

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROBERT J. RANDELL</b>	:	
<b>AS EXECUTOR OF</b>	:	DETERMINATION
<b>THE ESTATE OF PHYLLIS MILLSTEIN</b>	:	DTA NO. 827359
<b>AND AS TRUSTEE OF</b>	:	
<b>THE IRVING AND PHYLLIS MILLSTEIN</b>	:	
<b>CHARITABLE TRUST FOR ANIMALS</b>	:	
	:	
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Period July 14, 2015.	:	

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Petitioner, Robert J. Randell, as Executor of the Estate of Phyllis Millstein and as Trustee of the Iving and Phyllis Millstein Charitable Trust for Animals, filed a petition for redetermination of a deficiency or for refund of real estate transfer tax under article 31 of the Tax Law for the period July 14, 2015.

On June 30, 2017 and July 6, 2017, respectively, petitioner, appearing by Meltzer, Lippe, Goldstein & Breitstone, LLP (Jeffrey A. Galant, Esq., and Jason K Blasburg, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by December 29, 2017, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund of real estate transfer tax with respect to a transaction occurring on July 14, 2015.

***FINDINGS OF FACT***

1. Petitioner is the duly appointed executor of the Estate of Phyllis Millstein (Estate), and is the trustee of a trust, known as the Irving and Phyllis Millstein Charitable Trust for Animals (Trust), established under Article FIFTH of the May 1, 2001 Last Will and Testament of Phyllis Millstein (Will). The purposes of the Trust, as described in Article FIFTH of the Will, are to provide “. . . for the care of neglected and homeless animals and for the prevention of cruelty to animals, which may include public and private education, and research in connection therewith . . .”.

2. Phyllis Millstein died a resident of New York, New York, on March 21, 2009, owning real property situated at 22 East 81st Street, New York, New York (Property). Her Will was duly admitted to probate by the Surrogate's Court, New York County, on March 18, 2010. Letters Testamentary and Letters of Trusteeship were duly granted to petitioner on March 18, 2010.

3. Pursuant to Article FIFTH, Paragraph 1A of the Will, the residuary estate passed to the Trust established by the Will. Title to the Property vested in the Trust.

4. By a letter dated May 30, 2014, the Internal Revenue Service (IRS) informed petitioner that the Trust was exempt from federal income tax under section 501 (c) (3) of the Internal Revenue Code (IRC), such that contributions, bequests, devises, transfers or gifts to the Trust are tax deductible under IRC §§ 170, 2055, 2106 and 2522. This letter further advised petitioner that organizations that are exempt under IRC § 501 (c) (3) are classified as either public charities or

private foundations, that the Trust was classified as a private foundation within the meaning of IRC § 509 (a), and was required to file form 990-PF on an annual basis.

5. Similarly, the Trust was granted New York State and local sales and use tax exempt status with regard to its purchases, pursuant to an Exempt Organization Certificate (Form ST-119) issued by the Division on May 19, 2014.

6. On July 14, 2015, the Property was sold and transferred to 22 East 81st LLC (Purchaser), for the sum of \$15,600,000.00.

7. In connection with the sale of the Property, the Estate filed Form TP-584 (Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certificate of Exemption from the Payment of Estimated Personal Income Tax), and paid, under protest, New York State real estate transfer tax (State Tax) under Tax Law article 31 in the amount of \$62,400.00.<sup>1</sup>

8. On July 31, 2015, the Estate assigned the right to make and file a refund claim, including the proceeds of any refund of the State Tax, to the Trust. In turn, petitioner filed Form TP-592.2 (real estate transfer tax claim for refund), seeking a refund of the State Tax based upon the provisions of Tax Law §§ 1405 (a) (1) and (2) and 1405 (b) (1).

9. By a Refund Claim Determination Notice, dated September 4, 2015, the Division of Taxation (Division) denied petitioner's claim in full.

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<sup>1</sup> There is no dispute as to the computation of the amount of real estate transfer tax that was paid and that would be due, assuming the transaction is properly subject to such tax.

10. In connection with the sale of the Property, the Estate also filed Form NYC-RPT (Real Property Transfer Tax Return), and paid, under protest, the New York City real property transfer tax (City Tax) in the amount of \$409,500.00.<sup>2</sup>

11. On July 31, 2015, the Estate assigned the right to make and file a refund claim, including the proceeds of any refund of the City Tax, to the Trust. In turn, petitioner filed an Application to Claim a Refund of Real Property Transfer Tax, seeking a refund of the City Tax.

12. By a letter dated August 19, 2016, the New York City Department of Finance denied petitioner's claim for refund in full. Petitioner challenged this denial by filing a petition with the New York City Tax Appeals Tribunal, dated November 9, 2016, on the basis that the deed was made by the Trust (citing certain New York City Department of Finance letter rulings in support).<sup>3</sup> On January 17, 2017, the New York City Department of Finance issued to petitioner a check, refunding the full \$409,500.00 amount of the City Tax paid.

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

A. Under Tax Law article 31, a real estate transfer tax is “imposed on each conveyance of real property or interest therein” (Tax Law § 1402 [a]), and all conveyances are presumed subject to the tax (Tax Law § 1404). Tax Law § 1404 (a) specifies that the real estate transfer tax shall be paid by the grantor, unless the grantor is exempt from payment of the tax, in which case the grantee shall be liable for the tax.

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<sup>2</sup> There is no dispute as to the computation of the amount of New York City real property transfer tax that was paid and that would be due, assuming the transaction is properly subject to such tax.

<sup>3</sup> The specifically cited letter rulings were: FLR- (13) - RP - 2/84 (February 3, 1984) and FLR 94-4392 (November 7, 1994) [title to the Property vested in the Trust and deed was made by the Trust], and FLR - (47) - RP - 7/87 (July 1, 1987) [Estate was nominee for the Trust with respect to the Property].

B. Tax Law § 1405 (a) and 20 NYCRR 575.9 (b) specify certain transferors as exempt from the payment of the foregoing tax, as follows:

“(a) The following shall be exempt 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.

The exemption of such governmental bodies or persons shall not, however, relieve a grantee from them of liability for the tax.”

Tax Law § 1405 (b) (1) provides, in relevant part, as follows:

“(b) the tax shall not apply to the following conveyances:

1. Conveyances to the United Nations, the United States of America, the State of New York, or any of their instrumentalities, agencies or political subdivisions (or any public corporation, including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada); . . . .<sup>4</sup>”

C. Petitioner seeks the benefit of an exemption from tax, which, like all tax exemptions, must be strictly and narrowly construed. As such, petitioner bears the burden of demonstrating that the subject conveyance, or the parties thereto, come within the reach of the exemption (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]).

D. As above, the United States, the State of New York, and any agencies, instrumentalities, political subdivisions and public corporations thereof (collectively referred to

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<sup>4</sup> The statutory provisions apply to conveyances to and by the United Nations. That entity was not a party in any manner to the subject transaction.

herein as governmental bodies) are, as transferors, exempted from the payment of the real estate transfer tax. Similarly, the tax shall not apply with respect to conveyances to any of such governmental bodies. In order to grant petitioner's claim for refund, it is necessary to accept the notion that the conveyance in question is exempt because the transferor of the Property was among the foregoing specified governmental bodies that are exempt from the payment of the tax. Petitioner claims that the transferor-in-fact was the Trust, in that the legal and beneficial ownership of, and title to, the Property vested immediately in the Trust created upon the death of Phyllis Millstein, pursuant to the residuary clause (Article Fifth) of the Will, and that the Estate was merely a nominee transferor for the Trust. Petitioner goes on to argue that in carrying out the laudable and well-recognized public policy goal of protecting and providing for the welfare of animals, the Trust serves to alleviate a portion of the financial burden that would otherwise be born by the government in carrying out such public policy. Petitioner therefore maintains that the Trust should be considered an agent or instrumentality of the Federal and/or State government. Essentially, petitioner argues that the good works performed by the Trust, in accordance with its terms, make the Trust a governmental body that is exempt from the payment of real estate transfer tax under Tax Law § 1405 (a). Petitioner further asserts that the Trust's receipt and subsequent use of the proceeds of the conveyance of the Property should also result in exemption under Tax Law § 1405 (b) (1), since the government is a direct financial beneficiary of the transaction.

E. Regardless of whether the Estate, as the listed party to the conveyance, or the Trust, as the owner of the Property conveyed, is properly considered the transferor with respect to the conveyance upon which the tax was imposed, it remains that neither comes within the terms of

the exemptions pertaining to governmental bodies as specified under Tax Law § 1405 (a). Neither is the State of New York, or the United States of America, or any of the specified instrumentalities or agencies of either of those governmental bodies. There is no evidence that any governmental body consented to have the Trust act on its behalf as an agency or instrumentality thereof (*see Matter of Friends of the Town of Pelham Public Library, Inc.* (Tax Appeals Tribunal, September 3, 1992; citing *Matter of Hooper Holmes, Inc. v Wetzler*, 152 AD 2d 871 [3d Dept 1989], *lv denied* 75 NY 2d 706 [1990]; *Matter of C. E. Towers Co. v State Tax Commn.*, 135 AD2d 976 3d Dept [1987], *lv denied* 71 NY2d 804 [1988])). Furthermore, neither: a) the fact that the Trust may carry out acts that serve the good of the general public, so as to thereby augment or provide assistance that may reduce the financial burdens placed on governmental bodies, or b) the fact that the Trust, like many other organizations serving charitable purposes, is required to report to, and is subject to regulation by, various governmental bodies, serve to confer the status of agency or instrumentality of a governmental body upon the Trust. The Trust is, as the Division points out, a private trust. The fact that the Trust carries the organizational status and benefits afforded by the exemptions it holds with respect to income tax and sales tax, as described (*see* Findings of Fact 4 and 5), does not concomitantly qualify the Trust for the particular exemptions from the real estate transfer tax specifically set forth under Tax Law § 1405. Finally, there is no evidence or claim that the Purchaser, to whom the Property was conveyed, was in any manner a governmental body such that the tax would not apply under the terms of Tax Law § 1405 (b) (1).<sup>5</sup>

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<sup>5</sup> Even if the transferor was not subject to the tax, the Purchaser here would be subject pursuant to the terms of Tax Law § 1404 (a).

F. Petitioner has also noted that, in addition to the State Tax refund claim at issue herein, he likewise filed a claim for refund of the \$409,500.00 New York City real property transfer tax paid (under protest) in connection with the subject transfer, arguing (as above) that title to the Property was vested in the Trust, that the Estate was merely the nominee for the Trust with respect to the conveyance at issue, and that the deed by which the Property was conveyed was, in effect, made by the Trust. Subsequent to the City's initial denial of that claim, the City refunded the full amount of such tax to petitioner (*see* Findings of Fact 10 through 12). Although not cited in petitioner's brief, New York City Administrative Code § 11-2106 (b) (2) provides specifically that a deed conveying real property "by or to any corporation, or association, or trust, or community chest, fund or foundation, organized or operated exclusively for religious, charitable or educational purposes, or for the prevention of cruelty to children or animals, . . ." is exempt from the New York City real property transfer tax as imposed under Administrative Code § 11-2102. It may well be that the transaction in issue was properly exempt from the New York City real property transfer tax pursuant to Administrative Code § 11-2106 (b) (2). However, New York State does not provide the same exemption with respect to its real estate transfer tax under Tax Law article 31 (*see Matter of Andrew Bronsky*, Tax Appeals Tribunal, January 19, 2006). Accordingly, petitioner's implicit argument that the same result should follow here is rejected (*see Matter of Govt. of the Republic of Madagascar/Permanent Mission of Madagascar to the United Nations*, Tax Appeals Tribunal, March 10, 2011).



G. The petition of Robert J. Randell, as Executor of the Estate of Phyllis Millstein and Trustee of the Iving and Phyllis Millstein Charitable Trust for Animals is denied, and the Division of Taxation's denial of petitioner's application for refund, dated September 4, 2015, is sustained.

DATED: Albany, New York  
June 28, 2018

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE