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COURT OF APPEALS

STATE OF NEW YORK

TRUMP VILLAGE SECTION 3, INC.,

Respondent,

-against-

No. 221

CITY OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York 12207
November 17, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to get
2 started with number 221. Counsel, would you like any
3 rebuttal time?

4 MS. HENN: Yes, Your Honor, two minutes,
5 please.

6 THE COURT: Two minutes, go ahead. You're
7 on.

8 MS. HENN: My name is Francis Henn. I
9 represent the City of New York. Good afternoon, Your
10 Honors.

11 I'm not aware of any situation where a
12 private cooperative is created to share - - -

13 CHIEF JUDGE LIPPMAN: Coun - - - counselor,
14 let - - - let's stop there. What happened by what
15 Trump Village did? Is there something new - - - some
16 new entity? What - - - what went on?

17 MS. HENN: On - - -

18 CHIEF JUDGE LIPPMAN: Why isn't just an
19 amendment? They have gotten past the point of
20 meeting their obligations, you know, and they're a
21 Mitchell-Lama. What makes this a conveyance of a
22 deed or property or some kind of formal change?

23 MS. HENN: That's exact - - - exactly the
24 point, Your Honor. The significant feature of the
25 transaction here was a statutory mandatory

1 dissolution and a reconstitution.

2 CHIEF JUDGE LIPPMAN: Didn't the old
3 organization or entity survive this dissolution?

4 MS. HENN: Your Honor, we would maintain
5 that the old entity did not survive and, in fact,
6 could not have survived, if the shareholders wanted
7 to have a private cooperative.

8 JUDGE PIGOTT: Does that mean - - -

9 CHIEF JUDGE LIPPMAN: Were there - - -

10 JUDGE PIGOTT: - - - does that mean that
11 this tax bill that is now coming due, that they
12 should spread that among all of the - - - all of the
13 - - - all of the tenants, so that, you know - - - it
14 would seem to me there's a significant tax effect on
15 each one of the tenants that - - - that lived there
16 at the time of transfer.

17 And then there's a sec - - - a second tax,
18 and you'd say that makes sense, because they're - - -
19 now they're selling it to somebody else. But there
20 would be a tax at the time that this transfer
21 happened and then another tax when they sold?

22 MS. HENN: Your Honor, when that happens in
23 - - - in every single - - -

24 JUDGE PIGOTT: No, I'm just asking you to
25 say yes or no and - - -

1 MS. HENN: - - - conversion - - - that's
2 correct, Your Honor.

3 JUDGE PIGOTT: - - - and by that, I mean,
4 I'm - - - I'm thinking these are low-income people,
5 who then get a bill from the city for several
6 thousand dollars because Trump 3 became Trump 3.

7 MS. HENN: Well, Your Honor, they - - - the
8 individual shareholders won't get a bill. The tax is
9 imposed - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but how is that
11 paid?

12 MS. HENN: - - - on the corporation.

13 CHIEF JUDGE LIPPMAN: How - - - how is that
14 paid?

15 MS. HENN: Your Honor, I would think that
16 the corporation would probably have to get financing
17 to pay that.

18 CHIEF JUDGE LIPPMAN: What's happened in
19 other situations like this with Mitchell-Lamas?

20 MS. HENN: Your Honor, in - - - in the
21 cooperative situation, there haven't been that many
22 dissolutions in reconstitutions.

23 CHIEF JUDGE LIPPMAN: Well, there have been
24 - - - there have been some. Have they paid this big
25 tax bill that you're asking now?

1 MS. HENN: Your Honor, there - - - I - - -
2 they're in various stages of litigation, and so - - -

3 CHIEF JUDGE LIPPMAN: Has anyone paid it?

4 MS. HENN: Your Honor, I - - - I'm aware of
5 one that actually formed an - - - took the second dis
6 - - - dissolution route, whereby they formed a new
7 corporation, and - - -

8 JUDGE READ: So that's clear in that case,
9 if - - -

10 MS. HENN: Yes, Your Honor.

11 JUDGE READ: Does that make sense? That
12 depending on which route you take, you pay the tax or
13 you don't pay the tax?

14 MS. HENN: Well, Your Honor, we would say
15 it doesn't make any sense, and - - - and that there's
16 no indication in the legislative history that the
17 drafters of the Mitchell-Lama law were trying to
18 create a tax-free route.

19 JUDGE SMITH: But isn't that - - - isn't
20 that kind of arbitrary - - - I mean, obviously there
21 is some arbitrariness depending on the form of the
22 transaction. But isn't that inherent in a transfer
23 tax that you can - - - yeah, that you've - - - when
24 you change the form of the transaction, you may be
25 able to avoid the tax?

1 MS. HENN: Your Honor, and - - - that's
2 where we get to the substance over form, and as the
3 court correctly found in East Midtown, where they
4 examined the two routes, because if you - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but East
6 Midtown was a Martin Act proceeding, wasn't it?

7 MS. HENN: That's correct, Your Honor.

8 CHIEF JUDGE LIPPMAN: Is that the same kind
9 of proceeding as here?

10 MS. HENN: Well, what happened in East
11 Midtown was that the - - - the cooperative first was
12 going to privatize via the clearly taxable route, a
13 dissolution and conveyance. And I think when they
14 recognized the transfer tax liability that would
15 result, then they decided to dissolve and
16 reconstitute.

17 JUDGE SMITH: Well, even - - - even under
18 the route you say is clearly taxable, why wouldn't
19 the - - - the change-in-the-form-only exception
20 apply?

21 MS. HENN: Your Honor, because the
22 substance is the same, and this court found in East
23 Midtown that they - - - when they looked at the two -
24 - -

25 JUDGE SMITH: Well, I mean - - - I mean,

1 the - - -

2 MS. HENN: - - - the substance was the
3 same.

4 JUDGE SMITH: - - - as I understand the
5 exemption, it should apply when - - - when they - - -
6 when the - - - when the - - - the real owners are the
7 same before and after the transaction. That's true
8 here, isn't it?

9 MS. HENN: Your Honor, we would say the - -
10 - the real owner is a different corporation. It's a
11 BCL corporation.

12 JUDGE SMITH: Okay, but - - - the - - - but
13 - - - but - - - the corporation - - - a corporation
14 is a fiction. The - - - the - - - the - - -
15 beneficial owners are the same.

16 MS. HENN: The shareholders are the same,
17 Your Honor, but they're - - - they have - - -

18 JUDGE PIGOTT: I thought in terms of if - -
19 - if a law firm decides because of the - - - of the
20 way things are going that they're going to become an
21 LLP or an LLC, under your definitions as used here -
22 - - and I realize you're talking about one specific
23 statute - - - that that would be a transfer of all of
24 the assets of the law firm or the medical profession
25 or anything else if they decided to go from being a

1 partnership to a PC.

2 MS. HENN: Your Honor, that may be a mere
3 change in form, so you have to - - -

4 JUDGE PIGOTT: Well, that's - - - that's a
5 bigger change in form. I mean, if you go from a
6 partnership to a PC, you've made a more substantial
7 change, I would think, than this.

8 MS. HENN: Well, Your Honor, that is a
9 substantial change in form; however, an exception - -
10 - a specific exception to the mere - - - there is a
11 mere-change-of-form exemption under the Real Property
12 Transfer Tax. And the exception to that is a
13 cooperative conversion.

14 CHIEF JUDGE LIPPMAN: Where is - - - where
15 is the case law to support your position?

16 MS. HENN: Your Honor, this - - - this is a
17 unique - - -

18 CHIEF JUDGE LIPPMAN: And if there isn't
19 case law or law that makes it clearly support your
20 position, why shouldn't we find against you and for
21 the - - - for the - - - the taxpayer?

22 MS. HENN: Your Honor - - -

23 CHIEF JUDGE LIPPMAN: Where - - - isn't - -
24 - isn't it - - - without something to stand on, does
25 - - - don't our precedents say that basically, you

1 know, we'll find in - - - where - - - when in doubt,
2 we would find in favor of the taxpayer?

3 MS. HENN: Your Honor, at - - - at the same
4 time that you've espoused that - - - that very valid
5 position, in - - - in the same case when there's been
6 a broad statutory term, this court has repeatedly
7 deferred to the agency - - -

8 CHIEF JUDGE LIPPMAN: Then - - - but - - -

9 MS. HENN: - - - and its administration - -
10 -

11 CHIEF JUDGE LIPPMAN: - - - but here,
12 you're saying something that, at least,
13 conventionally, if we looked at it in its
14 conventional meaning, you wouldn't normally associate
15 this with like a transfer of real property, a
16 conveyance of a - - - of a deed. It's not what one
17 would prototypically think fits that situation. And
18 then you have, as Judge Pigott said before, all of a
19 sudden, you get a twenty-one-million-dollar tax bill,
20 with something, that at least on its face, doesn't
21 appear to fit the kind of conveyance we're talking
22 about.

23 MS. HENN: Well, Your Honor - - -

24 CHIEF JUDGE LIPPMAN: And - - - and again,
25 you - - - this is a tax case, and - - - and where do

1 - - - if we're going to err, where - - - where do we
2 err, and what side do we err if there's no clear
3 precedent?

4 MS. HENN: Your Honor, well, there is
5 precedent under what reincorporation means, in that,
6 reincorporation creates a new entity. And in
7 referring to the legislative history with regard - -
8 -

9 JUDGE SMITH: So what - - - what are you
10 referring to when you say there's precedent that
11 reincorporation creates a new entity?

12 MS. HENN: Excuse me, Your Honor?

13 JUDGE SMITH: What - - - what precedent are
14 you referring to?

15 MS. HENN: Your Honor, there are a line of
16 cases involving reincorporation. And - - -

17 JUDGE SMITH: What do you mean by
18 "reincorporation"? Do you mean - - - you mean - - -
19 you mean creating a new corporation and transferring
20 the assets to it?

21 MS. HENN: Well, Your Honor, the - - - the
22 term, actually, in the Mitchell-Lama law is
23 reconstitution, but - - -

24 JUDGE SMITH: I understand.

25 MS. HENN: - - - in the legislative

1 history, the - - -

2 JUDGE SMITH: But there's no - - - there's
3 no precedent directly under the Mitchell-Lama law, or
4 is there?

5 MS. HENN: There's no precedent under the
6 Mitchell-Lama - - -

7 JUDGE SMITH: I mean, what - - - what - - -
8 what - - - what reincorporation precedent were you
9 talking about?

10 MS. HENN: Your Honor, there are a number
11 of cases that I refer to in my brief.

12 JUDGE SMITH: Well, I mean, I'm not so much
13 asking for the name of the cases. Is what - - - in
14 those - - - are those cases where one corporation
15 transferred title to another?

16 MS. HENN: Your Honor - - -

17 JUDGE SMITH: Or a corporation was - - -
18 where an old corporation was either dissolved or
19 abandoned and a new one incorporated to do the same
20 thing?

21 MS. HENN: Your Honor, they didn't address
22 whether or not title was transferred. They addressed
23 whether or not there was a new entity. And that - -

24 -

25 JUDGE SMITH: Okay, then I guess, what I

1 may be - - - the - - - to get back to this case, in
2 this - - - if you ask the Secretary of State whether
3 there's a new entity here, he's going to say no.

4 MS. HENN: Your Honor, I don't know that
5 he'll say that. It's - - - it's newly formed under
6 the BCL. There's - - - there wasn't - - -

7 JUDGE PIGOTT: Because the - - - I mean,
8 the documents filed there say certificate of
9 amendment of the certificate of incorporation. And -
10 - - and as they point out - - - they seem to take a
11 little umbrage at the fact that in your brief, you
12 seem to indicate like there's two - - - there's two
13 corporations here: there's Trump Village - - - I
14 forget the name you used, and then all of a sudden,
15 it's a brand new corporation. But there's no
16 documents that show that. It's just an amendment to
17 the certificate of incorporation up in Albany - - -
18 here in Albany.

19 MS. HENN: The amendment, clearly on the
20 last page, indicates that the Mitchell-Lama entity
21 dissolved.

22 CHIEF JUDGE LIPPMAN: Why does - - - why
23 doesn't it make more sense to tax when the - - - when
24 the - - - when the sale is made of the apartment?

25 MS. HENN: Your Honor - - -

1 CHIEF JUDGE LIPPMAN: Why isn't that
2 logical, rather than here, what's basically, just
3 some paperwork that went on; it's an amendment,
4 clearly not - - - not an unusual thing these days at
5 some point in a Mitchell-Lama's life.

6 MS. HENN: Your Honor, every cooperative
7 conversion, when you eventually sell your apartment
8 to the - - - a private third party, is taxable. But
9 the actual conversion process is taxable as well.

10 And getting back to Your Honor's concern
11 that on the face, this may seem to everybody to be a
12 transfer of - - - that a deed that encompasses
13 transfer of title - - -

14 CHIEF JUDGE LIPPMAN: It doesn't seem to
15 fit the language of the statute.

16 MS. HENN: Your Honor, the statute is much
17 broader than the understanding of conveyance under
18 the Real Property Law.

19 JUDGE PIGOTT: But to get to where you are,
20 you had to redefine "deed", and I realize the statute
21 was rather - - - was rather generous in that,
22 redefine "delivery" and "conveyance". And - - - and
23 here we have something that has no grantor or
24 grantee, no metes and bounds, no consideration, and
25 yet we want to - - - we want to talk about, you know,

1 that it's a conveyance.

2 MS. HENN: Your Honor, the - - - the Real
3 Property Transfer Tax does not require a metes and
4 bounds. It's imposed - - -

5 JUDGE PIGOTT: No, but if I - - - if I
6 transfer - - -

7 MS. HENN: - - - upon a lease, Your Honor.

8 JUDGE PIGOTT: - - - if I transfer my
9 property to my wife for a dollar and no more, there's
10 no - - - there's no transfer tax.

11 MS. HENN: Excuse me, Your Honor? You - -
12 -

13 JUDGE PIGOTT: Because there's no value. I
14 - - - if I give my property away, or if I transfer it
15 for a dollar and no more, there is no transfer tax,
16 because that's - - - that's just one of them. And
17 there's nothing here. There's nothing here to put a
18 stamp on to say the value - - - you know, that you
19 transferred X amount of property at a value of a
20 certain amount.

21 MS. HENN: Your Honor, there's no transfer
22 tax in the instance that you mention, because you can
23 have a gift of a 1, 2, 3 family home, but if you - -
24 - you could have a transfer with no consideration on
25 its face, and if it didn't meet that exception, you

1 deem consideration, because someone's receiving
2 property. So that - - -

3 JUDGE PIGOTT: And that's what you're doing
4 here, right?

5 MS. HENN: - - - the statute allows you to
6 deem consideration; that's correct, Your Honor, and
7 that's - - -

8 CHIEF JUDGE LIPPMAN: Aren't you really - -
9 - aren't - - - isn't your position really based on
10 the fact that the value of this property increases
11 when this happens? Is that really the basis for your
12 - - - your saying that you can tax this - - -

13 MS. HENN: Your Honor, I - - - I think the
14 increase in the - - -

15 CHIEF JUDGE LIPPMAN: - - - in practical
16 terms?

17 MS. HENN: I think more significantly is -
18 - - is a step before that. The dissolution - - -

19 CHIEF JUDGE LIPPMAN: I mean, you're - - -
20 you're stretching to tax - - - stretching the statute
21 - - - stretch - - - stretching the normal view of
22 conveyance and all these things. It's because the
23 value increased, right? And you want to tax it.

24 MS. HENN: Your Honor, it's not because
25 necessarily the value's increased. We see it as a

1 new entity. You'd have to have a dissolution and
2 reconstitution. You have increases in value in
3 property all the time, in connection with a mere
4 change in form. But if you have a con - - - a - - -
5 excuse me, Your Honor?

6 JUDGE ABDUS-SALAAM: I'm sorry; I have a
7 little laryngitis here. I just wanted to - - - are
8 you saying if the value were the same after the
9 dissolution, you would still tax it?

10 MS. HENN: Your Honor, I don't see how in
11 this circumstance, the value could be the same.

12 JUDGE ABDUS-SALAAM: No, but if it were,
13 are you saying this - - - I'm trying to understand if
14 you're saying the dissolution is the event that
15 you're taxing or the amount - - - the increase in
16 value?

17 MS. HENN: It's - - - it's the dissolution
18 and reconstitution. It's not solely the in increase
19 in value. We have a new entity.

20 JUDGE SMITH: Okay, that - - - that - - -
21 that does produce an enhancement of value, but so
22 does the deregulation of a rent-controlled apartment.
23 You don't call that a transfer.

24 MS. HENN: No, Your Honor, but you don't
25 have a completely different entity there. It's a

1 completely different entity.

2 JUDGE SMITH: So it's - - - so they - - -
3 so it's - - - you really are - - - I mean, this isn't
4 necessarily wrong, but you really are stretching the
5 form. The transfer tax does depend on the form.

6 MS. HENN: Your Honor, the transfer tax
7 respectfully depends on the substance. There are
8 many aspects of the real property transfer tax where
9 substance is looked at over form - - -

10 JUDGE SMITH: But the - - - but the - - -
11 but the real - - -

12 MS. HENN: - - - and that's a fundamental
13 tax principle.

14 JUDGE SMITH: - - - the real - - - the - - -
15 - the - - - the real substantive change here - - -
16 but the change is essentially a change in regulatory
17 regime. You don't usually tax a change in regulatory
18 regime.

19 MS. HENN: Your Honor, we're taxing the new
20 entity. There is a new entity here.

21 JUDGE SMITH: Okay, they - - - when you - - -
22 - when you talk about new - - -

23 MS. HENN: It's a - - - it's a BCL entity.

24 JUDGE SMITH: The difference between - - -
25 if there - - - assuming there are two entities, which

1 I have a little trouble with, but assuming the Trump
2 Village Section 3, Inc. is a different entity from
3 Trump Village Section 3, Inc., I don't see how you
4 can say you're not relying on form.

5 MS. HENN: Your Honor, it's the substance
6 of the transaction that we're looking at. And the
7 court - - -

8 JUDGE SMITH: But which part of the
9 substance? I mean, obviously, the cha - - - the - -
10 - the - - - the difference in the entities is formal
11 at best.

12 MS. HENN: Your Honor, this court
13 recognized in East Midtown that the substance was the
14 same regardless of the privatization route that the
15 court took.

16 JUDGE SMITH: Well, I think we - - - I
17 think we recognized in - - - in East Midtown that
18 there is certainly a substantial change in the
19 economic interests of the tenant cooperators, and
20 they - - - and therefore they're entitled to the
21 protection of the securities act. And for those
22 purposes, we said it was a sale or a transfer. But
23 is this - - - do we - - - should we really do the
24 same kind of analysis here, just be - - - because
25 there's a change in the economic interest, we - - -

1 we - - - we - - - you - - - you impose a transfer
2 tax?

3 MS. HENN: Your Honor, as this - - - I
4 would maintain there's a change in the - - - in the
5 substance, Your Honor - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MS. HENN: - - - and that, therefore, the
8 transfer tax is appropriate.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.
10 You'll have rebuttal.

11 Counsel?

12 MR. ROSS: Good afternoon, my name is
13 Daniel Ross. I'm here for Trump Village Section 4 -
14 - - 3.

15 CHIEF JUDGE LIPPMAN: Counsel, is this form
16 or a substance in - - - in the light of Judge Smith's
17 question? What is this? Why are they taxing you?

18 MR. ROSS: Well, I think the - - - based on
19 - - -

20 CHIEF JUDGE LIPPMAN: Is it an argument
21 based on the form or the substance of what happened?

22 MR. ROSS: Certainly, not on - - -

23 CHIEF JUDGE LIPPMAN: If you had to
24 categorize their argument.

25 MR. ROSS: - - - not on the substance,

1 because there was no transfer, as anyone would
2 normally understand it. I think they're taxing this
3 because there is a huge increase in the value of the
4 shares, and people who previously weren't able to
5 sell are now able to sell. And as the City pointed
6 out, the - - -

7 CHIEF JUDGE LIPPMAN: Is that unfair?

8 MR. ROSS: Yes, it's unfair of - - - for a
9 rea - - - I think - - -

10 CHIEF JUDGE LIPPMAN: Well - - -

11 MR. ROSS: But - - -

12 CHIEF JUDGE LIPPMAN: I meant is it unfair
13 that - - - that these people now get a bigger return
14 on their apartment. I - - - is that part of why you
15 think this is - - - this big tax bill is coming up,
16 because the argument is they're getting all of a
17 sudden this kind of a windfall?

18 MR. ROSS: Yes, and for two reasons.

19 Leaving aside yesterday's Times article about all of
20 this, they opened their brief with an argument of, my
21 God, we've made a terrible mistake in allowing
22 privatization in the first place; what were we
23 thinking? We should have never done that. And
24 that's exactly what you can't do with a taxing
25 statute. You can't take a taxing statute that

1 doesn't apply - - - doesn't clearly apply - - - and
2 say - - -

3 CHIEF JUDGE LIPPMAN: But this is - - -

4 MR. ROSS: - - - well, I want it to apply.

5 CHIEF JUDGE LIPPMAN: This is really the -
6 - - the nub of all of this: the privatization and
7 what it's done to the value, I mean, in your view?

8 MR. ROSS: Well, I think two points on
9 that. One, it is - - - it is - - - the law - - - the
10 tax clearly doesn't apply to unrealized gain. It
11 only applies to transfer of property and what you pay
12 for the property then.

13 Second, just on fairness, you know, since
14 this thing happened seven years ago, up to date,
15 maybe twenty percent turnover in seven years. That
16 means eighty percent of the people sitting there now,
17 who are the same middle class people they were then,
18 are - - - maybe someday they'll make some money on
19 this, but they're not making it now. And now,
20 they're going to get a tax, where if you simply take
21 - - - you stop at twenty-seven million when you add
22 up all the - - -

23 CHIEF JUDGE LIPPMAN: What is - - -

24 JUDGE RIVERA: But - - - but - - - but
25 isn't - - - a property interest isn't just about the

1 dollar value, right? There's a lot of interest you
2 get. What - - - is there - - - are you saying there
3 was no interest that was conveyed at all with this
4 reconstitution?

5 MR. ROSS: No, there was no interest
6 conveyed at all.

7 JUDGE RIVERA: Absolutely none.

8 MR. ROSS: I mean, what - - - what you had
9 was a share of stock that was restricted, and now you
10 have a share of stock that's not.

11 JUDGE RIVERA: But isn't that change of
12 restriction, isn't that an interest that can be seen
13 as transferred - - -

14 MR. ROSS: No, it - - -

15 JUDGE RIVERA: - - - conveyed in the
16 language of the statute?

17 MR. ROSS: It's - - - it's a change in the
18 regulations governing your ability to transfer it,
19 but the - - -

20 JUDGE RIVERA: And why - - - why isn't that
21 an interest, though? That's what I'm asking.

22 MR. ROSS: I don't think it's an interest
23 because, you know, you had a share. It's - - - you -
24 - - it still has the same proprietary lease. It's
25 still for the same apartment. What changed is now

1 you can sell it.

2 JUDGE SMITH: Is there - - - is there - - -
3 is there - - -

4 JUDGE RIVERA: But you could always sell -
5 - - well, you could - - - yes, but you've got
6 different limitations on the sale, and you're going
7 to get different benefits of that. Why isn't that an
8 interest that's gained?

9 MR. ROSS: I - - - I don't mean to argue.
10 I don't believe it is, but even if it were - - -

11 JUDGE RIVERA: No, you do mean to argue.
12 That's what you're supposed to do today.

13 MR. ROSS: Even if it were, it's not a
14 taxable event here. I - - - I think it's - - - you
15 know, you have the exact same ownership - - -

16 CHIEF JUDGE LIPPMAN: It's a gain but it -
17 - - it's a gain but it's not taxable? That's your
18 position?

19 MR. ROSS: It's a potential gain in the
20 shares.

21 CHIEF JUDGE LIPPMAN: I mean, it used to be
22 you took the shares. You gave it back to the co-op,
23 and they sold it. You got back your 3,000 dollars,
24 and then they sold it to somebody else for 3,000
25 dollars. This is a different template now,

1 obviously.

2 MR. ROSS: There's no question that is it a
3 substantial change in many of these shareholders'
4 lives when and if they sell.

5 JUDGE SMITH: I guess, what I'm - - - what
6 some of us are struggling with, I think, is - - -

7 MR. ROSS: It just happens not to be a
8 taxable event.

9 JUDGE SMITH: - - - is, how do you tell the
10 difference between - - - what - - - what, yeah - - -
11 when do you say, I've got the same thing, it's just
12 worth more, and I've got a new thing?

13 MR. ROSS: Well, I think that we're talking
14 here about two concepts. One is, most importantly,
15 if you have a house that's worth more, it's still the
16 same house; you haven't transferred it.

17 And the second point, you know, is this a
18 new - - - let me just go back to it - - - is this a
19 new corporation? The reality of it is, is that there
20 are no cases that - - -

21 JUDGE SMITH: They do get - - - they do get
22 new stock certificates, don't they?

23 MR. ROSS: No, they get unlegended stock
24 certificates.

25 JUDGE SMITH: Well, with the - - - with the

1 new - - - literal - - - new pieces of papers, or they
2 take the old piece of paper and erase what - - -
3 cross out the line?

4 MR. ROSS: Yes, it's a new piece of paper,
5 but - - - but it's commonly done.

6 JUDGE SMITH: And the new - - - and the new
7 piece of paper is worth more than the old piece - - -
8 piece of paper.

9 MR. ROSS: Oh, sure it is, because you can
10 sell it.

11 JUDGE SMITH: So why - - - so why didn't
12 you just exchange something of a - - - one thing for
13 another?

14 MR. ROSS: Because - - - because you - - -
15 in terms of corporate law, you own the same
16 percentage of the corporation that you did before,
17 and more importantly, for the sampling of - - -

18 JUDGE SMITH: You're saying that the piece
19 of paper is an emblem for the same thing it used to
20 be; it's just the thing is worth more than it was?

21 MR. ROSS: It's just worth more than it
22 was, but it's the same thing. You have the same
23 apartment, same lease, same everything.

24 JUDGE ABDUS-SALAAM: Counsel, what - - -

25 CHIEF JUDGE LIPPMAN: Coun - - -

1 JUDGE ABDUS-SALAAM: Counsel - - -

2 MR. ROSS: You can now sell it. When you
3 sell it, you will pay tax.

4 CHIEF JUDGE LIPPMAN: Counsel, Judge Abdus-
5 Salaam.

6 JUDGE ABDUS-SALAAM: Is your pos - - - when
7 - - - sorry, thank you. What's your position on the
8 administrative code exemption? What - - - why isn't
9 what the City said, why isn't that t - - - here that
10 it only goes to a conversion and not a transfer?

11 MR. ROSS: Because as the Second Department
12 pointed out, the exception to the exception, which is
13 what they're talking about, only takes place if you
14 presuppose that there's been a deed in the first
15 place. In other words, in a real co-op conversion -
16 - - and this is not a co-op conversion; it's a co-op
17 already - - - it's nothing like a co-op conversion.
18 In a real co-op conversion, very often a landlord who
19 owns a rental, might have it as an LLC, transfer it
20 to a corporation. By deed, they get taxed, because
21 the law says they do, specifically and clearly. And
22 then when the landlord then sells it to the insider
23 price people in the building - - - you know, typical
24 conversion - - - people who didn't own anything
25 before, get taxed again with a credit. By the way,

1 for the first tax, nothing like that happened here.
2 It's - - - you know, there wasn't a deed in the first
3 place.

4 JUDGE RIVERA: But she - - - she - - -

5 MR. ROSS: If there wasn't a deed in the
6 first place, everything else that follows doesn't
7 matter.

8 JUDGE RIVERA: So she - - - because she
9 argues that - - - she argues that in - - - that the
10 statute's in - - - that that particular exception to
11 the exception is intended to encourage the creation
12 of this moderate, affordable housing. And you
13 certainly don't want to encourage or incentivize
14 exiting the program. What - - - what's your response
15 to that?

16 MR. ROSS: I - - - I think, you know, it is
17 - - - it is a possibly very worthy goal to keep
18 affordable housing, but there are - - - and it's a
19 very worthy goal to do a lot of things that you can't
20 do by just taking a tax that doesn't apply and sort
21 of trying to ram it in there to scare people off,
22 which is what they're trying to do here. I mean, it
23 just - - -

24 JUDGE RIVERA: Can - - - can I - - -

25 MR. ROSS: - - - it's not for the executive

1 to do that. It's for the - - - if the legislature
2 wants to turn - - -

3 JUDGE RIVERA: All right, let me - - - let
4 me ask you some - - - some - - -

5 MR. ROSS: - - - around tomorrow and say,
6 you know what? We hate these things; we're going to
7 tax them.

8 JUDGE RIVERA: Yes, let me ask you - - -
9 let - - -

10 MR. ROSS: They can do that.

11 JUDGE RIVERA: Counsel, let me just ask you
12 something else I was going to - - - you mentioned
13 before about - - - people are taxed when they then
14 actually convey the shares - - - when they sell the
15 apartment; let's put it - - - put it in the more
16 colloquial understanding of this.

17 So are you arguing that there is no
18 interest or benefits that - - - that is realized now
19 until they actual sell and make whatever profit they
20 make off the sale?

21 MR. ROSS: I'm - - - well, I think the word
22 you used was "realized" and I think that's exactly
23 right. If you have - - - if you want - - -

24 JUDGE RIVERA: But what if they wanted - -
25 - if they want to get a loan, isn't this more

1 valuable now? Don't they have more collateral?

2 MR. ROSS: It's more - - - yes, it is.

3 JUDGE RIVERA: Don't they have a - - - a
4 greater basis - - -

5 MR. ROSS: But that's not a realization of
6 - - - of the profit in the property.

7 JUDGE RIVERA: Um-hum.

8 MR. ROSS: I mean, if you owned - - -

9 JUDGE RIVERA: But it's an interest - - -
10 but it's a - - -

11 MR. ROSS: - - - an interest in Microsoft
12 stock, it's worth a lot of money, but until you sell
13 it, you don't pay a capital gains tax.

14 JUDGE RIVERA: Counselor, it's an interest,
15 isn't it? Wha - - - does the statute require more
16 than an interest - - - an interest in real property?

17 MR. ROSS: Yes. The section we're looking
18 at - - -

19 JUDGE RIVERA: Does it require that you
20 monetize it in the moment?

21 MR. ROSS: The section we're looking at,
22 which is not an interest in real property - - -
23 that's B; we're looking at A - - - A is, you know,
24 you tax a - - - each deed at the time of delivery by
25 a grantor a grantee, what you're describing is an

1 interesting question - - -

2 JUDGE RIVERA: Okay.

3 MR. ROSS: - - - but it's not this - - -

4 JUDGE RIVERA: This section.

5 MR. ROSS: - - - tax.

6 JUDGE SMITH: And if it - - - if it were
7 this section, will you - - - will you - - - would you
8 - - - is this a transfer of an interest? Is this
9 just a problem of they used the wrong section?

10 MR. ROSS: They would - - - they went out
11 of their way to - - - to - - - they went into the
12 Second Department and said, look, we're only talking
13 about A not B, and had the - - -

14 JUDGE SMITH: Okay, okay, okay. But if
15 they - - - suppose they hadn't. Suppose they said
16 they were talking about B. Would you say, okay - - -

17 MR. ROSS: They would - - - they would
18 lose.

19 JUDGE SMITH: - - - well pop by; I'll write
20 you a check?

21 MR. ROSS: And the reason they would lose
22 is that that's a mere-change-in-form exemption where
23 you move from one entity with the same owners to
24 another entity with the same owner, and what you
25 transfer is a interest. And the - - - and the

1 classic example is that is the Pan Am case, where you
2 sold the stock to get around the fact that under A,
3 there was no deed. But in Pan Am, which the loophole
4 was closed by B, there was a new owner. It was real
5 - - -

6 CHIEF JUDGE LIPPMAN: Let me - - - let me
7 ask you - - -

8 MR. ROSS: - - - transfer.

9 CHIEF JUDGE LIPPMAN: Let me ask you a
10 question that I think Judge Rivera touched on before.
11 What's the policy implications of this in terms of
12 the purpose of Mitchell-Lama housing to begin with?
13 Why is it more fair for your side to win? You get -
14 - - putting aside these formalistic things about the
15 exact nature or what happened here.

16 You got people who owned these shares.
17 After many, many years, co-op meets its
18 responsibility, and it wants to privatize. Fifty-one
19 percent of the people probably want to do that,
20 because you - - - you get an asset. We're talking
21 about - - - for - - - a strong asset as a result.

22 Why - - - why is it fair, in terms of - - -
23 or a better policy, I guess is really what I'm saying
24 - - - in terms of the original purpose of - - - of
25 Mitchell-Lama housing, and what's happening now? And

1 I understand the different views of people about
2 privatization, but what about this issue: whether or
3 not it should be - - - the co-op should be taxed for
4 privatizing?

5 MR. ROSS: Well, I think in terms of
6 fairness, this - - - this took place in 2007. As of
7 2007, the letter rulings from the City, going back to
8 1990, said that if you did it this way, you weren't
9 taxed. And they did it this way, and they were - - -
10 and they thought they weren't being taxed.

11 Now, they're being told, but wait a minute,
12 we're unhappy with the way things are going. We
13 don't like privatization. We changed our mind, and
14 not only are we going to hit you with this enormous
15 tax, which is going to - - - rough - - - at this
16 point, come to something like 16,000 dollars per
17 apartment, once it flows down in the form of
18 maintenance or whatever, you know - - -

19 CHIEF JUDGE LIPPMAN: So is it - - - this
20 is a - - -

21 MR. ROSS: - - - and maybe we'll scare
22 everyone else off.

23 CHIEF JUDGE LIPPMAN: Is it a penalty for
24 privatizing; is that what they're trying to do?

25 MR. ROSS: I think they're - - - in their

1 opening brief, they're explicit about that, and
2 they're not allowed to do that unless the - - - the
3 statute says you can. If you don't like cigarettes,
4 and you have a high cigarette tax, fine.

5 CHIEF JUDGE LIPPMAN: So what happened in
6 the interim? Was it that - - - that, oh, the value
7 is increased, and we can get a lot of money by taxing
8 for the City? Or was it a public policy change where
9 the City said, this is wrong that - - - that people
10 can now sell their own apartment?

11 MR. ROSS: I'm guessing a little of both.
12 And again - - - but the part that I'm not guessing
13 about is that they've been very explicit; they don't
14 like the fact that fifty years ago they allowed
15 privatization in co-ops. They think that was a
16 mistake. They don't like it, and now - - -

17 CHIEF JUDGE LIPPMAN: Well, that - - - that
18 was - - -

19 MR. ROSS: - - - and now they're trying to
20 fix it, but they can't fix it this way.

21 CHIEF JUDGE LIPPMAN: That was the - - -
22 the decision of the - - - the legislative - - -

23 MR. ROSS: Exactly. That's - - - that's my
24 point.

25 CHIEF JUDGE LIPPMAN: - - - it's, you know

1 - - - wisdom.

2 MR. ROSS: Fix it. You know, you don't
3 like? You know, it's been on the books for more than
4 fifty years; fix it.

5 CHIEF JUDGE LIPPMAN: What - - - what kind
6 of people live in - - - and I know the answer but
7 tell for all of us - - - what kind of people live in
8 Mitchell-Lama housing?

9 MR. ROSS: Middle income, lower middle
10 income, very large number of retirees. If - - - if
11 you went down, by the way, in - - - in ACRIS, which
12 is the public record of sale, you're going to see an
13 awful lot of estate sales.

14 CHIEF JUDGE LIPPMAN: Because - - - because
15 when Mitchell-Lama came into being, those people who
16 came in now are in a retirement phase? Maybe they
17 weren't - - -

18 MR. ROSS: Yes. There - - -

19 CHIEF JUDGE LIPPMAN: - - - at the time of
20 - - -

21 MR. ROSS: There is an awful - - - you
22 know, it's - - - not that I expect you to do this,
23 but if you actual sort of looked at all the rea - - -
24 real estate records for each one of these, you would
25 start to see a trend: more and more and more estate

1 sales. People are dying in the - - - I mean, they're
2 choosing to live in their apartments and die in their
3 apartments. They didn't cash in right away. There's
4 no gold rush here.

5 And - - - and now they're being confronted
6 with this, you know - - - I mean, 16,000 doesn't seem
7 like a lot of money if it - - - you know, to some
8 people, but to them it is. And it may not be hit all
9 at once. I don't know how they would finance this,
10 but sooner or later, it's - - - it's a hit.

11 It's - - - and I think the City is doing
12 this to scare off other middle-class or lower middle
13 income people from going down this route. And that's
14 just - - - you know, I'm not representing those
15 people; I'm representing these people. These people
16 can't be taken out and, you know, punished for that.
17 You know, fix the law. You can't do it executively
18 by taking a - - - you know, a square peg and getting
19 it into a round hole, which is very hard to do here.

20 CHIEF JUDGE LIPPMAN: Okay, anything else,
21 counselor?

22 MR. ROSS: Just - - - to go back - - - I
23 think, almost to your first point.

24 CHIEF JUDGE LIPPMAN: Sure, go ahead.

25 MR. ROSS: The starting point of all of

1 this is what's the standard to apply? And the
2 standard to apply in a taxing statute is, if there's
3 doubt, we win. If - - - if you have to do it by
4 implication, we win. If it has to be as complicated
5 as it has to be to get to where they want to go - - -
6 and it's clearly that, we win. And they have ignored
7 that standard in every piece of paper they put in
8 this court, and it's just wrong.

9 CHIEF JUDGE LIPPMAN: Okay, thanks,
10 counsel.

11 MS. HENN: Thank you, Your Honors.

12 CHIEF JUDGE LIPPMAN: Counselor, answer the
13 same question I asked your adversary. Why - - - why
14 is it better pub - - - public policy - - - putting
15 aside the technical - - - you know, is it a
16 conveyance, isn't this a new corporation, isn't it -
17 - - why is it better public policy that you win?

18 MS. HENN: Your Honor, this isn't about
19 punishing shareholders or - - -

20 CHIEF JUDGE LIPPMAN: What is it about?

21 MS. HENN: - - - or discouraging - - -

22 CHIEF JUDGE LIPPMAN: What is it about?

23 MS. HENN: It's about fundamental fairness
24 in taxation, Your Honor. As I began my argument,
25 every cooperative conversion - - - every conversion

1 to a private cooperative - - - this was a conversion
2 to a private cooperative - - - results in the
3 imposition of the transfer tax. This is the only
4 circumstance. Even a conversion to a Mitchell-La - -
5 -

6 CHIEF JUDGE LIPPMAN: Well, is it possible
7 but this is a different legislative framework? Why
8 this is a different situation? Suppose from your
9 typical conversion to a co-op.

10 MS. HENN: Your Honor, I don't see the
11 difference. And - - - and as this court found in
12 East Midtown, at the end of the day, the two
13 privatization routes, under the Mitchell-Lama law,
14 wind up in the same place. And so whether or not you
15 transfer to a newly formed corporation or you
16 transfer to a reconstituted corporation under the
17 BCL, you're forming a private cooperative. And the -
18 - - the definition of "deed" is - - - is not the
19 common definition. In fact - - -

20 CHIEF JUDGE LIPPMAN: And the - - - and so
21 on - - - your prior answer then is that when you - -
22 - when you change to a private co - - - cooperative,
23 you should be taxed. That's why - - -

24 MS. HENN: At - - -

25 CHIEF JUDGE LIPPMAN: - - - from a policy

1 perspective, your side should prevail.

2 MS. HENN: That's correct, Your Honor. And
3 in addition, the transfer tax, the definition of
4 "deed" is - - - is defined broadly enough to
5 encompass these - - -

6 JUDGE SMITH: Granted that people should be
7 taxed when they get rich. Isn't - - - isn't it
8 better, other things being equal, to wait until they
9 actually get the money? Doesn't it all usually wait
10 until they realize the money? That is, if I own a
11 stock of Microsoft, or whatever tomorrow's Microsoft
12 is, and it goes from one to a million, I don't pay a
13 dime in tax until I sell it.

14 MS. HENN: Your Honor, it's - - - the
15 transfer tax isn't on the realization of gain. I - -
16 - I buy my house now, and I have to pay a transfer
17 tax on that. It's not when I buy it twen - - - sell
18 it twenty years from now and it's appreciated - - -

19 JUDGE SMITH: Well, but when you buy it - -
20 - when you buy your house, I mean, the - - - the - -
21 - the - - - buyer pays the tax?

22 MS. HENN: Your Honor, the tax is imposed
23 initially on the grantor, but it's both the grantor
24 and the grantee that's responsible.

25 JUDGE SMITH: Economically, of course, it's

1 argu - - - you know, it's - - - it lands where it
2 lands. But the - - - when you - - - when you - - -
3 when the house is sold, there's money there to pay
4 the tax. You're - - - you're - - - you're attaching
5 a tax to a transaction that does not normally
6 generate - - - I admit - - - I agree, it creates
7 wealth, but it doesn't immediately generate any
8 funds.

9 MS. HENN: That's correct, Your Honor. And
10 - - - and so there would have to be financing in
11 order to pay the tax.

12 JUDGE SMITH: And other things being equal,
13 should we not avoid doing that?

14 MS. HENN: Excuse me, Your Honor?

15 JUDGE SMITH: Other things being equal,
16 isn't it better to avoid imposing a tax in a
17 situation where no funds are being generated?

18 MS. HENN: Your Honor, that's not a
19 criteria set forth in the transfer tax. And - - -
20 and I think as a matter of fundamental fairness, if
21 everyone else who - - - who obtains a private
22 cooperative has to pay the tax, there's no reason if
23 given the breadth of the real property transfer tax,
24 that this should be any different.

25 CHIEF JUDGE LIPPMAN: Okay, thanks.

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MS. HENN: Thank you so much.

CHIEF JUDGE LIPPMAN: Thank you both.

Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Trump Village Section 3, Inc. v. City of New York, No. 221, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: November 25, 2014