

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>GOVERNMENT OF THE REPUBLIC OF MADAGASCAR/PERMANENT MISSION OF MADAGASCAR TO THE UNITED NATIONS</b>	:	DECISION DTA Nos. 822357 and 822358
for Revision of Determinations or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Year 2007.	:	

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Petitioner filed an exception to the determination of the Administrative Law Judge issued on December 10, 2009. Petitioner appeared by Michael R. Atadika, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioner's request, was heard on September 15, 2010, in New York, New York.

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

***ISSUES***

I. Whether petitioner, a diplomatic mission of a sovereign state, has established entitlement to a refund of real estate transfer tax paid with respect to its sale of real property, which was used exclusively as "premises of the mission" as that phrase is defined under the Vienna Convention on Diplomatic Relations of 1961.

II. Whether petitioner has established entitlement to a refund of real estate transfer tax paid with respect to its purchase of real property to be used exclusively as “premises of the mission” as that phrase is defined under the Vienna Convention on Diplomatic Relations of 1961.

***FINDINGS OF FACT***

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

Petitioner, Government of the Republic of Madagascar/Permanent Mission of Madagascar to the United Nations, is the Government of the Republic of Madagascar acting through its Mission to the United Nations in New York, New York. As such, petitioner is a diplomatic mission of the sovereign state of the Republic of Madagascar, a member nation of the United Nations.

Both the Republic of Madagascar 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’s sale of real property***

Petitioner was the owner of residential real property located on East 74<sup>th</sup> Street, New York, New York. Petitioner purchased this property in the 1970s, and used the property exclusively as the primary residence of the Republic of Madagascar’s Ambassador to the United Nations. Accordingly, the property was properly considered “premises of the mission” under the Vienna Convention on Diplomatic Relations of 1961 (Article 1[i]).

Petitioner entered into a Residential Contract of Sale dated November 27, 2006 to sell the property located on East 74<sup>th</sup> Street. The purchase price was \$7,750,000.00. As part of its

negotiations with the purchaser over the terms of the sale, petitioner agreed to pay all New York State real estate transfer tax due on the conveyance. In accordance with this agreement, paragraph 18 of the contract provides in relevant part: "At the time of closing Seller agrees to grant purchaser a credit of \$31,000." At the time, it agreed to pay real estate transfer tax on the sale petitioner believed that it was entitled to a refund of such tax. Additionally, petitioner was advised that payment of the real estate transfer tax was necessary in order to record the deed.

Both petitioner, as seller, and the purchaser were represented by their own respective attorneys for purposes of the negotiation of the contract of sale.

The closing for the property located on East 74<sup>th</sup> Street was on April 2, 2007. At that time, petitioner conveyed the property to the purchaser. Also at that time, petitioner provided funds to the title company present at the closing in order for the title company to pay \$31,000.00 in transfer tax with respect to the conveyance on petitioner's behalf.

Petitioner, as grantor, and the purchaser, as grantee, executed and filed a joint Combined Real Estate Transfer Tax Return (Form TP-584) with respect to the April 2, 2007 conveyance of the property located on East 74<sup>th</sup> Street. This return reported \$7,750,000.00 as the consideration for the conveyance and \$31,000.00 in real estate transfer tax due.

As noted, petitioner paid the real estate transfer tax of \$31,000.00 as reported due on the Combined Real Estate Transfer Tax Return.

Petitioner filed a Real Estate Transfer Tax Claim for Refund dated April 3, 2007 seeking a refund of the \$31,000.00 in transfer tax paid with respect to the conveyance of the East 74<sup>th</sup> Street property.

By letter dated May 8, 2007, the Division of Taxation (Division) denied petitioner's refund claim in its entirety. In explanation, the Division's denial letter stated that, while generally the

real estate transfer tax was payable by the seller-grantor, petitioner was itself an exempt entity, and that under such circumstances, liability for the tax shifted to the purchaser-grantee. The Division determined that petitioner had paid the tax in question on the purchaser-grantee's behalf; therefore, the payment was not erroneous and the claim was denied.

***Petitioner's purchase of real property***

Petitioner entered into a Purchase Agreement, dated April 23, 2007, for the purchase of a condominium unit located on Second Avenue, New York, New York. The condominium unit was to be used, and in fact has been used, exclusively for purposes of the mission and therefore is properly considered "premises of the mission" under the Vienna Convention on Diplomatic Relations of 1961 (Article 1[i]). As part of its negotiations with the seller over the terms of the sale, petitioner agreed to pay one-half of the New York State real estate transfer tax due on the conveyance. This agreement is set forth in paragraph 6 of the Purchase Agreement. At the time it agreed to pay real estate transfer tax on the sale, petitioner believed that it was entitled to a refund of such tax. Additionally, petitioner was advised that payment of the real estate transfer tax was necessary in order to record the deed.

The closing for the condominium unit on Second Avenue was on May 31, 2007. At that time the seller conveyed the property to petitioner. Also at that time, petitioner, as the purchaser, and the seller each paid \$8,325.00 in New York State real estate transfer tax with respect to the condominium transfer. Petitioner provided the funds for payment of its share of the tax to the title company present at the closing, which paid the tax on petitioner's behalf.

Petitioner, as grantee, and the seller, as grantor, executed and filed a joint Combined Real Estate Transfer Tax Return (Form TP-584) with respect to the May 31, 2007 conveyance of the

condominium unit located on Second Avenue. This return reported \$4,162,012.50 as the consideration for the conveyance and \$16,650.00 in real estate transfer tax due.

As noted, petitioner paid \$8,325.00 of the real estate transfer tax liability, which was one-half of the total real estate transfer tax reported due on the Combined Real Estate Transfer Tax Return.

Petitioner filed a Real Estate Transfer Tax Claim for Refund dated July 17, 2007, seeking a refund of the \$8,325.00 in transfer tax it paid with respect to the conveyance of the condominium unit.

By letter dated August 2, 2007, the Division denied petitioner's refund claim in its entirety. In explanation, the Division's denial letter stated that while petitioner was exempt from the tax, it had, in this instance, paid the tax on behalf of the seller. Accordingly, the payment was not erroneous and the claim was denied.

At the closing for the condominium unit on Second Avenue on May 31, 2007, petitioner also paid \$54,626.42 in New York City real property transfer tax. Petitioner filed a refund application with the New York City Finance Department with respect to such payment. By check dated November 9, 2007, the Finance Department granted petitioner's refund claim.

***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). However, the Administrative Law Judge found that, with respect to petitioner's sale of the East 74<sup>th</sup> Street Property, the Tribunal's decision in *Matter of the Ministry of Foreign Affairs of the Arab Republic of Egypt* (Tax Appeals Tribunal, January 20, 2005), is controlling. Based on the Tribunal's rationale in *Egypt*, the Administrative Law Judge denied petitioner's refund claim,

finding that petitioner was not liable for the transfer tax under the Tax Law, and as such, does not have a remedy under the Tax Law to recover the monies it seeks refunded to it. The Administrative Law Judge found that the Tribunal's decision in *Egypt* compels the same result with respect to petitioner's purchase of the condominium unit, and thus rejected petitioner's refund claim.

### ***ARGUMENTS ON EXCEPTION***

Petitioner presents the same arguments on exception as were made before the Administrative Law Judge, i.e., that petitioner is the diplomatic mission of a sovereign nation and under Article 23 of the Vienna Convention is exempt from New York State taxes. Petitioner further argues that it does not matter that it entered into contracts agreeing to pay the subject taxes on behalf of parties who were not exempt from tax.

The Division urges that we affirm the determination of the Administrative Law Judge, arguing that the Administrative Law Judge correctly determined that although exempt from the payment of real estate transfer tax itself, petitioner assumed the obligation of the other party to each transaction and voluntarily chose to make payment on behalf of the party liable for the real estate transfer tax due on each conveyance.

### ***OPINION***

The real estate transfer tax is "imposed on each conveyance of residential real property or interest therein" (Tax Law § 1402[a]), and all conveyances are presumed subject to the tax (Tax Law § 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 that petitioner was exempt from payment of the transfer tax as the diplomatic mission of a sovereign nation, pursuant to Article 23, paragraph 1 of the Vienna Convention. Tax Law § 1405(a) exempts from payment of the real estate transfer tax, *inter alia*, the State of New York, its agencies and instrumentalities, as well as the United Nations, the United States of America and its agencies and instrumentalities. This subsection provides, however, that the “exemption of such governmental bodies or persons shall not, however, relieve a grantee from them of liability for the tax” (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.

Petitioner argues that it is exempt from the transfer tax under Article 23 of the Vienna Convention, and that it does not matter whether it entered into contracts agreeing to pay the subject taxes on behalf of non-exempt parties. We reject petitioner’s argument.

Our decision in *Egypt, supra*, a factually similar case, is controlling in this matter. In *Egypt*, the mission premises, as here, were sold by the diplomatic mission of a sovereign nation to a nonexempt private purchaser. In that case, as in the present matter, the Vienna Convention exempted the mission, as grantor in the transaction, from liability for the tax. Accordingly, in that case, as here, Tax Law § 1405(a) shifted the liability to the nonexempt grantee-purchaser. This statutory shift in liability notwithstanding, the exempt seller-grantor in both the *Egypt* case and the present matter paid the tax pursuant to a contractual obligation. Accordingly, petitioner’s refund claim with respect to its sale of the East 74<sup>th</sup> Street property is properly denied because as in *Egypt*, “[p]etitioner 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.”

Our decision in *Egypt* compels the same result with respect to petitioner's purchase of the condominium unit. In that transaction, the nonexempt grantor-seller was liable for the payment of the transfer tax pursuant to Tax Law § 1404(a). Petitioner, however, voluntarily contracted to pay one-half of the liability. Accordingly, consistent with our rationale in *Egypt*, the Administrative Law Judge properly found that since "petitioner was not liable for the transfer tax under the Tax Law," its payment could not be considered erroneous and its refund claim must be denied.

As the Administrative Law Judge correctly noted, the State of New York did not impose any tax liability upon petitioner in this case. Rather, under the Tax Law, the subject transfer taxes were imposed on the other, non-exempt parties to the transactions. Petitioner's obligation to pay resulted from volunteering to do so as part of its contractual agreements. Similar to the facts in *Egypt*, it was petitioner, through its contractual agreements, that bound itself to pay the transfer tax at issue, despite the fact that it was exempt from the tax under the Tax Law. The Vienna Convention does not affect petitioner's liability under the Tax Law since it was the terms of the parties' contracts that resulted in petitioner paying the transfer tax at issue. Given the facts here, there is no remedy for petitioner under the Tax Law.

Petitioner asserts that the decision in *Egypt* does not apply because petitioner did not contractually agree to pay the real estate transfer tax on the sale of the Ambassador's residence, but paid the transfer tax in order to record the deed. Petitioner's argument is not supported by the record. The evidence shows that as part of its negotiations with the purchaser of the East 74<sup>th</sup> Street property, petitioner agreed to grant purchaser a credit of \$31,000.00 for the real estate transfer tax due on the conveyance. Petitioner freely entered into the agreement to pay the amount of real estate transfer tax due on the conveyance. Petitioner, a tax-exempt entity, paid a



transfer tax for which it was not liable under the Tax Law on behalf of a third party to fulfill a contractual obligation. Contrary to petitioner's argument, these circumstances are indistinguishable from the facts in *Egypt*, and that decision is controlling here.

Petitioner submitted several letters expressing legal opinions in support of its position herein. Several of these letters pertained to the exemption of foreign embassy residences from New Jersey real estate taxes. As noted, petitioner's exempt status is not in dispute. The conclusion that petitioner is not entitled to a refund is not a denial of petitioner's exempt status. Rather, it is a recognition that the other parties to the transactions at issue were not exempt. In effect, the denial of the refund claims is an assertion of the liability of the other parties to the transactions. Such liability cannot be avoided by means of a contractual arrangement. Accordingly, the Administrative Law Judge properly found that there was no legal basis upon which to grant petitioner's claims, notwithstanding its tax exempt status.

Petitioner also objected to the apparent inconsistency between the Division's denial of refund in the instant matter and the New York City Department of Finance's granting of petitioner's refund claim with respect to its purchase of the condominium unit. Considering that New York State and New York City are different entities operating under different (albeit similar) laws (*cf.* Administrative Code of the City of New York § 11-2106), and also that the basis for the Department of Finance's decision to grant a refund is not in the record, the Administrative Law Judge properly found the fact of the City refund insufficient to overcome the statutory language and Tribunal precedent in this matter.

Petitioner further argues that Real Property Tax Law § 418 supports its position. That section specifically exempts the real property of a foreign government from taxes on real property. The Administrative Law Judge properly determined that Real Property Tax Law § 418

is not relevant here, because the present matter involves a tax on a transfer of real property under the Tax Law, rather than a tax on real property under the Real Property Tax Law.

As such, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Government of the Republic of Madagascar/Permanent Mission of Madagascar to the United Nations is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of the Government of the Republic of Madagascar/Permanent Mission of Madagascar to the United Nations are denied; and
4. The Division of Taxation's denials of petitioner's refund claims are 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