

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
GOVERNMENT OF THE REPUBLIC OF MADAGASCAR/ PERMANENT MISSION OF MADAGASCAR TO THE UNITED NATIONS	:	DETERMINATION 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.	:	

Petitioner, Government of the Republic of Madagascar/ Permanent Mission of Madagascar to the United Nations, filed petitions for revision of determinations or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 2007.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the office of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 26, 2009 at 10:30 A.M., with all briefs submitted by June 15, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Michael R. Atadika, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

Judge Barrie retired from the Division of Tax Appeals in July 2009 and this matter was assigned to Administrative Law Judge Timothy Alston. After due consideration of the record, Judge Alston renders the following determination.

ISSUES

I. Whether petitioner, a diplomatic mission of a sovereign state, has established entitlement to a refund of real estate transfer tax paid in respect of 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 in respect of 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

1. 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.

2. 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

3. Petitioner was the owner of residential real property located on East 74th 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]).

4. Petitioner entered into a Residential Contract of Sale dated November 27, 2006 to sell the property located on East 74th 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.

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

6. The closing for the property located on East 74th 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 in respect of the conveyance on petitioner’s behalf.

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

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

9. 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 in respect of the conveyance of the East 74th Street property.

10. 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

11. 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.

12. 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 in respect

of 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.

13. Petitioner as grantee and the seller as grantor executed and filed a joint Combined Real Estate Transfer Tax Return (Form TP-584) in respect of 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.

14. 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.

15. 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 in respect of the conveyance of the condominium unit.

16. 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.

17. 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 in respect of such payment. By check dated November 9, 2007, the Finance Department granted petitioner's refund claim.

18. The Division submitted proposed findings of fact numbered 1 through 22. Proposed findings 1 through 10 and 13 through 20 are accepted and have been incorporated, in substance,

herein. Proposed findings of fact 11, 12, 21 and 22 set forth some of the undisputed procedural history of this matter and are not recited herein.

CONCLUSIONS OF LAW

A. The real estate transfer tax is “imposed on each conveyance of real property or interest therein” (Tax Law § 1402[a]). 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 from the tax, the grantee has the duty to pay the tax (Tax Law § 1404[a]).

B. Tax Law § 1405(a) exempts the following entities from payment of the real estate transfer tax:

1. The State of New York, or any of its agencies, instrumentalities, political subdivisions, or public corporations
2. The United Nations, the United States of America and any of its agencies and instrumentalities.

This subsection further provides that “the exemption of such governmental bodies or persons shall not, however, relieve a grantee from them of liability for the tax.”

C. Tax Law § 1409 requires the filing of a joint return by both the grantor and the grantee for each conveyance of real property, whether or not tax is due thereon. Tax Law § 1410(b) requires the return to be filed and the transfer tax due, if any, to be paid before the deed of the property conveyed may be recorded by the recording officer.

D. Article 23 of the Vienna Convention on Diplomatic Relations of 1961 (*see* Finding of Fact 2) provides as follows:

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the

mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or head of mission.

E. Treaties, such as the 1961 Vienna Convention on Diplomatic Relations, are the “Supreme Law of the Land” (*see* United States Constitution, Article VI). The State of New York is bound by international treaties such as the Vienna Convention (*see United States v. City of Glen Cove*, 322 F Supp 149 [ED NY 1971], *affd* 450 F2d 884 [2d Cir 1971]).

F. There is no question in the present matter that petitioner, as the diplomatic mission of a sovereign nation, is exempt from the imposition of New York State taxes in general and real estate transfer taxes in particular pursuant to Article 23, paragraph 1, of the Vienna Convention.

G. With respect to petitioner’s sale of the East 74th Street property, the facts in this case are on all fours with the facts in *Matter of the Ministry of Foreign Affairs of the Arab Republic of Egypt* (Tax Appeals Tribunal, January 20, 2005). Accordingly, the Tribunal’s decision is controlling in the instant matter and compels a finding against petitioner.

In that case, as in the present matter, mission premises 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 in the present matter, 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 must be denied because, as in the *Egypt* case,

“[pe]titioner 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.”

H. The *Egypt* decision 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, contracted to pay one-half of the liability. Accordingly, consistent with the Tribunal’s rationale in the *Egypt* case, since “petitioner was not liable for the transfer tax under the Tax Law,” its payment cannot be considered erroneous and its refund claim must be denied.

I. Petitioner contends that because it was exempt from the transfer taxes at issue pursuant to the Vienna Convention, its refund claims must be granted. As noted above, there is no question that petitioner was exempt from the imposition of transfer taxes under Article 23, paragraph 1, of the Vienna Convention. The State of New York, however, did not impose any tax liability upon petitioner. Rather, under the Tax Law, the subject transfer taxes were imposed on the other parties to the transactions. As noted, petitioner’s obligation to pay resulted from its contractual agreements. Pursuant to the *Egypt* decision, under such circumstances, there is no remedy for petitioner under the Tax Law.

It is observed that paragraph 2 of Article 23 of the Vienna Convention specifically limits the diplomatic mission’s tax exemption by denying its application to “taxes payable under the law of the receiving State by persons contracting with [the mission].” Here, the transfer taxes at issue were payable by persons contracting with the mission, specifically, the purchaser of the East 74th Street property and the seller of the condominium unit. Hence, the imposition of the transfer taxes at issue was not inconsistent with Article 23 of the Vienna Convention.

Furthermore, as the imposition and payment of the subject taxes was not contrary to the Vienna Convention, there is no Supremacy Doctrine issue as asserted by petitioner.

J. Petitioner asserted that it paid the taxes at issue under duress and compulsion and that, accordingly, its payments were not voluntary. This claim is not supported by the record. The record shows that petitioner freely entered into contracts pursuant to which petitioner agreed to pay transfer tax. If these terms were unsatisfactory, petitioner should not have agreed to them. There is no dispute that payment of the tax was required to record the deeds. Petitioner's payment of such tax, however, was an obligation it freely assumed.

K. 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. Petitioner also submitted a letter from the United States Department of State asserting that petitioner is entitled to an exemption from all taxes associated with the sale of the East 74th Street property. Additionally, a letter from the Madagascar Minister of Finance asserted exemption for the taxes at issue under the Vienna Convention and a letter from the United States Ambassador to Madagascar noted his embassy's tax exempt status in that country.

With respect to these letters, it is noted, again, that petitioner's exempt status is not in dispute. It is further noted that 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, there is no legal basis upon which to grant petitioner's claims, its exempt status notwithstanding.

L. 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 (*see* Finding of Fact 17). Considering, however, that New York State and New York City are different entities operating under different (albeit similar) laws (*cf.* New York City Administrative Code § 11-2106), and also considering that the basis for the Department of Finance's decision to grant a refund is not in the record, the fact of the City refund is clearly insufficient to overcome the statutory language and Tribunal precedent in this matter.

M. Petitioner also cited Real Property Tax Law § 418 in support of its position. That section specifically exempts the real property of a foreign government from taxes on real property. As noted, although petitioner is not entitled to the claimed refunds, petitioner's exempt status is not in dispute. In any event, Real Property Tax Law § 418 is not relevant herein as the present matter involves a tax not on real property but on the transfer of real property and is imposed under the Tax Law and not the Real Property Tax Law.

N. The petitions of the Government of the Republic of Madagascar/ Permanent Mission of Madagascar to the United Nations are denied and the Division of Taxation's denials of petitioner's refund claims are sustained.

DATED: Troy, New York
December 10, 2009

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE