

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DANIEL AND CHRISTINA PAPES : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 821658
Real Estate Transfer Tax under Article 31 of the Tax :
Law for Year 2005. :

Petitioners, Daniel and Christina Papes, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 2005.

On October 5 and 9, 2007, respectively, the Division of Taxation, appearing by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel), and petitioner, appearing by Pollock & Maguire, LLP (Lee A. Pollock, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by May 16, 2008, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioners' purchase of six one-sixth interests in a timeshare condominium was subject to the additional real estate transfer tax pursuant to Tax Law § 1402-a (Mansion Tax).

FINDINGS OF FACT

The Division of Taxation submitted 12 proposed findings of fact. The proposed findings of fact have been accepted in substance and have been made part of the Findings of Fact herein.

1. Petitioners entered into a Purchase and Sale Agreement for The Whiteface Lodge Condominium dated August 9, 2005. The agreement provided that Resort Holdings-Lake Placid, LLC, as sponsor, was to transfer to petitioners a residential condominium located at 7 Whiteface Inn Lane, Lake Placid, Town of North Elba, New York. The agreement provided that petitioners were to purchase six one-sixth interests known as Intervals I, II, III, IV, V and VI (the Fractional Interests) in Suite 201/203, together with a 0.0017% undivided interest in the common elements of the condominium. The purchase price was \$1,120,000.00. Pursuant to the agreement, petitioners represented that as purchasers, they were “purchasing the Fractional Interest for the personal and other permitted use of Purchaser and other permitted occupants only, to hold for an indefinite time with no expectation of profit or tax advantage therefrom whether through income, appreciation or otherwise” The agreement further provided, in part, under the “Definitions” section, that “[c]apitalized words and terms not otherwise defined in this Agreement shall have the meanings given to them in the Offering Plan for The Whiteface Lodge Condominium, Town of Elba, New York” Petitioners executed the Purchase and Sale Agreement on September 22, 2005 and an amendment to the agreement on September 26, 2005.

2. The Timeshare Offering Plan for The Whiteface Lodge Condominium was presented by Resort Holdings-Lake Placid, LLC, a New York limited liability company, for the sale of whole or fractional interests in The Whiteface Lodge Condominium. The Condominium is located at 204 Saranac Avenue in the Town of Elba, New York approximately one-half mile west of the

Village of Lake Placid, New York. There are 85 hotel suites in The Whiteface Lodge Condominium.

3. According to the Offering Plan, each purchaser of an interest in a hotel suite was to receive an undivided one-sixth fee simple title in the particular hotel suite (a Fractional Interest) with the exclusive right to occupy and use that suite. A purchaser may purchase one or more Fractional Interests in a hotel suite, and if a purchaser purchases all six of the intervals in a suite, the purchaser is referred to as a “Whole Interest Owner.”

4. The Offering Plan indicates that the condominium is located in the commercial business zoning district in the Town of North Elba, New York. Hotels are a permitted use in that zoning district subject to the issuance of a special use permit. The sponsor received a special use permit for a hotel from the Town of North Elba. Accordingly, to comply with applicable zoning requirements, the condominium was required to operate as a hotel, at least in part, where overnight transient guests are lodged. Overnight transient guests are deemed to be guests whose stays do not exceed 45 consecutive days. Accordingly, the Offering Plan specifically provides that a majority of the residential units in the condominium may not be occupied by the same natural person or persons for more than 45 consecutive days unless special arrangements are made with the board of managers. In addition, although a majority of the hotel suites, or residential units, are to be used by transient guests, the rental of such suites for use and occupancy for residential purposes on a transient basis is deemed a residential purpose.

5. On November 18, 2005, petitioners closed on the purchase of Hotel Suite No. 201/203 of The Whiteface Lodge Condominium, by acquiring six one-sixth time share intervals in the Hotel Suite known as Intervals I, II, III, IV, V and VI, together with a 0.0017% undivided interest in the common elements of the condominium. According to the Statement of Sale relating to the

conveyance, the total purchase price was \$1,120,000.00. As part of the closing costs, petitioners paid the additional transfer tax imposed by Tax Law § 1402-a in the amount of \$11,200.00. The deed, dated November 18, 2005, indicates a transfer between Resort Holdings-Lake Placid, LLC, as grantor, and Daniel W. And Christina A. Papes, as grantees, of “Unit 201/203 (hereinafter called the ‘Unit’) in The Whiteface Lodge Condominium, including all six Intervals” (Intervals I, II, III, IV, V and VI), together with an undivided interest in the common elements. The deed further provides that “the Unit is designated also as Tax Lot No. 42.006-2-9.310/27 in the Town of North Elba, New York.”

6. On January 5, 2006, petitioners filed a Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate (Form TP-584) reporting the conveyance of November 18, 2005. The return indicates Resort Holdings-Lake Placid, LLC, as grantor, petitioners, as grantees, the type of property conveyed as “Residential condominium,” the percentage of real property conveyed which is residential real property as 100% and the consideration for the conveyance to be in the amount of \$1,120,000.00. The return further provides that petitioners paid real estate transfer tax in the amount of \$4,480.00 and paid additional real estate transfer tax in the amount of \$11,200.00.

7. On February 6, 2006, petitioners filed a Real Estate Transfer Tax Claim for Refund, Form TP-592.2, claiming a refund in the amount of \$11,200.00. Petitioners asserted in the refund claim that the conveyance which occurred on November 18, 2005 was of six separate intervals in a timeshare unit. Petitioners further asserted, in the refund claim, that as each one-sixth interval of the timeshare is separate, with separate deeds in the same unit, and each interval being worth \$186,677.00, individually, each conveyance is not subject to the additional real estate transfer tax.

8. In a letter dated February 16, 2006, the Division of Taxation (Division) advised petitioners that their refund claim was disallowed. The Division explained, in part, as follows:

It is our position that by purchasing all six of the available intervals in the timeshare unit you effectively purchased a one hundred percent interest in a single condominium apartment unit. As the total consideration is more than one million dollars and the property acquired is residential real property, the additional tax is due and owing.

Accordingly, the refund is denied in its entirety.

CONCLUSIONS OF LAW

A. In 1989, a real estate transfer tax on residential property known as the Mansion Tax was enacted under the Laws of 1989 (ch 61, § 182-a). This transfer tax was in addition to the real estate transfer tax imposed by Tax Law § 1402. The Mansion Tax, codified at Tax Law § 1402-a(a), provides 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. Such tax shall be paid at the same time and in the same manner as the tax imposed by section fourteen hundred two of this article.

B. The evidence in the record clearly establishes that the consideration for the entire conveyance at issue exceeded one million dollars. The Purchase and Sale Agreement, the Statement of Sale for the closing and the Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate (Form TP-584) all indicate the purchase price for the conveyance at issue to be \$1,120,000.00.

C. The record supports the Division's position that the conveyance involved the transfer of a single condominium unit, not six separate intervals in a timeshare unit at a cost of \$186,677.00 per interval. The deed conveying the property at issue describes the property as "Unit 201/203 (hereinafter called the 'Unit') in The Whiteface Lodge Condominium, including all six Intervals" The deed further states "that the Unit is designated also as Tax Lot No. 42.006-2-9.310/27 in the Town of North Elba, New York." Petitioners filed a single Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate reporting the conveyance of the residential condominium at a consideration of \$1,120,000.00. The Statement of Closing indicates one purchase price together with closing costs, without any allocation of the purchase price or taxes to six separate intervals. Here, there were no separate contracts and no separately stated purchase prices. There is no evidence that the parties thought of their dealings as involving separate transactions. By purchasing all six of the available intervals in the timeshare condominium unit, petitioners effectively purchased a 100% interest in a single condominium unit with a total purchase price of \$1,120,000.00, bringing the transfer within the requirements of Tax Law § 1402-a(a) (*see Matter of Kelly*, Tax Appeals Tribunal, February 1, 2007).

D. Petitioners claim that the property conveyed is not residential real property within the meaning of Tax Law § 1402-a because the hotel suites are to be used on a transient basis and therefore cannot be a personal residence. Petitioners' position is based on the allegation that the restriction that the stays of overnight occupants of the hotel suites cannot exceed 45 days precludes the premises from being considered residential real property. However, it is noted that petitioners themselves, in filing the Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate (Form TP-584) stated that the type of property conveyed was a "Residential condominium," and that the percentage of real property conveyed which is

residential real property was 100%. Petitioners, as purchasers of all six intervals in the Hotel Suite No. 201/203 of The Whiteface Lodge Condominium, were considered “whole interest owners” as defined by the Offering Plan. The Offering Plan makes clear that only a majority of the hotel suites were to be subject to the restriction of requiring transient guests, and even this restriction could be waived by the board of managers. Furthermore, the Offering Plan specifically provides that although a majority of the hotel suites, or residential units, are to be used by transient guests, the rental of such suites for use and occupancy for residential purposes on a transient basis is deemed a residential purpose. It is clear that petitioners, and the Offering Plan, at the time of the conveyance, intended that the premises were to be used as a personal residence.

E. Petitioners have not established that their hotel suite could only be used for a period of 45 consecutive days. The Offering Plan specifically provides that a majority of the residential units may not be occupied by the same individual or individuals for more than 45 consecutive days. As there are 85 hotel suites in the condominium, 42 of such suites would not be subject to this limitation. Petitioners have not established whether their condominium unit was so limited, and as owners of a 100% interest in a single condominium unit, it would be logical to assume, absent any evidence to the contrary, that their hotel suite would be available for continuous occupancy. Furthermore, the Offering Plan contains a provision whereby special arrangements can be made with the board of managers of the condominium units to allow occupancy for more than 45 consecutive days. Petitioners have failed to establish that such special arrangements were either requested or denied. The record does not support petitioners’ position that they were limited in the number of consecutive days they could stay in their hotel suite.

F. The additional real estate transfer tax imposed by Tax Law § 1402-a is applicable to conveyances of residential real property or interest therein when the consideration for the entire conveyance is \$1,000,000.00 or more. The statute includes in the definition of residential real property an individual condominium unit that is or may be used in whole or in part as a personal residence at the time of conveyance. Petitioners purchased a 100% interest in a condominium unit for \$1,120,000.00, a purchase which they themselves considered to be a residential condominium when they filed the Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate (Form TP-584). They also considered the conveyance to involve 100% of residential real property. The Offering Plan also indicates that the condominium unit was to be used in whole or in part as a personal residence. Under these circumstances it is concluded that, at the time of the conveyance of the condominium unit for a sum in excess of \$1,000,000.00, the transaction involved the transfer of residential real property which was intended to be used as a personal residence within the meaning and intent of Tax Law § 1402-a(a). Therefore, petitioners' claim for refund is denied.

G. The petition of Daniel and Christina Papes is denied, and the Division of Taxation's denial of petitioners' refund claim is sustained.

DATED: Troy, New York
October 30, 2008

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE