

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition

of

VINCENT G. PIAZZA

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DETERMINATION

TAT (H) 10-10 (RP)

Schwartz, A.L.J.:

The Commissioner of Finance ("Respondent" or "Commissioner") brought a motion, dated February 14, 2011, pursuant to 20 RCNY §1-05(d) (1) for an order granting summary determination to Respondent and dismissing the Petition of Vincent G. Piazza ("Petitioner") concerning Petitioner's claim for refund of New York City ("City") Real Property Transfer Tax ("RPTT") under Chapter 21 of Title 11 of the City Administrative Code ("Code") with respect to Petitioner's purchase of two condominium units at 80 John Street, New York, NY. Respondent's motion was supported by an affirmation of his representative, Amy H. Bassett, Esq., Assistant Corporation Counsel, and by various documents. Petitioner filed an Affirmation of his representative, Jane Carbonaro, Esq. in Opposition to Respondent's Motion. This Affirmation was supported by various documents. Each party filed a Memorandum of Law in support of that party's position. All submissions were received by March 16, 2011.

After due consideration of the moving papers and supporting documents, Respondent's motion is granted and Petitioner's Petition is denied.

ISSUE

Is Petitioner entitled to a refund of Real Property Transfer Tax when the written refund claim was made more than one year after the date the tax was paid?

FINDINGS OF FACT

Giving all reasonable inferences to Petitioner and taking all statements made by Petitioner's representative in her submission as true, the facts are as follows:

Petitioner entered into separate contracts of sale with the sponsor/seller to purchase apartments 10A and 10B in 80 John Street, New York, NY, Block 68, Lots 1076 and 1077, a new construction condominium development.

Under the terms of the Condominium Offering Plan, Petitioner was required to enter into two separate contracts of sale to purchase the units. He wished to purchase the two units as his family's home. The sponsor was not willing to combine the units into one unit but was willing to allow Petitioner to do so at his own expense after the closings.

The terms of the Condominium Offering Plan required that the Petitioner pay the RPTT.

Petitioner's title company notified him that the New York County Register's office took the position that when a person buys more than one condominium unit, the RPTT is fixed at the rate applicable to properties other than one, two or three-family houses

and individual condominium units¹ (referred to here as the "Bulk Sale²" rate) rather than the lower rate applicable to one, two or three-family houses and individual condominium units³ (referred to here as the "Residential Rate"). Petitioner was thus required to pay the RPTT at the higher Bulk Sale Rate.

The closing for Apartment 10B took place on January 31, 2007 and the RPTT of \$15,556.31 at the 2.625% rate was paid on February 14, 2007. The closing for Apartment 10A took place on April 25, 2007 and the RPTT of \$24,556.01 at the 2.625% rate was paid on May 2, 2007.

After the April 25, 2007 closing and prior to April, 2008, Petitioner and Petitioner's closing attorney made inquiries of the Department about obtaining a refund of a portion of the tax that had been paid as they believed the tax to have been improperly collected at the higher Bulk Sale Rate. However, these inquiries were not made in writing. No representative of the City advised Petitioner that he had a limited time in which to claim a refund of any overpayment determined to be due.

On or about April 2008 and thereafter, Petitioner's representative made verbal requests to the Department. Each time, Petitioner's representative was notified that the tax had been collected at the correct rate.

¹ Code §11-2102.a(9)(ii). The rate is 2.625% where the consideration is more than \$500,000.

² The term "Bulk Sale" is found in Finance Memorandum 00-6, June 19, 2000 "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units" ("Finance Memorandum 00-6").

³ Code §11-2102.a(9)(i). The rate is 1.425% where the consideration is more than \$500,000.

By letter dated October 27, 2008 to Respondent, Petitioner's representative requested a refund of \$18,337.07, the portion of the RPTT that she asserted was overpaid.

By letter dated December 27, 2008 the Assistant Commissioner, City Register/Tax Map Unit responded to the October 27, 2008 letter by stating that Petitioner is not entitled to a refund of an overpayment because he paid tax at the correct rate.

Subsequently, a Notice of Disallowance of Petitioner's refund claim was issued on July 14, 2009. The stated reason for the disallowance of the refund claim was that it was not filed within one year of the payment of the tax.

Following a conference with the Department's Conciliation Bureau, a Conciliation Decision was issued on February 9, 2010 in Respondent's favor.

Petitioner timely filed a Petition with the Tax Appeals Tribunal protesting the disallowance of the refund claim.

POSITIONS OF PARTIES

Respondent contends that Petitioner's Petition must be dismissed because he failed to file his refund claim within the applicable period of limitations.

Petitioner asserts that equitable principles apply and that I should use my discretion to grant the refund notwithstanding that the written refund claim was filed more than one year after the tax was paid.

CONCLUSIONS OF LAW

A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party." 20 RCNY §1-05(d)(1).

To prevail on this motion, Respondent must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985). Nevertheless Petitioner retains the burden of proof on the underlying issue. See Code §11-703(a).

Code §11-2108(a) provides that the Commissioner shall refund any tax erroneously paid if application for the refund is made to the Commissioner within one year from the payment of the tax. While no specific form is required for the refund claim, the relevant Rule is clear that the application must: be in writing; be signed by the taxpayer or his duly authorized agent; if signed by an agent must be accompanied by a power of attorney; and must be accompanied by proof of payment of the tax. 19 R.C.N.Y. §23-14.

Accordingly, to be a timely refund claim, it must be in writing. For Apartment 10B, the written refund claim must have been filed by February 14, 2008 and for Apartment 10A, it must have been filed by May 2, 2008. Petitioner does not claim to have met these requirements.

Petitioner's representative makes various equitable arguments as to why the Department or this Tribunal should disregard the statute of limitations and grant a refund in this case. The essence of those arguments is that both she and the attorney who handled the closings made several telephone calls to the Department inquiring about what the appropriate tax rate should have been and how to apply for a refund and were not given adequate information.⁴ However, the authority of this Tribunal is limited to that set out in City Charter §168(a) under which the Tribunal "shall have the same power and authority as the commissioner of finance to impose, modify or waive any taxes within its jurisdiction." While there is special refund authority granted to the Commissioner under the General Corporation Tax and the Unincorporated Business Tax, see, Code §§11-687.4; 11-537(d), there is no comparable authority under the City excise taxes. *J. Martinez Shoe Store*, TAT No. 92-0128 (1994). The RPTT is such an excise tax. In addition, Gen. City Law §20.5, under which the New York State Legislature grants certain specific powers to the cities of the State of New York, specifically

⁴ The requirement that a written refund claim be filed within a year is contained in the applicable statute and Rule. Code §11-2108(a); 19 R.C.N.Y §23-14. The position of the Department, set out in Finance Memorandum 00-6, *supra*, which was published in 2000, was that the Bulk Sale rate applied to transfers of more than one condominium unit to the same purchaser unless the units were physically combined into a single residence prior to the sale. However, three cases decided by the Appeals Division of this Tribunal in 2006 made it clear that, under certain factual situations, sales of more than one condominium unit to a single buyer should be taxed at the lower Residential Rate even where the units were not combined prior to sale or could not physically be combined after the sale where the multiple units were being used as one residence. *Matter of David Gruber*, TAT(E)03-7(RP), *et al.* (September 12, 2006) (three adjacent units comprising an entire floor were physically combined after the closing); *Matter of Daniel and Sheila Rosenblum*, TAT(E)01-31(RP) (September 12, 2006) (non-contiguous suite unit located on separate floor of building restricted to use as residence of guest or domestic employee of residential unit); *Matter of Cambridge Leasing Corporation*, TAT(E) 03-11 (RP) (September 12, 2006) (maid's room on separate floor of building from two combined units). The Appeals Division declined to decide that the Bulk Sale approach of the Department could never apply. Rather, each case was to be decided on its facts. These are all published documents. Because each case is fact specific, to obtain the lower Residential Rate a taxpayer must apply for a ruling from the Department prior to closing or pay the higher tax rate and file a timely refund claim.

provides that cities "shall have no power to waive the defense of the statute of limitations." Inherent in any statutory period of limitations is the potential for injustice which the legislature has determined is insufficient to override the need for finality.

Since the Commissioner does not have the authority to grant a refund of RPTT that is barred by the statute of limitations, neither does this Tribunal and Respondent's motion must be granted.

I have considered all other arguments and find them unpersuasive.

ACCORDINGLY, IT IS CONCLUDED THAT the Commissioner properly disallowed Petitioner's application for refund of RPTT that was dated October 27, 2008 on the grounds that the refund claim was not filed within one year of the payment of the tax. Respondent's Motion for Summary Determination is granted and Petitioner's Petition is denied.

DATED: April 5, 2011
New York, New York

MARLENE F. SCHWARTZ
Administrative Law Judge