

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| LISA AND MITCHELL SOLOMON | : | DETERMINATION DTA NO. 828076 |
| for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Period March 6, 2015. | : | |

Petitioners, Lisa and Mitchell Solomon, 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 period March 6, 2015.

Petitioners, by their representative, Bryan J. Farrell, Esq., brought a motion filed on October 24, 2018, seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006 (6) and 20 NYCRR 3000.9 (b). The Division of Taxation appeared in opposition to the motion by its representative, Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel). The parties completed their submissions on January 4, 2019, which date began the 90-day period for issuance of this determination.

After due consideration of the motion, the supporting affidavits of Bryan J. Farrell, Esq., Joseph G. Farrell, Jr., and Jane R. Kratz, Esq., and supporting exhibits, the Division of Taxation's memorandum in opposition, affidavit of Theresa A. Carucci and supporting exhibits, and all the pleadings and proceedings had herein, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the additional tax on the conveyance of residential property under Tax Law § 1402-a applies to the facts of this case.

FINDINGS OF FACT

1. On February 11, 2015, petitioners, Lisa and Mitchell Solomon, entered into a contract to purchase vacant land at 9 Wainscott Northwest Road, Wainscott, New York, from Farrell Holding Company, Ltd. (Farrell Holding), a New York corporation, for \$2.5 million.

2. On the same day, petitioners entered into a separate contract for \$3.3 million with Farrell Building Company (FBC) for the construction of a home on the property at the 9 Wainscott Northwest Road location.

3. Joseph G. Farrell, Jr., is the president and owner of both FBC and Farrell Holding.

4. FBC is a business involved in custom and spec building. Farrell Holding is a land holding company.

5. The transaction at issue is a spec building. Farrell Holding bought the property at issue, while FBC created an architectural plan, obtained the necessary approvals and began construction.

6. In his affidavit, Mr. Farrell states that Farrell Holding purchased the land separate and apart from the construction entity, FBC, in order to protect the land assets from personal injury lawsuits and judgments. Mr. Farrell states that personal injury lawsuits are prevalent in the construction industry and, in fact, FBC is presently a defendant in twelve personal injury lawsuits.

7. The closing on the land contract was held on March 6, 2015. At the time of this closing, construction was at a very early stage and the parties agreed that the buyer would make a \$500,000.00 payment toward the construction at the land closing. The construction contract provided for milestone payments to be made at various stages of construction. Based upon the payment schedule, the payment of \$500,000.00 reflected that the foundation had not yet been finished since the contract called for the payment of \$660,000.00 upon the completion of the foundation. This was a condition of the land closing, but once that condition was satisfied, the land was irrevocable conveyed. At this point, there remained a payment of \$2.8 million on the construction project. In the event of a breach, FBC's only recourse would be to sue on the construction agreement.

8. At the closing, Farrell Holding, as seller/grantor and petitioners, as purchasers/grantees, filed a form TP-584 combined real estate transfer tax return reporting the land conveyance. Petitioners reported the amount of consideration as \$2.5 million and calculated real estate transfer tax due under Tax Law § 1402 on the conveyance in the amount of \$10,000.00, on line 6 of schedule B, part I. On the form TP-584, on schedule B, part II, it was asserted that this land was vacant and the percentage of residential real property conveyed was 0%.

9. On or about January 4, 2016, petitioners' form TP-584 was reviewed by an auditor for the Division of Taxation (Division). In the auditor's review of the contract, she noticed that it appeared to be the sale of vacant land coupled with an agreement to construct a single-family residence. The auditor contacted Farrell Holding for additional information. After she received the complete contract of sale, she concluded that, despite the two contracts, the entire conveyance was taxable as a single transaction in the amount of \$5.8 million.

10. The auditor relied on several factors for her conclusion that the transaction should be considered a single conveyance. The auditor noted that paragraph R17 of the rider to the contract of sale between Farrell Holding and petitioners states as follows:

“Simultaneous Construction Agreement. The parties acknowledge that simultaneously herewith, the Purchaser is executing a Construction Agreement with Seller, a copy of which is annexed hereto as Schedule C, which shall be effective as of the date of closing of title hereunder. The Purchaser shall be obligated to pay the first scheduled construction payment thereunder on the execution of this Contract of sale [sic] and the Construction Agreement, which payment shall be maintained in escrow pursuant to paragraph 6 of the printed form of the Contract of Sale. At the closing of title herein, Purchaser shall also pay any other progress payments(s) [sic] if the work has been completed with respect to such payments(s), by official bank or cashier’s check, which payment shall be a condition of Seller’s obligation to close title hereunder.”

It is noted that R17 refers to Farrell Holding as the Seller.

11. The contract of sale has four schedules attached to it. Schedule A is the description of the land using metes and bounds, schedule B is the survey map, schedule C is the construction agreement and schedule D is the Town of East Hampton Building Permit. It is noted that in section 18 of schedule C, it describes the price and payment schedule of the entire project. Specifically, it states that the land was priced at \$2.5 million and the construction contract was priced at \$3.3 million for a project total of \$5.8 million.

12. An advertisement for the sale of 9 Wainscott Northwest Road also contemplates a sale of a single-family residence to be built on 1.1 acres for a list price of \$5,995,000.00.

13. A reading of paragraph R17 coupled with the schedules attached to the contract indicated to the auditor that the contracts were integrally linked and were a single transaction. The auditor concluded that the construction agreement was not effective until petitioners had title to the land. At the closing, petitioners were required to make a \$330,000.00 payment on the construction agreement for it to be effective and for petitioner to gain title to the land. The

contract of sale was one contract with four interrelated components; the auditor emphasized that neither contract with petitioners could be independently executed and the language demonstrated that the transaction contemplated the project to be a sale of both land and construction of a single-family residence for \$5.8 million. Petitioners do not dispute that the land and construction were marketed together, nor the suggestion that the land would not be sold without the construction contract in this instance.

14. The Division issued a notice of determination, assessment number L-044545760, to petitioners, dated May 16, 2016, in the amount of \$71,200.00 in additional real estate transfer tax due plus penalty and interest thereon. Petitioners paid \$77,681.78, representing the tax and interest. Therefore, petitioners are seeking a refund of this payment. Petitioners did not submit any argument regarding their request for an abatement of the penalty imposed.

CONCLUSIONS OF LAW

A. Pursuant to the Rules of Practice and Procedure (Rules) of the Tax Appeals Tribunal (Tribunal), a motion for summary determination shall be granted if:

“upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

The Rules further provide that CPLR 3212 is applicable to motions for summary determination where not otherwise in conflict with the Rules (20 NYCRR 3000.9 [c]). To satisfy CPLR 3212, “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The Division argues that there is a material issue of fact that prohibits this case from being decided on a motion for summary determination. However, the Division's representative failed to submit an affidavit to contest any of the facts set forth by petitioners that are essential to the question presented herein. The Division states that, since this case turns on the issue of whether the facts establish that the contracts resulted in one transaction or two, this matter necessarily involves a question of fact that needs to be resolved through a formal hearing. This position is without merit.

The issue presented is a legal one; whether the contracts executed by petitioners result in a single transaction pursuant to the real estate transfer tax law. As there are no material facts in dispute, disposition of this case by summary determination is appropriate.

B. 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 § 1402-a imposes an additional tax on "each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more."

The Division concluded that the entire conveyance encompassed both the contract for the land and the construction contract. The Division points to the facts that: (1) the contracts were conveyed by entities that share a single owner; (2) neither contract could be executed independently; (3) the contract referred to a project total of \$5.8 million; (4) the land and construction were marketed together; and (5) the contracts were purchased by the same purchasers. The Division states that despite Farrell Holding and FBC structuring the conveyance

using two contracts for protection from personal injury lawsuits does not alter the interpretation of the Tax Law that views these transactions as a single conveyance.

In opposition, petitioners argue that whether the two contracts operate in a dependent or independent manner turns on the presence or absence of cross default and/or land reversion provisions in one or both contracts, relying on *Matter of Mitchel Engel* (TSB-A-96[14]R, October 24, 1996). Petitioners argue that the land and construction contracts it executed contain no such provisions and, thus, must be independent. Petitioners acknowledge that advisory opinions have no binding effect other than on the requester; however, petitioners emphasize that since the Tribunal cited it in its decision in the *Matter of Kelly* (Tax Appeals Tribunal, February 1, 2007), the advisory opinion may properly be viewed as precedential.

C. The facts of this case clearly point to a single transaction. The land contract between Farrell Holding and petitioners could not have been accomplished without the construction contract. In fact, the construction contract was a rider to the land contract. The rider at paragraph R17 specifically set forth that the construction agreement was to be executed simultaneously between the Seller and petitioners. The term *Seller* in paragraph R17 refers to Farrell Holding, yet the construction agreement was between FBC and petitioners. It is apparent from the plain language of the contract that the entities view themselves interchangeably.

Petitioners interpret the advisory opinion and the decision in *Kelly* as setting forth a two-prong test for determining separate and independent contracts: (1) contracts list separate prices for the land and construction and (2) there can be no cross default and/or land reversion provisions. This proposition is without merit. It is important to review all the facts and circumstances surrounding each transaction in order to determine whether the separate contracts were truly independent or whether it was one integrated transaction.

In *Matter of Kelly*, the Tribunal stated that the facts in that case did not require an analysis of substance and form or business purpose because there existed only one contract that the petitioner therein hoped to bifurcate in hindsight. However, the instant case does require an analysis of substance and form to determine whether there was one transaction or two.

Here, the formal structure represents two separate contracts. However, the entities/sellers share the same president and owner. The plain language of the contracts envisioned one project, i.e., the sale of a single-family residence to be built on a 1.1 acre lot. Moreover, in the language of the land contract, Farrell Holding, as seller, referred to itself as the seller in the construction agreement. The construction agreement was required to be executed simultaneously with the land contract and construction had begun at the time the land was conveyed. Petitioners clearly purchased an 8-bedroom, single-family residence located on 1.1 acres and, as such, execution of the two contracts was properly treated as a single transaction for the application of the real estate transfer tax under article 31. Although the entities claim that the transaction was separated into two contracts to protect it from personal injury lawsuits, that business purpose does not militate against finding that the entire conveyance was a single transaction.

D. Petitioners' motion for summary determination is denied. Pursuant to 20 NYCRR 3000.9 (b) (1), summary determination is granted in favor of the Division of Taxation, the petition of Lisa and Mitchell Solomon is denied and the notice of determination is sustained in full.

DATED: Albany, New York
March 28, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE