

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHAEL AND FRANCES SACKS	:	DECISION
	:	DTA NO. 822322
for Revision of a Determination or for Refund of Real	:	
Estate Transfer Tax under Article 31 of the Tax Law for	:	
the Period January 12, 2005.	:	

Petitioners, Michael and Frances Sacks, filed an exception to the determination of the Administrative Law Judge issued on January 21, 2010. Petitioners appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Maria DiCostanzo, Esq. and Michele W. Milavec, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on September 15, 2010, in New York, New York.

ISSUE

Whether the Division of Taxation properly assessed additional tax on the conveyance of residential property pursuant to Tax Law § 1402-a.

FINDINGS OF FACT

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

Petitioners, Michael and Frances Sacks, are married and were married at all times relevant to this proceeding.

On November 18, 2004, Michael B. Sacks, as purchaser, entered into a contract of sale for Unit 34B, 160 East 38th Street, New York, NY 10016, with Bart Swenson and Bibi Rafikh Swenson, as sellers, for a purchase price of \$900,000.00.

On November 18, 2004, Frances L. Sacks, as purchaser, entered into a contract of sale for Unit 34C, 160 East 38th Street, New York, NY 10016, with Bart Swenson and Bibi Rafikh Swenson, as sellers, for a purchase price of \$625,000.00.

On January 12, 2005, at the closing of the sale of Unit 34B, 160 East 38th Street, New York, New York 10016, 460 shares of Murray Hill Mews Owners Corp. were issued to Michael B. Sacks.

On January 12, 2005, at the closing of the sale of Unit 34C, 160 East 38th Street, New York, New York 10016, 380 shares of Murray Hill Mews Owners Corp. were issued to Frances L. Sacks.

At the time of the closing of the respective sales of 160 East 38th Street, Units 34B and 34C, on January 12, 2005, there was a passageway between the units, which continues to exist. In addition, each unit had a separate entrance from the common hallway of the cooperative apartment building. Such entrances continue to exist; however, on the inside of Unit 34, the entrance area has been converted to storage and has a door on the opposite side of the common hallway door entrance that did not exist prior to 1999.

The document of the sellers' broker setting forth real estate listing information described Units 34B and 34C, 160 East 38th Street, New York, New York, as being for sale together as one apartment with three full bedrooms and two and a half baths for an original asking price of \$1,575,000.00 as of August 16, 2004.

On February 25, 2005, Michael B. Sacks filed Form TP-584, Combined Real Estate Transfer Tax Return, reporting a conveyance that occurred on January 12, 2005 between Bart Swenson and Michael B. Sacks of property located at 160 East 38th Street, Unit 34B, New York, New York, which listed the amount of consideration for the conveyance as \$900,000.00.

On February 25, 2005, Frances L. Sacks filed Form TP-584, Combined Real Estate Transfer Tax Return reporting a conveyance that occurred on January 12, 2005 between Bart Swenson and Frances L. Sacks of property located at 160 East 38th Street, Unit 34C New York, New York, which listed the amount of consideration for the conveyance as \$625,000.00.

Unit 34B and 34C of 160 East 38th Street, New York, New York, were physically combined at some point between June 3, 1999, when a New York City Department of buildings application for construction on the units was filed, and November 10, 2004 when the last action on the construction was signed off on. The job description for the construction project indicated that Units 34B and 34C were to be combined, walls were to be removed, the kitchen appliances were to be removed, and the kitchen piping was to be capped.

160 East 38th Street, Units 34B and 34C, New York, New York, has only one shared kitchen.

Petitioners occupy and use units 34B and 34C as a single unit and intended at the time of the conveyances of the units on January 12, 2005 to occupy and use the two units as a single unit.

The Division performed an audit of the real estate transfer tax returns filed by petitioners for the transfers that occurred on January 12, 2005. The Division determined that such conveyances to petitioners are subject to the additional real estate transfer tax imposed pursuant to Tax Law § 1402-a; therefore, additional tax is due.

The Division issued a Notice of Determination, Notice No. L-026975204, dated July 20, 2006 asserting that petitioners owe \$15,250.00 in tax plus interest and penalty for the tax period ended January 12, 2005.

Petitioners timely requested a conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS), which was conducted on March 1, 2007. By conciliation order dated March 14, 2008 (CMS No. 215958) the conciliation conferee recomputed statutory notice number L-026975204 to cancel the penalty imposed and sustained a modification of the statutory notice whereby the petitioners owe \$15,250.00 in tax plus interest and no penalty for the tax period ended January 12, 2005.

Petitioners timely filed a petition with the Division of Tax Appeals, to which the Division timely filed an answer in response. A hearing before the Division of Tax Appeals was held on February 17, 2009.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the Division properly assessed taxes due pursuant to Tax Law § 1402-a because the entire conveyance to petitioners on January 12, 2005 exceeded \$1,000,000.00. Based upon a review of the record, the Administrative Law Judge held that the entire conveyance was the transfer of one apartment comprised of two units that were renovated and conjoined to form a single dwelling. Petitioners argued that there were two separate conveyances on January 12, 2005, each for less than \$1,000,000.00, because the apartments retained their identity as two separate units with separate sets of shares in the cooperative corporation. The Administrative Law Judge rejected this argument because the sale was advertised as a single cooperative apartment and because the use of the units immediately prior to the transfer was as a single cooperative apartment. Accordingly, the Administrative Law

Judge found the consideration for the entire conveyance amounted to over \$1,000,000.00 and sustained the Notice of Determination.

ARGUMENTS ON EXCEPTION

Petitioners argue that the Administrative Law Judge erred by aggregating the considerations for the two separate conveyances to meet the \$1,000,000.00 threshold provided in Tax Law § 1402-a. They cite to the statutory language of “each conveyance” as support for this proposition. They also contend that the record requires that the Tribunal overturn the Administrative Law Judge and find that two separate conveyances occurred because, on January 12, 2005, two separate transfers for two distinct interests in property were issued to each petitioner individually. They highlight the structures of the transactions and the two separate sets of interests conveyed to two separate individuals. Petitioners also cite to General Obligations Law §§ 3-301 and 3-305, as well as Domestic Relations Law § 50, for the proposition that aggregation is an affront to a married woman’s right to enter into transactions and have sole ownership over property as though she were unmarried.

The Division argues that the determination below should be affirmed because petitioners failed to adduce clear and convincing evidence of error. It contends that the Administrative Law Judge properly rejected petitioners’ argument regarding the structure of the transfer because, at the time of conveyance, the property consisted of a single three bedroom, two-and-a-half bathroom apartment. In support of its position, the Division cites to the cooperative floor plan, which indicates a single unit, and advertisements for the property that indicate the same. The Division provides legal support within the language of “the entire conveyance” in Tax Law § 1402-a, 20 NYCRR 575.3(b), as well as our decision in *Matter of Kelly* (Tax Appeals Tribunal, February 1, 2007).

OPINION

This matter presents the question of whether petitioners' two transactions for a combined single-dwelling apartment constitute a single or two conveyances for the purposes of Tax Law § 1402-a.

Article 31 of the Tax Law imposes a transfer tax on conveyances of real property. The basic tax is imposed by Tax Law § 1402, which reads, in relevant part, as follows:

A tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof . . .

Tax Law § 1402-a imposes an additional tax in certain circumstances. As relevant herein, this section provides, in part, as follows:

In addition to the tax imposed by section fourteen hundred two of this article, a tax is hereby imposed on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more. For purposes of this section, residential real property shall include any premises that is or may be used in whole or in part as a personal residence, and shall include a one, two, or three-family house, an individual condominium unit, or a cooperative apartment unit. The rate of such tax shall be one percent of the consideration or part thereof attributable to the residential real property.

We have previously addressed the imposition of the so called "mansion tax" under Tax Law § 1402-a in ***Matter of Kelly*** (*supra*). Therein, we declined to divvy, or fragment, the consideration where the subject conveyance consisted of a single contract with the sole purpose of transferring both land and a single-family house with a single purchase price. The taxpayer provided no evidence or testimony to controvert the clear intent of the formal agreement. Our decision therein required no inquiry or in-depth analysis into substance and business purpose of the agreement. The development of the record in the present matter distinguishes petitioners' case from ***Matter of Kelly***. As such, we engaged in a somewhat different analysis.

The formal agreements herein require that we analyze the substance and form of petitioners' transactions "to determine the nature of the taxable transfer and the purchase price that determines the amount of the tax" (*Matter of Kelly, supra*; see Tax Law § 1401[d], [e], and [f]). Put alternatively, we must look to the entire conveyance of real property "to search for substance over form with emphasis on economic reality" (*Matter of Avon Products v. State Tax Commn.*, 90 AD2d 393, 395 [1982] citing *United Housing Found. v. Forman*, 421 US 837 [1975]).

We conclude that the facts in this case require that the two transactions be viewed as a single conveyance for a single living unit. Although petitioners entered into two contracts of sale, in their individual capacities, for interests in two separate apartments, the actual subject matter of both contracts was the sale of a single condominium apartment. Prior transactions reflected the pre-existing condition of units 34B and 34C as separate apartments, each with its own bedroom, bathroom and kitchen. Between 1999 and 2004, the two separate units were combined to form a single and indivisible three bedroom, two-and-a-half bathroom apartment. Units 34B and 34C remained and were used as this single, indivisible apartment prior to the sale, after the sale, and at the time of the conveyance. While the formal structure reflects two contracts for two separate apartments, the substance amounted to the transfer of interest in a single and indivisible apartment. We hold that in order to accurately reflect the conveyance and actual purchase price, the considerations must be aggregated.

Petitioners ask us, in effect, to recognize the two contracts for separate properties based upon the prior independent and individual identities of units 34B and 34C. We are not persuaded. As discussed above, this argument must be rejected because the nature of the transfer was one of a single property. The record reveals that, on January 12, 2005, petitioners intended

to and completed the purchase of this one apartment, comprised of the combined 34B and 34C units. While petitioners validly elected to transfer and hold their respective interests in the property separately and individually, we cannot hold that there were separate properties when there was only one property at issue. Accordingly, petitioners' arguments regarding separate property interests fail to present a rationale for dividing the consideration paid for this single property.

We note that the language of Tax Law § 1402-a does not require a finding of two conveyances based upon the presentation of two contracts. The definition of conveyance found in Tax Law § 1401(e) controverts petitioners' proposed elevation of the two formal contracts over the single substantive transfer. This section provides the following:

'Conveyance' means the **transfer or transfers** of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. . . (emphasis added).

The Legislative intent is clear: the number of conveyances is not determined by the quantity of instruments used to transfer real property interests. Indeed, a conveyance can include multiple transfers. The record reveals that, on January 12, 2005, petitioners received a single combined apartment. We can find no legal basis to recognize the elective divvying of property interests as an actual, physical division of a property. As such, the quantity of transfers does not determine the number of conveyances and petitioners' arguments are rejected.

We note that the Administrative Law Judge properly dismissed petitioners' arguments under General Obligations Law §§ 3-301, 3-305, and Domestic Relations Law § 50 as immaterial to the instant proceedings. The balance of petitioners' arguments are rendered moot.

Based upon the foregoing, the consideration for the entire conveyance of the cooperative apartment at issue was properly aggregated to \$1,525,000.00. This amount exceeds the \$1,000,000.00 threshold provided in Tax Law § 1402-a and, as such, the Division properly assessed additional property taxes due pursuant to this section.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael and Frances Sacks is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Michael and Frances Sacks is denied; and
4. The Notice of Determination dated July 20, 2006, as modified, is sustained.

DATED: Troy, New York
March 10, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner