. (Ex. A.) No monetary consideration was exchanged between 68 TD and Mr. Parisi. Neither Mr. Parisi nor 68 TD paid any real estate transfer tax following the transfer.

At the time of the transfer, Mr. Parisi and/or Paul J. Parisi, III, LLC ("PJP, LLC") were the member(s) of 68 TD.[1] (Stip. ¶ 6.) Mr. Parisi was the sole member of PJP, LLC. (Ex. G.) He was also the managing member of 68 TD.

In October 2007, the Audit Division of the DRA conducted an audit regarding the transfer. The audit revealed that at the time of the transfer, the Property was valued at $2,334,600.00. As a result of the audit, the DRA determined that 68 TD owed a total of $29,356 in real estate transfer taxes, which included a Failure to Pay Penalty and a Failure to File Penalty.[2] Consequently, the DRA issued a Notice of Assessment.

68 TD filed a timely appeal of the assessment with the DRA. On April 16, 2009, a DRA Commissioner conducted an administrative hearing regarding 68 TD's appeal. On October 5, 2009, the Commissioner issued a Final Order

[1] Although the parties stipulated that PJP, LLC, may have been a member of 68 TD at the time of the transfer, subsequent annual reports for the years 2005, 2006 and 2007, list Mr. Parisi as 68 TD's sole member.
[2] The total amount due changes as interest continues to accrue.

denying 68 TD's appeal and upholding the DRA's 2008 Notice of Assessment. (See Pet., Ex.1.) Subsequently, 68 TD filed a Petition for *de novo* Appeal of Adjudicative Proceedings with this court.

B. Standard of Review

Pursuant to RSA 21-J: 28-b, IV (Supp. 2010), the superior court shall hear taxpayer's appeals *de novo*. In deciding a motion for summary judgment, "the court must consider the evidence in the light most favorable to the party opposing the motion and take all reasonable inferences from the evidence in that party's favor." Barnsley v. Empire Mortgage Ltd. P'ship V, 142 N.H. 721, 723 (1998) (internal quotation and citation omitted). "Summary judgment is appropriate when the evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Grossman v. Murray, 141 N.H. 265, 269 (1996). Since both parties concede there are no genuine issues of material fact, the court's analysis is confined to determining which party is entitled to judgment as a matter of law. (See Pet.'s Mot. for Sum. Judg. ¶ 1; Resp.'s NH Dept. of Rev. Admin. Mot. for Sum. Judg. ¶ 2.)

C. Analysis

RSA 78-B: 1, I (a) states,

> A tax is imposed upon the sale, granting and transfer of real estate and any interest therein including transfers by operation of law. Each sale, grant and transfer of real estate, and each sale, grant and transfer of an interest in real estate shall be presumed taxable unless it is specifically exempt from taxation under RSA 78-B: 2.

The petitioner argues that Mr. Parisi's transfer of the Property did not qualify as a "sale, grant and transfer" of interest subject to the real estate transfer tax. Id.

Specifically, the petitioner maintains that a contractual transfer did not occur. Alternatively, the petitioner argues that the transfer is specifically exempt from taxation under RSA 78-B: 2, IX. Because all contractual transfers are presumed taxable unless specifically exempt under RSA 78-B: 2, the court first determines whether the transaction was exempt.

RSA 78-B: 2, IX exempts "noncontractual transfers." A noncontractual transfer is "a transfer which satisfies the 3 elements of a gift transfer: (a) Donative intent; (b) Actual delivery; and (c) Immediate relinquishment of control." RSA 78-B: 1-a, III.

The respondent argues the transfer does not satisfy all of the elements of a gift transfer, and therefore, is not exempt as a noncontractual transfer. The respondent concedes that Mr. Parisi "fulfilled the second element of a gift by delivering the deed to the property and promptly recording it, Ex. A, *Warranty Deed*," but argues that Mr. Parisi lacked donative intent and did not immediately relinquish control over the Property. (Resp.'s Mot. for Sum. Jud., p. 9.) The petitioner contends that all three elements for a noncontractual transfer have been satisfied; therefore, the transfer is exempt.

The court agrees with respondent. Specifically, the court finds that Mr. Parisi did not immediately relinquish control of the Property. When Mr. Parisi owned the Property in his individual capacity, he alone had the ability to control and manage the Property, and to alienate it as he saw fit. As manager and sole owner of the petitioner, Mr. Parisi retained the same amount of control and power

over the Property after the transfer as he had before the transfer.[3] While Mr. Parisi had a fiduciary duty as manager of the petitioner to act in a manner consistent with the interests of the other members, he was the only member. Finally, upon dissolution of the petitioner, Mr. Parisi, as its sole member, will have the same ownership interest in the Property as he had when he owned it in his individual capacity. The court finds, therefore, that Mr. Parisi did not immediately relinquish control of the Property when he transferred it to the petitioner. Because the court finds the transfer did not satisfy this element of a gift transfer, it need not address the remaining element in dispute. Consequently, the transfer was not exempt under RSA 78-B: 2, IX as a noncontractual transfer.

The respondent avers that since the transaction was not specifically exempt under RSA 78-B: 2, the court must presume the transaction taxable. The petitioner objects, arguing that because the transaction lacked a bargained-for exchange, a contractual transfer did not occur. See RSA 78-B: 1-a, II. Accordingly, the petitioner contends that the respondent erred in assessing the tax.

When interpreting statutes, the court will look to the language of the statute as a whole and, if possible, construe that language according to its plain and ordinary meaning. State v. Duran, 158 N.H. 146, 155 (2008). Where "a statute's language is plain and unambiguous, [the court] need not look beyond it for further indication of legislative intent." Town of Acworth v. Fall Mt. Reg'l Sch. Dist., 151

[3] The parties stipulated that Mr. Parisi and/or PJP, LLC, were the members of 68 Technology Dr., LLC. Mr. Parisi is the sole member of PJP, LLC. Thus, at the time of the transfer, Mr. Parisi was the sole member of 68 Technology Dr., LLC.

N.H. 399, 401 (2004) (citing Steir v. Girl Scouts of the U.S.A., 150 N.H. 212, 214 (2003)).

A "'[s]ale, granting and transfer' means every contractual transfer of real estate, or any interest in real estate from a person or entity to another person or entity, whether or not either person or entity is controlled directly or indirectly by the other person or entity in the transfer." RSA 78-B: 1-a, V. A "contractual transfer" is "a bargained-for exchange of all transfers of real estate or an interest therein ...." RSA 78-B: 1-a, II.

"Bargained-for exchange" is not defined in RSA 78-B. The New Hampshire Supreme Court, however, has recently held that "the term 'bargained-for exchange' as used in RSA 78-B: 1-a, II is the exchange of 'money, or other property and services, or property or services valued in money' for an interest in real estate." First Berkshire Business Trust v. Dept. of Rev. Admin., 161 N.H. 176, 181 (2010) (quoting RSA 78-B: 1-a, IV). Based on the plain meaning of RSA 78-B: 1, I (a), the Court finds that for a tax to apply there must be a "contractual transfer," and for there to be a "contractual transfer," there must be a bargained-for exchange. Accordingly, the court must determine whether a bargained-for exchange occurred when Mr. Parisi transferred the Property to the petitioner.

The respondent contends that the petitioner and Mr. Parisi engaged in a bargained-for exchange when Mr. Parisi transferred the Property for a service—namely relief from personal liability as the sole owner of the Property.[4] (See Resp.'s Supp. of Auth. to its Mot. for Sum. Jud. ¶ 8.) The petitioner objects,

[4] Unlike in First Berkshire, there was no monetary exchange involved in this transfer. See First Berkshire, 161 N.H. at 182.

maintaining that the protections he gained as a member of an LLC were granted by operation of law and not through a bargained-for exchange. (See Pet.'s Resp. to Resp.'s Supp. of Auth. to its Mot. for Sum. Jud. ¶ 9.)

RSA 304-C: 25 (2005) provides:

> Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

The legal protections, if any,[5] offered to Mr. Parisi by the petitioner's status as an LLC arose by operation of law rather than through a bargained-for exchange. Thus, those protections do not provide a basis for finding that a contractual transfer occurred. See Petition of Lorden, 134 N.H. 594, 598-99 (1991) (finding that there was not a bargained for exchange when, as a result of a corporate dissolution, unencumbered real estate passed to the shareholders by operation of law). While the specific holding in Lorden is no longer good law because the legislature subsequently "amended the definition of consideration to include the surrender of shareholder or beneficial interest holder rights in liquidation of a corporation", First Berkshire, 161 N.H. at 181 (quotation and citation omitted), its underlying rational – that when a benefit accrues by operation of law, there is no bargained-for exchange and therefore no consideration – is applicable here.

[5] Parisi did not personally benefit from the transfer to the LLC with respect to the note and mortgage because he still remained obligated on the underlying debt for the purchase of the property. See argument, infra, regarding the legal effect of the "subject to" language in the warranty deed transferring the property from Mr. Parisi to the LLC.

While the conveyance here (unlike that in Lordon) did not occur by operation of law, the alleged benefit resulting from that conveyance did. Thus, applying the logic of Lordon, that purported benefit is not a bargained-for exchange.

In Mandell v. Gavin, 816 A.2d 619, 620 (Conn. 2003), the petitioner, a sole owner and member of an LLC transferred property to the LLC as an asset contribution. Subsequently, the transfer was taxed. The Connecticut court held that the tax was improper because there was no consideration. The petitioner did not promise to transfer the property in exchange for performance or something in return from the LLC. The court concluded the petitioner acted unilaterally. Id. at 625 ("Thus, the petitioner did not induce any conduct on the part of the company, and that element must be present, or there is no bargain.") See also Ferris v. Gavin, 816 A.2d 628 (Conn. 2003) (following the reasoning in Mandell and rejecting the respondent's argument that the increased value of the petitioner's ownership interest in the LLC was sufficient consideration).

Similar to the petitioner in Mandell, Mr. Parisi transferred the Property unilaterally. He did not promise to convey the Property in exchange for any money, property or services, and he did not receive any money, property or services in return for his conveyance. The protection the LLC offers its members was by operation of law. It was not induced by Mr. Parisi's unilateral act.

The respondent also argues that when Mr. Parisi transferred the Property, "there was sufficient consideration reflected in the assumption of the mortgage and tax lien on the property to make it taxable under RSA 78-B." (Resp.'s Memo. of Law in Sup. of its Mot. for Sum. Jud., p. 4.) The petitioner disagrees, and

maintains the Commissioner's analysis of its liability regarding the mortgage and tax lien was erroneous as a matter of law. The court agrees with the petitioner.

The Warranty Deed transferring the Property from Mr. Parisi to the petitioner provides:

> This conveyance is *subject to* the following:
>
> 1. Unpaid real estate taxes. ...
>
> 3. Subject to any existing mortgages.

(Ex. A (emphasis added).)

"Where land is conveyed in terms *subject to* a mortgage, the grantee does not undertake or become bound, by the mere acceptance of the deed, to pay the mortgage debt." Woodbury v. Swan, 58 N.H. 380, 382 (1878) (emphasis added). See also Lawrence v. Towle, 59 N.H. 28, 30 (1879) ("The recital in the deed, that the premises were subject to a mortgage...without words importing that the defendant assumed payment of the debt, did not bind her personally to pay the debt. No obligation to pay was in terms expressed, and the law will not imply or raise a promise or covenant.") Rather, "[i]t is necessary that there be a promise in terms to pay the mortgage, in order to impose personal liability" on the grantee. 13 Willison, Contracts § 37:41 (4th ed., Supp. 2010). The same principle applies when land is conveyed subject to a tax lien.

Here, the petitioner took the Property *subject to* the mortgage and the tax lien. Therefore, it has no legal obligation to make payments towards these debts.[6] Mr. Parisi's legal obligation regarding these debts has not changed. He remains

[6] The Court recognizes that as a practical matter, the petitioner may feel obligated to make payments towards these debts. Practicality, however, does not equate to legal liability.

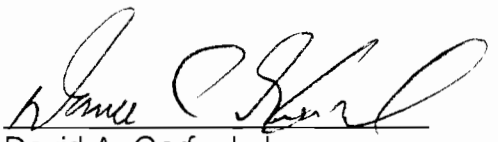
personally liable for both. Accordingly, the court finds there was no consideration when Mr. Parisi transferred the Property "subject to" the mortgage and tax lien.

D. Conclusion

For the reasons stated herein, the petitioner's motion for summary judgment is **GRANTED**, and the respondent's motion for summary judgment is **DENIED**. To the extent the DRA assessed a tax against the petitioner, the assessment shall be rescinded and any taxes paid shall be refunded.

SO ORDERED.

April 6, 2011



David A. Garfunkel
Presiding Justice