

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of : DETERMINATION  
**ARNOLD AND FLORENCE HANDLER** : DTA NO. 818308  
for Revision of a Determination or for Refund of Real :  
Estate Transfer Tax under Article 31 of the Tax Law. :  
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Petitioners, Arnold and Florence Handler, 425 East 58<sup>th</sup> Street, New York, New York 10022, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 27, 2002 at 1:15 P.M., with all briefs to be submitted by May 24, 2002, which date began the three-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Ted Lackner).

***ISSUE***

Whether petitioners are required to include in the consideration paid for a cooperative apartment the amount of the apartment's pro rata share of the underlying mortgage on the building in which the apartment is located because the seller was a successor sponsor of the cooperative conversion of the building.

***FINDINGS OF FACT***

1. On July 16, 1998, petitioners, Arnold and Florence Handler, purchased a cooperative apartment, #23D, in a building located at 425 East 58<sup>th</sup> Street, New York, New York, from Ms.

Viola Sommer, for \$950,000.00. The seller was a successor sponsor of the cooperative conversion of the building.

2. Petitioners and the seller filed a Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate, Form TP-584, which computed the amount of the consideration for the conveyance to be \$1,048,897.91. The consideration consisted of the cash price of \$950,000.00 plus the apartment's pro rata share of the underlying mortgage on the building of \$98,897.91. The return further indicated that the additional tax due on the conveyance of residential real property for one million dollars or more was \$10,488.98.

3. Petitioners paid the amount of additional tax due as shown on the return on July 16, 1998 and filed, on November 4, 1999, a Claim for Refund, Form TP-592.2, in the amount of \$10,488.98. The basis for petitioners' claim for refund was that the sales price for the apartment was less than one million dollars, and that the consideration shown on the return exceeded the one million dollar threshold only because the seller was a successor sponsor of the cooperative conversion and, as such, was required to report as part of the taxable consideration the amount of the apartment's pro rata share of the underlying mortgage on the building. Petitioners argue that their tax obligation should be determined based on the actual cash sales price, since they were non-sponsor purchasers.

4. The Division of Taxation ("Division") disallowed petitioners' claim for refund by letter dated January 5, 2000. The Division applied Tax Law § 1401(d)(v) to the transaction at issue, which states that in determining the amount of the consideration in the case of the original conveyance of shares in a cooperative housing corporation, consideration shall include a proportionate share of the unpaid principal of any mortgage on the real property of the cooperative housing corporation.

***CONCLUSIONS OF LAW***

A. Tax Law §§ 1402(a) and 1404 impose a real estate transfer tax on the grantor of each conveyance of real property or interest therein when the consideration exceeds five hundred dollars. Tax Law § 1402-a(a) provides that in addition to the basic tax imposed by Tax Law § 1402, a tax is imposed on each conveyance of residential real property or interest therein “when the consideration for the entire conveyance is one million dollars or more.” Such additional tax is to be paid by the grantee (Tax Law § 1402-a[b]). For purposes of this section, residential real property includes a cooperative apartment unit. Pursuant to Tax Law § 1401(d), consideration “means the price actually paid or required to be paid for the real property or interest therein . . . . It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to.”

Section 1401(d)(v) provides, in relevant part:

In the case of (i) the original conveyance of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold by the cooperative corporation or cooperative plan sponsor, . . . consideration shall include a proportionate share of the unpaid principal of any mortgage on the real property of the cooperative housing corporation comprising the cooperative dwelling or dwellings.

B. Section 1402-a(c) of the Tax Law provides that:

[e]xcept as otherwise provided in this section, all the provisions of this article relating to or applicable to the administration, collection, determination and distribution of the tax imposed by section fourteen hundred two of this article shall apply to the tax imposed under the authority of this section with such modifications as may be necessary to adapt such language to the tax so authorized. Such provisions shall apply with the same force and effect as if those provisions had been set forth in this section except to the extent that any provision is either inconsistent with a provision of this section or not relevant to the tax authorized by this section.

It is the position of the Division that section 1402-a(c) authorizes it to utilize the definition of consideration as provided in section 1401(d)(v) to require petitioners, as grantees from a

successor sponsor, to include in total consideration the proportionate share of the cooperative corporation's underlying mortgage. As the successor sponsor, the seller of the unit in question properly included in total consideration the amount of the apartment's pro rata share of the underlying mortgage on the building, as required by Tax Law § 1401(d)(v)(i). Petitioners argue that in determining the amount of the consideration for purposes of the additional tax imposed by Tax Law § 1402-a, Tax Law § 1401(d)(v)(i) is not applicable because such section applies to the determination of the amount of consideration for purposes of the grantor-sponsor, not the purchaser from such a seller. However, section 1401(d)(v) clearly states that in determining consideration for purposes of the real estate transfer tax imposed by Tax Law § 1402, consideration is to include the proportionate share of the unpaid underlying mortgage on the real property of the cooperative housing corporation comprising the cooperative unit. In addition, section 1402-a(c) of the Tax Law, which imposes the additional real estate transfer tax, states that all the provisions of Article 31, including those relating to the determination of the basic tax, apply to the additional tax imposed by section 1402-a(c), with such modifications as may be necessary to adapt such language to the tax so authorized. Petitioners' position is inconsistent with the incorporating language of section 1402-a(c) of the Tax Law and would effectively nullify such section, a result inconsistent with the notion that all parts of a statute should be harmonized with each other as well as with the general intent of the whole enactment, and meaning and effect be given to all provisions of the statute (McKinney's Cons Laws of NY, Book 1, Statutes, § 98). Furthermore, there is nothing in Tax Law § 1401(d) dealing with the definition of consideration which specifically limits its application to grantors only.

The conclusion reached herein is consistent with the definition of consideration contained in the statute, its application by section 1402-a(c) to the additional tax, the provisions of Tax

Law § 1405-B relating to cooperative housing corporation transfers and the Real Estate

Transfer Tax regulation 20 NYCRR 575.3, which provides as follows:

[w]hen determining the taxable consideration for the purpose of computing the additional tax, no deduction may be made for continuing liens on real property or, in the case of the conveyance of cooperative shares, for any mortgage on the property owned by the cooperative corporation or any lien on the cooperative housing shares.

As petitioners were required to include in the amount of total consideration the pro rata share of the unpaid principal of the underlying mortgage on the real property of the cooperative housing corporation comprising the cooperative dwelling, the Division properly denied petitioners' refund claim.

C. The petition of Arnold and Florence Handler is denied and the Notice of Disallowance dated January 5, 2000 is sustained.

DATED: Troy, New York  
June 20, 2002

/s/ Thomas C. Sacca  
PRESIDING OFFICER