

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**ORANGE PYRAMID ASSOCIATION, INC.** :

for Revision of a Determination or for Refund of Mortgage :  
Recording Tax under Article 11 of the Tax Law with :  
Reference to an Instrument Recorded on October 1, 1993. :

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DETERMINATION  
DTA NOS. 817396  
AND 817397

In the Matter of the Petition :

of :

**833 BROADWAY REALTY CORP.** :

for Revision of a Determination or for Refund of Mortgage :  
Recording Tax under Article 11 of the Tax Law with :  
Reference to an Instrument Recorded on October 1, 1993. :

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Petitioner Orange Pyramid Association, Inc., 6 Waterview Road, Great Neck, New York 11024, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on October 1, 1993.

Petitioner 833 Broadway Realty Corp., 6 Waterview Road, Great Neck, New York 11024, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on October 1, 1993.

The Division of Taxation, by its representative, Barbara G. Billett, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated January 20, 2000 seeking summary determination in the above-referenced matters pursuant to sections 3000.5, 3000.9(a)(1)(i) and

3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners' representative, Robert M. Silverstein, Esq., filed an affirmation in opposition on February 18, 2000, which date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly denied as untimely petitioners' claims for refund of mortgage recording tax where such claims were filed more than two years from the date of payment of the tax but where such tax was erroneously paid on two mortgages which gave mortgage interests to the United States of America, as mortgagee.

***FINDINGS OF FACT***

1. On September 30, 1993, petitioner Orange Pyramid Association, Inc., petitioner 833 Broadway Realty Corp., Jack Shaoul, Kristina Shaoul and the United States Attorney for the Southern District of New York entered into an Agreement to Furnish Security for Appearance Bond. The purpose of the agreement was to secure the release of Jack Shaoul on bail pending sentencing and appeal in an action entitled *United States of America v. Jack Shaoul* (Case No. 92 CR 1110 [DLD]). Jack Shaoul was president of Orange Pyramid Association, Inc. and vice-president of 833 Broadway Realty Corp.

2. On October 1, 1993 petitioner Orange Pyramid Association, Inc. recorded a mortgage with the New York City Register's Office wherein petitioner, as mortgagor, gave a mortgage interest in property commonly known as 144 Fifth Avenue, New York, New York, to the United

States of America, as mortgagee. Petitioner paid mortgage recording tax of \$27,500.00 at the time of recordation.

3. Also on October 1, 1993 petitioner 833 Broadway Realty Corp. recorded a mortgage with the New York City Register's Office wherein petitioner, as mortgagor, gave a mortgage interest in property commonly known as 833 Broadway, New York, New York, to the United States of America, as mortgagee. At that time, petitioner paid mortgage recording tax of \$27,500.00.

4. Petitioners executed and recorded the two mortgages which granted the United States of America a mortgage interest in the two properties as noted above and paid the mortgage recording tax solely for the purpose of complying with the Agreement to Furnish Security dated September 30, 1993. Petitioners were represented by counsel at the time the mortgage recording tax was paid.

5. Petitioners filed a single claim for refund of mortgage recording tax paid to record the two mortgages given to the United States. This claim was received by the Division of Taxation ("Division") on September 21, 1998. In response to the Division's request, petitioners filed separate claims for refund. These claims were received by the Division on October 13, 1998.

6. The Division subsequently denied petitioners' refund claims as filed beyond the applicable period of limitations.

7. Jack Shaoul fulfilled his obligations to the United States Attorney's office under the Agreement to Furnish Security. On July 26, 1994, in accordance with the agreement, the United States Attorney executed and filed a Satisfaction of Mortgage for each of the mortgages described herein.

***SUMMARY OF PETITIONERS' POSITION***

8. Petitioners asserted that Mr. Shaoul, who made the payments of recording tax at issue, made such payments under duress because he was faced with imprisonment if he failed to comply with the Agreement to Furnish Security. Petitioners further asserted that Mr. Shaoul was not aware of the nature and consequences of the payment of recording tax at the time the payments were made. Petitioners also asserted that Mr. Shaoul was not aware of the two-year limitations period for the filing of a refund claim, and that it was Mr. Shaoul's understanding that all monies paid would be returned *ab initio* once he had fulfilled his obligation to the United States Attorney. Petitioners argued that it would be unfair and unjust for New York State to benefit from their mistakes and that the State has a good faith obligation to refund the recording tax at issue.

#### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may 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 NYCRR 3000.9[b][1]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as [summary judgment] motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; *see also, Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary judgment is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the "procedural equivalent of a trial" (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d

572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgment must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

As noted, a party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). On the other hand, one opposing a motion for summary determination:

must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York, supra*).

In this case, upon all of the proof presented and pursuant to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

B. Article 11 of the Tax Law imposes taxes on the recording of a mortgage on real property situated in New York State. Mortgages where the United States of America is the mortgagor or mortgagee are exempt from mortgage recording tax imposed under Article 11 (20

NYCRR 644.1[a][2]). Accordingly, petitioners erroneously paid recording tax on the mortgages described herein.

C. Pursuant to Tax Law § 263(1)(a), “[n]o refund of tax paid under this article [Article 11] shall be allowed unless the application for refund is filed within two years from the time the erroneous payment of tax was received.” Here, petitioners paid recording tax on October 1, 1993. Petitioners’ initial joint refund claim was filed on September 21, 1998, well beyond the two-year limitations period. The Division therefore properly denied petitioners’ refund claims as untimely.

D. Petitioners’ position amounts to a claim of an equitable exception to the period of limitations imposed by Tax Law §263(1)(a). The language of that section is unequivocal, however, and leaves no room for any such equitable exceptions. Moreover, even if the equitable circumstances were relevant, petitioners have not offered proof sufficient to raise an issue of fact, for petitioners’ factual allegations rest upon the unsubstantiated allegations set forth in their representative’s affirmation. Such allegations may not defeat a motion for summary determination (*see, Zuckerman v. City of New York, supra*). Moreover, even if the facts as alleged in petitioners’ representative’s affirmation were accepted as fact and the equitable circumstances of this case were relevant, such equities do not favor petitioners. Specifically, even assuming that petitioners paid the recording tax under duress, petitioners had two years from the date of payment to pursue the statutory remedy of a refund, but failed to do so. Additionally, even if Mr. Shaoul believed that the tax would be returned upon his fulfillment of his obligations under the Agreement to Furnish Security, there remained approximately 14 months from the satisfaction of the mortgages in July 1994 until the expiration of the limitations period, yet petitioners failed to file any refund claims within the statutory period. Thus, even

under the facts as alleged, petitioners had ample opportunity to timely file their refund claims. Finally, petitioners' assertion that Mr. Shaoul was not aware of the two-year limitations period for the filing of refund claims is of no merit, for every taxpayer is charged with knowledge of the Tax Law (*Nathal v. Commissioner of Taxation & Fin.*, 232 AD2d 836, 649 NYS2d 196).

E. The petitions of Orange Pyramid Association, Inc. and 833 Broadway Realty Corp. are denied, and the Division of Taxation's denial of petitioners' claims for refund is sustained.

DATED: Troy, New York  
April 13, 2000

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE