

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE MINISTRY OF FOREIGN AFFAIRS OF THE ARAB REPUBLIC OF EGYPT	:	DECISION DTA NO. 818737
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Year 2000.	:	

Petitioner The Ministry of Foreign Affairs of the Arab Republic of Egypt, 304 East 44th Street, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on June 26, 2003. Petitioner appeared by Fulbright & Jaworski, LLP (Robert T. Loos, Esq. and Felice Galant, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was withdrawn.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Vienna Convention on Diplomatic Relations of 1961 compels the granting of a refund of real estate transfer tax paid by petitioner, a diplomatic mission of a foreign state,

where petitioner, an exempt grantor, paid the tax in accordance with its obligations under the contract of sale of the subject real property and in order to record the deed.

FINDINGS OF FACT

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

Petitioner, the Ministry of Foreign Affairs of the Arab Republic of Egypt, is the Egyptian Permanent Mission to the United Nations. As such, petitioner is a diplomatic mission of the sovereign state of the Arab Republic of Egypt, a member nation of the United Nations.

Both the Arab Republic of Egypt and the United States of America are parties to the Vienna Convention on Diplomatic Relations, a treaty establishing certain privileges and immunities to be accorded diplomatic missions, adopted in 1961.

Petitioner was the owner of a certain building and real property located at 36 East 67th Street, New York, New York (“the Mission Property”). For the entire period petitioner owned the Mission Property, it was occupied and used by the Egyptian Mission exclusively as its headquarters and office.

On February 29, 2000 petitioner conveyed the Mission Property to Stadler Capital, Inc. (“Stadler”), a Delaware corporation, pursuant to an Agreement of Purchase and Sale dated February 25, 2000. Section 6.3 of said agreement provides as follows:

6.3. Seller [petitioner] hereby notifies Purchaser [Stadler] that the Seller is exempt from taxation of every kind regarding the lands and buildings owned by the Seller in the United States of America, and Seller believes it is exempt from any and all transfer taxes imposed on the transfer of the Premises. The Seller agrees that in the event the Deed cannot be recorded unless a transfer tax is paid, that Seller shall promptly pay such tax under protest and shall be free to take whatever action or actions it deems necessary or desirable to obtain a refund of such tax. In the event that the State of New York and/or the City of New York

attempts to collect any such transfer tax from the Purchaser in connection with the recording of the Deed, Seller shall take such actions as it deems necessary and/or appropriate to prevent the collection of such tax from the Purchaser and in the event such actions are not successful in preventing such collection from the Purchaser, the Seller shall then promptly pay such transfer tax. The Purchaser covenants and agrees, in any and all circumstances, to cooperate with the Seller in order that no transfer tax of any nature is payable in connection with conveying the Premises from the Seller to the Purchaser, including, but not limited to, Purchaser executing and delivering such reasonable documents and instruments which may be required by Seller in order for the Deed to be recorded without the payment of any transfer tax. The provisions of this Section 6.3 shall survive the Closing and the delivery of the Deed.

During the closing petitioner remitted a check of \$294,962.50 to Metropolis Abstract Corp. to cover the cost of the transfer tax as well as other closing costs. Petitioner, as grantor, and the purchaser, as grantee, also signed a joint Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate (Form TP-584) which calculated real estate transfer tax due on the subject sale of \$39,000.00 and also claimed an exemption from such tax pursuant to the Vienna Convention on Diplomatic Relations. The explanation further provided that if the recording officer refused to record the deed without payment of the transfer tax, then such payment would be made under protest with the proviso that petitioner did not waive any of its rights by such payment.

At the direction of petitioner, Metropolis Abstract Corp. offered the deed of sale with respect to the subject conveyance to the City Clerk of New York County for recording. The City Clerk would not accept and record the deed without payment of real estate transfer tax of \$39,000.00. Accordingly, at petitioner's direction, Metropolitan Abstract Co. paid the transfer tax under protest and the deed was recorded on March 8, 2000.

Petitioner filed a claim for refund of real estate transfer tax paid of \$39,000.00 in connection with the subject conveyance dated April 26, 2000. Petitioner claimed exemption from tax pursuant to the Vienna Convention.

By letter dated August 8, 2000, the Division of Taxation (“Division”) denied petitioner’s refund claim. The letter explained the disallowance as follows:

Please be advised that Section 1405(a)(2) of the Tax Law does grant an exemption from payment of the real estate transfer tax to the United Nations, the United States of America and any of its agencies and instrumentalities. However, Section 575.9(b) of the Real Estate Transfer Tax Regulations states in part that the exemption for certain governmental organizations or entities does not extend to the grantee: that is, if the exempt governmental entity conveys title to real property to a non exempt individual or entity, there will be tax due which is payable by the grantee.

For that reason, we hereby deny your claim for refund. Although the Arab Republic of Egypt was aware that they were exempt from payment of tax, they chose to pay the tax on behalf of the grantee. Accordingly, the Arab Republic of Egypt must seek recourse from the grantee, not the state.

Petitioner subsequently filed a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services. A conference was held on February 6, 2001 and a conciliation order denying petitioner’s request was issued on June 22, 2001.

Petitioner submitted a letter dated September 30, 2002 from the United States Department of State Office of Diplomatic Law and Litigation in support of its refund claim (“State Department letter”).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge concluded that petitioner, as grantor, was exempt from the transfer tax pursuant to Tax Law § 1405(b)(1). The Administrative Law Judge determined that because the transfer tax is a joint and several liability, and since petitioner

was exempt from the transfer tax, the liability due for such tax properly fell upon Stadler who was the grantee. The Administrative Law Judge pointed out that the transaction at issue would be exempt only if both the grantee and grantor were exempt entities which are not the facts in this case.

The Administrative Law Judge rejected petitioner's argument that the transaction at issue was exempt under the provisions of the Vienna Convention. Specifically, the Administrative Law Judge noted that petitioner entered into a contract of sale with Stadler which terms provided for petitioner paying the transfer tax due if such tax payment was required. Since petitioner was unable to record the deed without payment of the tax, the Administrative Law Judge reasoned that petitioner's payment of the tax was a liability assumed under its contract with Stadler. Therefore, the Administrative Law Judge stated that although petitioner may have some recourse against Stadler, the Division was not required to refund the transfer tax paid by petitioner since such payment was based upon the contract of sale entered into by petitioner and Stadler. Such payment was not required pursuant to the Tax Law, since, as set forth above, petitioner as grantor was exempt from the transfer tax. Thus, the Administrative Law Judge sustained the Division's denial of the refund claim.

ARGUMENTS ON EXCEPTION

In its exception, petitioner emphasizes that before the City Clerk would accept and record the deed of the transfer of the mission property, the "City Clerk compelled the Egyptian Mission to pay a transfer tax of \$39,000" (attachment to exception, p. 1). Thus, petitioner submits that it did not pay the transfer tax voluntarily, but mandatorily in order to have the deed recorded upon the transfer of the subject property. Petitioner alleges that such payment of transfer tax flies in

the face of the provisions of the Vienna Convention which exempt petitioner from the payment of such tax. Moreover, petitioner states that New York State has no authority or power to deny petitioner its full rights under the treaty and respectfully requests that it be provided with a refund of the \$39,000.00 plus applicable interest thereon.

In opposition, the Division states that petitioner made a choice to assume the duty of the grantee, in this case, Stadler, to pay the transfer tax due and owing despite being exempt from such payment. The Division claims that petitioner knowingly entered into a contract of sale which obligated it to assume such payment for the transfer tax. Thus, the Division argues that the Administrative Law Judge properly held that petitioner has not met its burden of proof to show that its refund claim was denied in error. As such, the Division requests that the determination be sustained in its entirety.

OPINION

As set forth in the Tax Law, real estate transfer tax is imposed on each conveyance of real property (*see*, Tax Law §§ 1402[a]; 1404). While the grantor in the transaction is generally responsible for the payment of the transfer tax, where the grantor is exempt, the liability for payment of the tax shifts to the grantee (*see*, Tax Law § 1404[a]).

There is no dispute between the parties that petitioner, as grantor, was exempt from payment of the transfer tax due on this transaction pursuant to Tax Law § 1405(a). Thus, as recited above, where the grantor is exempt from the transfer tax, the duty to pay the tax falls on the grantee. As such, the grantee, Stadler, would have to be exempt from payment of transfer tax in order for this transaction to result in no transfer tax being due. Clearly, Stadler is not exempt nor has petitioner argued that Stadler is an exempt entity.

This controversy arises out of the recordation of the deed transferring the mission property. Petitioner would have us find that, since the City Clerk demanded payment of the transfer tax at the time of recordation, the City Clerk, acting as an agent for the Department of Taxation and Finance, required that petitioner be liable for the \$39,000.00 due upon the transfer of the property. However, this is not the case.

It is petitioner through its contract of sale with Stadler who bound itself to pay the transfer tax in this case, despite the fact that it was exempt from the tax under the Tax Law. Stadler was, in fact, the responsible party. Obviously, the terms of the contract between the parties must have resulted in a bargained for exchange between them and, as such, it was petitioner that undertook the responsibility, pursuant to the contract of sale to pay the transfer tax voluntarily. Clearly, the treaty does not affect petitioner's liability under the Tax Law since it was the terms of the parties' contract that resulted in petitioner paying the transfer tax at issue. Petitioner was not liable for the transfer tax under the Tax Law and, as such, petitioner does not have a remedy under the Tax Law to recover the monies it seeks refunded to it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Ministry of Foreign Affairs of the Arab Republic of Egypt is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of The Ministry of Foreign Affairs of the Arab Republic of Egypt is denied; and

4. The Division's denial of the refund claim dated August 8, 2000 is sustained.

DATED: Troy, New York
January 20, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner