

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
182-188 COLUMBUS AVENUE LLC	:	DETERMINATION
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Year 2007.	:	DTA NO. 823746

Petitioner, 182-188 Columbus Avenue LLC, 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 2007.

On April 2 and 16, 2012, respectively, petitioner, appearing by Perelson Weiner LLP (Robert Spierer, CPA), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), waived a hearing and submitted this matter for determination based upon documents and briefs to be submitted by October 5, 2012, which date commenced the six-month period for issuance of this determination. After due consideration of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that the conveyance of residential real property located in Upper Brookville, New York, on May 10, 2007 to petitioner was subject to the additional real estate transfer tax imposed pursuant to Tax Law § 1402-a.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been substantially incorporated into the Findings of Fact below.

1. On March 26, 2007, Frederick J. Rudd, as buyer, entered into a Contract For Sale of Government Real Property for 34-44 Chestnut Hill Drive, Upper Brookville, New York 11771, with EG&G Technical Services, acting as agent of the Government with respect to the sale of Government real property on behalf of the Internal Revenue Service (IRS), as seller, for a purchase price of \$8,300,000.00.

2. On March 27, 2007, Michael Pescatore, as grantor, and the United States of America c/o EG&G Technical Services, Inc., as grantee, executed and filed a Form TP-584 - Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax (Form TP-584 - Combined Real Estate Transfer Tax Return) reporting a conveyance that occurred on March 27, 2007 of residential real property located at 34 Chestnut Hill Drive, Upper Brookville, Nassau County, New York, that listed the amount of consideration for the conveyance as \$0. Under Schedule B, Part III - Explanation of exemption claimed on Part I, line 1, "Other" was designated on line 1 and the explanation listed as "Transfer to U.S. Gov't pursuant to Asset Forfeiture."

3. On March 27, 2007, the United States of America c/o EG&G Technical Services filed a Form RP-5217 - Real Property Transfer Report, reporting the conveyance of 34 Chestnut Hill Drive, Upper Brookville, New York, to the United States of America c/o EG&G Technical Services, as buyer, from Michael Pescatore, as seller.

4. The IRS issued a Certificate of Discharge of Property From Federal Tax Lien (Section 6325[b][2][B] of the Internal Revenue Code),¹ Form 669-C for the premises known as 34-44 Chestnut Hill Drive, Upper Brookville, New York, designated pursuant to the Tax Map of Nassau County as Section 24, Block E, Lot 1050.

5. On April 23, 2007, Frederick J. Rudd, as assignor, entered into an Assignment and Assumption of Contract of Sale for the Contract For Sale of Government Real Property for the premises 34-44 Chestnut Hill Drive, Upper Brookville, New York, dated March 26, 2007, with petitioner, 182-88 Columbus Avenue LLC, as assignee, for consideration of \$10.00.

6. By Internal Revenue Service Deed dated May 4, 2007, the United States of America, acting by and through the IRS, as grantor, transferred the property known as 34-44 Chestnut Hill Drive, Upper Brookville, New York, to petitioner, as grantee, in consideration of a bid of \$8,300,000.00. The Internal Revenue Service Deed stated, in part, the following:

TO HAVE AND TO HOLD THE SAME together with all singular the appurtenances thereunto belonging or in any wise appertaining, and all the estate, right, title, interest and claim whatsoever in the said property either in law or equity, to the use, benefit and behoove of the Grantee, its successors and assigns forever. Said property has been in the custody and control of the United States of America, and pursuant to the order of this Court in Case No. 03-6456 in the United States District Court Eastern District of New York the SPECIAL AGENT IN CHARGE, Criminal Investigation, Internal Revenue Service, has been directed to dispose of said property.

This deed is executed to consummate the sale made by the SPECIAL AGENT IN CHARGE, Criminal Investigation, Internal Revenue Service, New York Field Office, in accordance with the terms of the Stipulation of Settlement and Decree of Forfeiture entered by the United States District Court for the Eastern District of New York in the case of the United States of America v. Real Property and Premises Located at 322 Richardson Street, Brooklyn, New York, et al. including

¹ A discharge is issued under Internal Revenue Code (IRC) § 6325(b)(2)(B) when it is determined that the government's interest in the property has no value. The debts senior to the federal tax lien are greater than the fair market value of the property or greater than the sale value of the property.

the appurtenances and improvements thereon, which the Grantee was the successful bidder for the property herein described.

7. On May 10, 2007, a real estate closing for the purchase of the premises known as 34-44 Chestnut Hill Drive, Upper Brookville, New York, by petitioner from the United States of America, acting through the IRS by its agent EG&G Technical Services, was held.

8. On June 11, 2007, the Division of Taxation (the Division) received a Form TP-584 - Combined Real Estate Transfer Tax Return reporting a conveyance that occurred on May 10, 2007 between the United States of America c/o EG&G Technical Services, Inc., as grantor, and petitioner, as grantee, of residential real property located at 34 Chestnut Hill Drive, Upper Brookville, Nassau County, New York, that listed the total amount of consideration for the conveyance as \$8,300,000.00. The parties to the conveyance reported real estate transfer tax due on the conveyance in the amount of \$33,200.00 on line 6 under Schedule B, Part I, and additional real estate transfer tax (also known as the "mansion tax") due of \$83,000.00 on line 3 under Schedule B, Part II, on Form TP-584. On this form, the parties also reported that a fee interest in a one- to three-family house was conveyed and that the "Percentage of real property conveyed which is residential real property" was 100%.

9. Petitioner, as buyer, and the United States of America c/o EG&G Technical Services, as seller, filed a Real Property Transfer Report - Form RP-5217 for the conveyance that occurred on May 10, 2007 of 34 Chestnut Hill Drive, Upper Brookville, New York. The full sale price was listed as \$8,300,000.00, and the use of the property at the time of the sale was described as one-family residential.

10. Petitioner filed a Real Estate Transfer Tax Claim for Refund, Form TP-592.2, dated February 4, 2009 claiming a refund of the additional real estate transfer tax paid in the amount of

\$83,000.00. In that claim, petitioner alleged that the mansion tax did not apply to the conveyance of the Upper Brookville, New York, property. Petitioner's claim was based upon the assertion that the conveyance of the property on May 10, 2007 was a transfer made by the United States Government in its capacity as a receiver of the property under a federal tax lien and thus the re-conveyance of the property to it should not be treated as a transfer subject to the real property transfer tax.

11. The Division performed an audit of petitioner's tax return for the transfer at issue that occurred on May 10, 2007.

12. Based upon the audit, the Division determined that the conveyance to petitioner on May 10, 2007 is subject to the additional real estate transfer tax imposed pursuant to Tax Law § 1402-a and does not meet the criteria for exemption from payment of real estate transfer tax under Tax Law § 1405; therefore, the refund claimed by petitioner was denied in its entirety.

13. On April 9, 2009, the Division issued a refund denial letter to petitioner denying the claimed refund of \$83,000.00.

14. Petitioner thereafter filed a petition with the Division of Tax Appeals that was received on July 22, 2010, to which the Division timely filed an answer in response. In its petition, petitioner asserts that its purchase of the Upper Brookville, New York, property is exempt from the additional real estate transfer tax (the mansion tax) because the deed conveying the property to it should be considered a deed given in connection with a tax sale.

15. Petitioner submitted no documents or brief.

CONCLUSIONS OF LAW

A. Tax Law § 1402-a provides, in part, as follows:

(a) 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.

(b) Notwithstanding the provisions of subdivision (a) of section fourteen hundred four of this article, the additional tax imposed by this section shall be paid by the grantee. If the grantee is exempt from such tax, the grantor shall have the duty to pay the tax.

B. 20 NYCRR 575.3 provides, in part, as follows:

(a) In addition to the tax imposed by section 1402 of the Tax Law and described in section 575.2 of this Part, a tax is imposed on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is \$1,000,000.00 or more. For purposes of this section, residential real property means the following premises that are or may be used in whole or in part as a personal residence at the time of conveyance: a one-, two-, or three-family house; an individual condominium unit; a cooperative apartment unit. When 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.

(b) The rate of such tax is one percent of the consideration or part thereof attributable to the residential real property. The tax must be paid at the same time and in the same manner as the tax imposed by section 1402 of the Tax Law and described in section 575.2 of this Part.

C. On May 10, 2007, petitioner acquired the Upper Brookville, New York, property from the United States of America, acting through the IRS by its agent EG&G Technical Services, Inc. On the Form TP-584-Combined Real Estate Transfer Tax Return filed on June 11, 2007, the property is described as residential real property, and the consideration for the entire conveyance was \$8,300,000.00. Therefore, the conveyance of the Upper Brookville, New York, property to petitioner was subject to the tax imposed by Tax Law § 1402-a. Petitioner asserts that the deed conveying the property to it should be considered a deed given in connection with a tax sale, and

therefore the conveyance would be exempt under Tax Law § 1405(b)(5) from the imposition of the additional real estate transfer tax.

D. Statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed against the taxpayer (*see Matter of International Bar Assn. v. Tax Appeals Tribunal*, 210 AD2d 819, 620 NYS2d 582 [1994], *lv denied* 85 NY2d 806, 627 NYS2d 323 [1995]; *Matter of Estate of Lever v. New York State Tax Commn.*, 144 AD2d 751, 535 NYS2d 158 [1988]). “Petitioner has the burden of showing a clear entitlement under a provision of the law plainly giving the exemption (citations omitted)” (*Matter of Old Nut Co. v. New York State Tax Commn.*, 126 AD2d 869, 871, 511 NYS2d 161, 163 [1987], *lv denied* 69 NY2d 609, 516 NYS2d 1025 [1987]).

E. Tax Law § 1405(b) exempts certain conveyances from the real estate transfer tax. Among the transactions listed as exempt are, “5. Conveyances given in connection with a tax sale.”

Unfortunately, the statute does not define “tax sale.” It is appropriate, therefore, to interpret this phrase in its ordinary, everyday sense (*Matter of Automatique v. Bouchard*, 97 AD2d 183, 470 NYS2d 791 [1983]). Webster’s Third New International Dictionary of The English Language Unabridged defines “tax sale” as “a sale (as at public auction) conducted by an officer of the taxing authority of specific property for nonpayment of a tax due from its owner and granting to the purchaser a tax title” (Webster’s Third New International Dictionary of The English Language Unabridged 2345 [1986]). Black’s Law Dictionary defines “tax sale” as a “sale of property for nonpayment of taxes” (Black’s Law Dictionary 1311 [5th ed 1979]).

F. It is clear from the documents in the record that the conveyance of the Upper Brookville, New York, property on May 10, 2007 was not a conveyance given in connection with

a tax sale. Under the terms of a Contract For Sale of Government Real Property dated March 26, 2007, the United States of America, by the IRS acting through EG&G Technical Services, Inc., agreed to sell and Frederick J. Rudd, agreed to purchase, the government's fee title interest in the Upper Brookville, New York, property. Subsequently, on April 23, 2007, Mr. Rudd assigned his right, title and interest under the March 26, 2007 Contract for Sale of Government Real Property to petitioner. By Internal Revenue Service Deed dated May 4, 2007, the United States of America, acting by and through the IRS, transferred the Upper Brookville, New York, property to petitioner in consideration of a bid of \$8,300,000.00. Review of that deed indicates that the sale of the Upper Brookville, New York, property was directed by the United States District Court, Eastern District of New York, in Case No. 03-6456. Further review indicates that the Special Agent In Charge, Criminal Division, Internal Revenue Service, executed the deed "to consummate the sale" of the property, "in accordance with the terms of the Stipulation of Settlement and Decree of Forfeiture entered by the United States District Court for the Eastern District of New York" in Case No. 03-6456. The record does not include a copy of the Stipulation of Settlement and Decree of Forfeiture, therefore its terms are unknown. However, it is noted that the IRS issued a Certificate of Discharge of Property From Federal Tax Lien under IRC § 6325(b)(2)(B) for the Upper Brookville, New York, property. A discharge is issued under section 6325(b)(2)(B) when it is determined that the government's interest in the property has no value, i.e., debts senior to the federal tax lien are greater than the fair market value of the property or greater than the sale value of the property. The purchase and sale of the Upper Brookville, New York, property was a simple residential real estate transaction between two parties, the United States of America, by the IRS acting through EG&G Technical Services, Inc., and petitioner, that closed on May 10, 2007. Accordingly, petitioner has failed to establish

entitlement to the exemption under Tax Law § 1405(b)(5). As such, the Division's disallowance of petitioner's claim for refund of the additional real estate transfer tax was proper.

G. The petition of 182-188 Columbus Avenue LLC is denied, and the Division of Taxation's denial of the refund claim, dated April 9, 2009, is sustained.

DATED: Albany, New York
March 14, 2013

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE