STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRANCIS GREENBURGER AND RS & P/WVII LIMITED PARTNERSHIP	:	DECISION DTA No. 810773
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Year 1986.	:	

Petitioners Francis Greenburger and RS & P/WVII Limited Partnership, c/o Time Equities, Inc., 55 Fifth Avenue, New York, New York 10003, filed an exception to the determination of the Administrative Law Judge issued on November 18, 1993.

Petitioners, by their duly appointed attorney and representative, Zeigler, Sagal & Winters, P.C. (Stephen S. Zeigler, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), submitted a Stipulation of Facts[1] which by its terms waives the right to a hearing. Pursuant to the stipulation, the parties agreed to submit for decision the threshold issue of whether petitioners' claim for refund was timely filed. Under the stipulation, if it is determined that said refund claim was not timely filed, the petition shall be denied. If it is determined that said refund claim was timely filed, then the parties agree that there shall be a hearing before the Division of Tax Appeals to determine whether petitioners are entitled to a refund. In the event of such a hearing, the parties have agreed that the stipulation would be of no further force or effect.

Petitioners filed a brief on exception. The Division of Taxation submitted a brief in opposition to petitioners' exception. Petitioners filed a reply brief received on March 18, 1994, which date began the six month-period to issued this decision. Petitioners' request for oral

[1]With attached exhibits.

argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners filed a valid informal claim for refund of transfer tax paid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Francis Greenburger and RS & P/WVII Limited Partnership, are the transferees and successors-in-interest to 299 W. 12th Corp., 302 W. 12th Corp., 59 W. 12th Inc. and 45 Christopher Corp. (the "Realty Corporations").

In December 1986 the Realty Corporations paid New York State real estate transfer tax (the "Transfer Tax") in regard to certain transfers of real property.

The transfer tax referred to above totaled $57,605.00 and was paid by four checks tendered to the New York City Register upon filing of the deeds evidencing said transfers. On each of these checks was a handwritten notation "Paid under Protest." The reverse side of each of these checks is endorsed as payable to the "City of New York, Office of City Register-New York County, Treasury Collection Account."

In a letter dated May 22, 1989, Alan Winters, Esq., then attorney for petitioners, wrote a letter to the Division of Taxation ("Division") setting forth a detailed statement of the factual and substantive bases for petitioners' claim that they were entitled to a refund in the amount of $57,605.00, plus interest. Petitioners do not argue that this letter could, by itself, constitute a timely filed application for refund.

In a letter dated June 2, 1989, the Division denied petitioners' refund claim on the basis that the claim had not been timely filed.

In a letter dated August 1, 1989, petitioners submitted a letter to the Division again stating the bases for their position that payment of the tax with checks which indicated thereon that payment was being made under protest, constituted a timely refund claim. The Division

again denied petitioner's refund claim in a letter dated April 17, 1990.

OPINION

The Administrative Law Judge, relying on Matter of Rand (Tax Appeals Tribunal, May 10, 1990), determined that petitioners' alleged claim for refund did not satisfy the requirements for an informal claim. The language "paid under protest" inscribed on the front of checks paid over to the City Register was insufficient, the Administrative Law Judge concluded, to apprise the Commissioner of Taxation and Finance of the substance and legal basis for petitioners' refund claim, let alone the fact that petitioner sought a refund. The Administrative Law Judge also rejected petitioners' argument that the Division is charged with knowledge of petitioners' refund claim because the New York City Register was acting as agent for the Division under Tax Law § 1407. The Administrative Law Judge held that the specific language of Tax Law § 1407 provides for the Register to act as agent for the purpose of collecting tax only, and this duty does not include receiving and accepting refund claims.

The Administrative Law Judge went on to note that the May 22, 1989 letter, if sent to the Division's Miscellaneous Tax Unit pursuant to Commissioner's Regulation 20 NYCRR 575.11, would have been sufficient to put the Division on notice of petitioners' claim had it been timely. The Administrative Law Judge further commented that if there was any confusion on the part of petitioners to file a refund claim, then petitioners should have inquired with the Division as to how to proceed. The Administrative Law Judge stated that the record does not reflect the existence of any such inquiry.

Petitioners, on exception, argue that the refund claim is valid even if some technical requirements have not been complied with. Petitioners contend that there is a strong argument for a valid informal claim given that during the period at issue no formal refund application had been prescribed under Tax Law § 1409. Petitioners further cite State and Federal case law in support of their position that the notation "paid under protest" was sufficient notice to the Division, given the relatively simple manner in which the transfer tax is calculated. Petitioners further contend that even if the initial claim had defects, such defects were cured by petitioners'

letter of May 22, 1989. Petitioners assert that the letter set forth a comprehensive review of the relevant facts and request for refund based thereon.

Petitioners argue the Administrative Law Judge incorrectly interpreted Matter of Rand (supra) as requiring actual knowledge of a refund claim. Petitioners claim that the law only requires a claim which should reasonably put the Division on notice. Petitioners also argue the submission of checks to the recording officer was adequate notice to the Division because, unlike most other taxes, the transfer tax is collected by an agent (i.e., recording officer) of the Division. As a result, the Division, as principal, should be charged with the knowledge of its agent.

Relying on Matter of Rand (supra) and several Federal decisions, the Division argues the Administrative Law Judge's determination should be affirmed in all respects. The Division argues petitioners do not meet the requirements for an informal claim because they failed to provide "notice fairly advising the Commissioner of the nature of the claim" (Matter of Rand, supra). The Division agrees with the Administrative Law Judge that Tax Law § 1407 should be taken as giving the recording officer no more responsibility than what is explicitly stated by the statute, the collection of transfer tax and nothing more.

Petitioners, on reply, argue that contrary to the Division's assertions there are material differences between Tax Law § 1412 which replaced Tax Law § 1409. Petitioners further argue the Division misstated the United States Supreme Court's ruling in Angelus Milling Co. v. Commissioner (325 US 293, reh denied 325 US 895). Petitioners argue the primary issue in Angelus Milling was whether the Internal Revenue Service waived requirements of a valid refund claim and not that informal claims must focus on the merits.

We reverse the determination of the Administrative Law Judge for the reasons set forth below.

The issue we must address is whether the use of the language "paid under protest" written on checks drawn in payment of the transfer tax constitutes a valid informal claim. What constitutes an adequate or valid "informal refund claim" is not well settled. The sufficiency or

adequacy of an informal refund claim is largely a question of fact (see, United States v. Commercial Natl. Bank of Peoria (874 F2d 1165, 89-1 USTC ¶ 9333). Because courts created the concept of an informal claim or notice which may toll the statute of limitations, no specific rules address the requirements for such notice; only general principles exist (United States v. Commercial Natl. Bank of Peoria, supra). Other than the fact a taxpayer cannot rely on oral communication, courts often vary on which elements satisfy the requisite notice. When determining if a valid informal claim exists, courts will look to any statute or regulation in effect that addresses formal claims applications for the relevant tax (see generally, United States v. Kales, 314 US 186).

In the instant case, the Tax Law in effect during the relevant period did not authorize the Commissioner of Taxation and Finance to prescribe the form for refund applications. Tax Law § 1409, in effect during the time at issue,[2] provided:

> "[w]henever the tax commission shall determine that any monies received under the provisions of this article where paid in error, it may cause such monies to be refunded, without interest, pursuant to such rules and regulations as it may prescribe, out of funds in the custody of the comptroller to the credit of such taxes provided an application for such refund is filed with the tax commission within two years from the date the erroneous payment was made."

The Division's regulations in effect during this period stated that refunds were to be filed with the miscellaneous tax section, but did not describe the substantive requirements of a refund claim.

Because of their failure to address the substantive requirements of a refund claim, we cannot turn to the Tax Law or the Division's regulations for guidance as to what factors we should look for in determining what is a valid informal claim.

The Administrative Law Judge, in determining what analysis to undertake, correctly relied on our decision in Matter of Rand (supra),

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[2]Tax Law § 1412 which replaced Tax Law § 1409 included the following language "[s]uch application shall be filed with the Commissioner of Taxation and Finance on a form which he shall prescribe."

in which we identified and applied several key principles used by the Federal courts to ascertain whether an informal claim for refund of personal income tax had been made. As noted by the Administrative Law Judge, the transfer tax is not patterned after any Federal tax, as is the case with New York income tax, but we have not found this a limiting factor in applying the Federal test to informal refund claims (see, e.g., Matter of Glover Bottled Gas Corp., Tax Appeals Tribunal, September 27, 1990 [where we applied the Federal informal refund claim analysis to a claim for a sales and use tax refund]).

In Rand, we recognized the principle that an informal claim need only be a written document which adequately apprises the taxing authority that a refund is sought and of the tax period in question (Matter of Rand, supra). In Rand, we also recognized the requirement that the claim must contain sufficient information to enable the taxing unit to begin the investigation of the matter if it so chooses (see also, Matter of Glover Bottled Gas Corp., supra).

We find the written component requirement was satisfied by petitioners' notation on the face of the checks "paid under protest." We also find this language adequately apprises the Division that a refund was sought. The notation written clearly across the front of each check paid was submitted in conjunction with the recorded deed. Such notation apprised the Division that petitioners were asserting that this tax was in dispute. The "tax period" in question here would more properly be treated as the tax "transaction" which would be the transfer of the property noted on the deed filed (Tax Law § 1402).

In finding that the "paid under protest" notation was an adequate informal claim, we rely on the decisions of courts in this State and the Federal system which have held that the notation "paid under protest" is sufficient to preserve a claim for refund (see, Night Hawk Leasing Co. v. United States, 18 F Supp 938; City of Buffalo v. Wysocki, 112 Misc 2d 543, 447 NYS2d 386; Pellnat v. City of Buffalo, 80 Misc 2d 849, 367 NYS2d 672, rev'd on other grounds 87 Misc 2d 742, 386 NYS2d 965). These cases are relevant for the proposition that "protest" language suffices to put the government entity on notice of a claim for refund so that the government can make financial provision for the possible refund (see, Mercury Mach. Importing Corp. v. City of

New York, 3 NY2d 418, 165 NYS2d 517).

As noted above, the analysis to determine whether a valid informal refund claim was made is fact intensive, so in determining whether there is sufficient information to begin an investigation we look not only to the informal claim itself, but to the surrounding circumstances, including the tax law at issue. The transfer tax is simple to calculate. Petitioners point out that the simplicity of the tax is evidenced by the fact there was no requirement for the filing of tax returns during the relevant period. Former Tax Law § 1402 provides:

> "[a] tax is hereby imposed on each deed at the time it is delivered by a grantor to a grantee when the consideration or value of the interest conveyed exceeds one hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof."

Because the rate of tax remains the same, the only variable is the consideration paid. This limits the possible bases under which a taxpayer would be seeking a refund to either a reduction in consideration (Tax Law § 1401[d]) or an exemption claim (Tax Law § 1405). In addition, the information required to commence an investigation is present on the face of the deed which is filed simultaneously with the payment of the transfer tax, i.e., the deed reveals the real property transferred, the grantor and grantee.

Upon considering the relative simplicity of the tax itself, the information on the deed and the protest lodged by petitioners, it could be inferred that the taxpayer sought a refund for all or part of the tax paid on the transfer of the deed being recorded. As a result, we find there was enough information for the Commissioner to undertake an investigation.

We also find that petitioners successfully perfected their informal refund claim.

The Supreme Court, in upholding the legal effect of informal claims for refund, stated:

> "a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period" (United States v. Kales, supra, at 194).

In the instant case, the claim was perfected by a letter sent May 22, 1989 explaining in detail the

basis of petitioners' claim which was submitted to the Division after the statute of limitations period. The 1989 letter is acceptable as an amendment because, as noted above, then effective Tax Law § 1409 did not provide for a formal application to be provided. Not until Tax Law § 1412 took effect did an application as prescribed by the Commissioner become required.

While we recognize petitioners have satisfied the requirements of an informal claim, it will be of no benefit to them unless it is also found the recording officers at the City Register where the tax was paid and the deed was recorded is found to be an agent of the Division. Finding the recording officer an agent for the purposes of collecting refunds is necessary to impute knowledge of petitioners' protest to the Division. We find the Division should be charged with the knowledge of its agent, the New York City Register.

Tax Law § 1407 provides for the designation of recording officers as agents for the collection of transfer taxes. We reject the Division's contention that agent status is strictly limited to mere collection, thereby excluding any other responsibilities attendant to this task. We also agree with petitioners that actual knowledge of the claim is not required, but as noted in Matter of Rand (supra), it is one of the surrounding circumstances that may be taken into consideration when determining if there was sufficient information to begin an investigation.

In Night Hawk Leasing, the United States Court of Claims recognized that those who collect tax will invariably receive claims for refunds as well. The Court noted that failure by a tax collector to pass on or preserve in his records a claim for refund is irrelevant for informal claims purposes (Night Hawk Leasing Co. v. United States, supra). The Court also held that a written document, when accepted by the tax collector, is sufficient to constitute an informal refund claim subject to completion at a later date. The Court went on to add that the fact the Commissioner did not receive the refund claim should not prejudice the taxpayer's rights to later perfect such demand by a formal claim.

The findings in Night Hawk Leasing are consistent with the general principle recognized by the New York Court of Appeals that "knowledge acquired by an agent acting within the scope of agency is imputed to his principal and the principal is bound by such knowledge,

although information is never actually communicated to it" (Center v. Hampton Affiliates, 66 NY2d 782, 497 NYS2d 898).

In this case, the City Register acquired knowledge of petitioners' informal refund when collecting the transfer tax, an act undeniably within the Register's scope of agency. Accordingly, we find the Division can be charged with knowledge of the informal claim for real estate transfer tax submitted to the recording officer.

To find petitioners' claim does not meet the standard for informal claims because the claim was submitted to the recording officer charged with collection, as opposed to the Division directly, would undermine the very purpose courts created informal claims for. The informal claims rule exists to provide those who are unsure of their rights, due to the confusing nature of the Tax Law, an opportunity to preserve claims. To avoid abuse, however, courts have added the requirement of perfecting claims with the submission of a formal application after the statute of limitations has run. This strikes a compromise between the interests of both parties, giving the Division a more accurate picture of the claim sought by requiring the taxpayer to go through proper channels for a refund, but allowing the taxpayer to satisfy the time restrictions in a more informal manner. To require informal claims to go through formal channels as argued by the Division would limit the effect of the informal claims rule unnecessarily. It is reasonable for a taxpayer to think it acceptable to file his or her protest over the tax assessed with the individual charged with the responsibility of collecting this tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Francis Greenburger and RS & P/WVII Limited Partnership is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Francis Greenburger and RS & P/WVII Limited Partnership is granted; and

4. The denial of the claim for refund is reversed and the matter shall proceed to a hearing on the merits as agreed to by the parties.

DATED: Troy, New York
September 8, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner