

New York City's Real Property Transfer Tax and Bulk Sales Revisited

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New York City's Real Property Transfer Tax ("RPTT") is charged on the transfer of "one, two or three-family houses", "individual residential condominium units" or an "individual cooperative apartment" at the rate of 1 percent when the amount of taxable consideration is \$500,000 or less, and at the rate of 1.425 percent when the amount of taxable consideration is more than \$500,000. These tax rates are commonly referred to as the "Residential Rates". Other types of property are subject to the so-called "Commercial Rates", which are 1.425 percent when the amount of taxable consideration is \$500,000 or less and 2.625 percent when the amount of taxable consideration is greater than that amount. [FN1]

The City's Department of Finance ("Department") applies the Commercial Rates to what it deems to be a "Bulk Sale", the transfer by a single grantor of more than one residential condominium unit or cooperative apartment to a single grantee, in accordance with its Finance Memorandum 00-6 dated June 19, 2000, "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units" (the "Bulletin"). [FN2] However, as stated in the Bulletin the Residential Rates apply to a transfer of adjacent cooperative apartments or residential condominium units that have been physically combined into a single residence; such a transfer will not be considered a Bulk Sale.

On a Bulk Sale of residential condominium units transferred by separate deeds, the rates are separately applied to the consideration for each deed. For example, if the consideration for Unit A is greater than \$500,000 and the consideration for Unit B is \$500,000 or less the Commercial Rate of 2.625% will apply to Unit A and the Commercial Rate of 1.425% will apply to Unit B. In a Bulk Sale of cooperative apartments the Commercial Rates are applied to the aggregate consideration for the entire transfer.

In determining whether units have been physically combined into a single residence, for Residential Rates to apply, the Bulletin advises that "(t)he Department will examine all the facts and circumstances in determining whether two or more apartments or units have been physically

combined. The issuance of a revised Certificate of Occupancy, a letter of completion from the Buildings Department [FN3] or a revised tax lot designation reflecting the joining of two or more apartments or units will be acceptable evidence of such a combination. However, the absence of any of these documents will not be determinative. That two or more units or apartments will be combined following the transfer will not be sufficient to permit the transaction to be treated as a transfer of an individual apartment or individual residential unit taxable at the lower rates".

On September 28, 2004 the Chief Administrative Law Judge for the New York City Tax Appeals Tribunal ("Tribunal"), In the Matter of the Petition of Cambridge Leasing Corp. ("Cambridge") [FN4], held that the transfer of multiple residential condominium units between the same parties is subject to New York City's Real Property Transfer Tax ("RPTT") at the Residential Rates. Interpreting the language in Administrative Code Section 11-2102(a)(9), he held "(h)ad the Legislature intended the [Residential Rates] to apply only to the sale of a single residential property, they would never have drafted the statute in the plural to provide that the [Residential Rates] applied to conveyances of individual condominium units ... The legislative history does not indicate that the legislature ever intended Bulk Sales to be taxed at the [Commercial Rates]. To the contrary, the legislative history indicates that all conveyances of residential property are to be taxed at the [Residential Rates]". [FN5]

An Administrative Law Judge, In the Matter of the Petition of Daniel and Sheila Rosenblum ("Rosenblum") [FN6], decided November 9, 2004, and the Deputy Chief Administrative Law Judge in the Matter of David Gruber ("Gruber") [FN7], decided May 5, 2005, also held that the sale of multiple residential condominium units between the same parties is subject to the Residential Rates.

The Administrative Law Judges ("ALJS") in these cases also ruled that even if Bulk Sales of condominium units are properly subject to the Commercial Rates the transfers in question were not, on the facts presented, Bulk Sales. On that basis the Residential Rates also applied to the transactions.

The Department filed exceptions to each of these Determinations for review by the Tribunal's Commissioners. Pending the decisions on Appeal, the Department continued to apply the Commercial Rates to what it considers to be Bulk Sales of residential condominium units and cooperative apartments. Members of the real estate bar in New York City who represent parties involved in the transfer of multiple condominium units to a single purchaser have been awaiting the outcome of the appeals.

On September 12, 2006 the Tribunal's Appeals Division, acting by two Commissioners, one of whom had been involved in the issuance of the Bulletin before being appointed to the Tribunal, ruled on these three cases. [FN8]. Each Decision sustained the ALJS' cancellations of the Notices of Deficiency and their findings that refunds were due. However, the Commissioners ruled solely on the facts. They held, in each Decision, that the transfers in question did not constitute the conveyance of more than one residential condominium unit for application of the RPTT. They were not "Bulk Sales".

As to whether the Commercial Rates could be applied at all to the transfer of a residential unit,

each Decision stated:

"...we decline to adopt the [Administrative Law Judge's] conclusion that no sale of multiple residential condominium units from the same seller to the same buyer could ever be subject to the Higher Tax Rate Schedule. Under the facts in the matter at bar it is not necessary for us to address that issue at this time and, thus, we decline to do so..."

As Petitioners are to be refunded excess RPTT paid at the Commercial Rates, the issue for them of whether a transfer of multiple residential condominium units may be at all subject to the Commercial Rates is moot. The Determinations of the ALJS on that point are not precedent. [FN 9]. Accordingly, the standards to apply to the transfer of multiple residential condominium units and cooperative apartments will continue to be as set forth in the Bulletin; "facts and circumstances" will determine the rates to be applied.

What are the facts and circumstances that led the ALJS and the Commissioners to conclude that the transfers of the units in question were not Bulk Sales, subject to the Commercial Rates? Assuming that the parties to the transfer of multiple condominium units reasonably believes that their facts are similar to those in those three Decisions how may they proceed?

Cambridge involved three condominium units being transferred for \$3,275,000 by one deed under a single contract of sale. Two units on the 24th and 25th floors of the building were physically combined prior to the sale. The third unit, a Maid's Room, is located on the 14th floor. The ALJS and the Commissioners found that the Maid's Room was not a separate unit for the RPTT but an integral part of the same residence as the combined units. The Maid's Room has a 129 square foot main room, a walk-in closet, and a bathroom, but no kitchen. In addition, under the Condominium's Offering Plan each of the four Maid's Rooms is required to be purchased in conjunction with the ownership of a residential unit or leased to a residential unit owner or a bona fide tenant of a residential unit owner. A Maid's Room has to be used exclusively as a residence for a maid or other housekeeping employee of a residential unit owner or a bona fide tenant of a residential unit.

Rosenblum involved the purchase of a Residential Unit for \$11,500,000, a Suite Unit for \$40,000, a Wine Cellar Unit for \$5,000, and a Storage Unit for \$5,000 in a building under a single contract. The closing for the Residential, Wine Cellar, and Storage Units took place first; RPTT was paid for that closing at the Residential Rate of 1.425%. When the Suite Unit was conveyed, based on a Letter Ruling from the Department, an amended return was filed computing RPTT for the transfer of the Residential Unit and the Suite Unit at the Commercial Rates of 2.625% and 1.425%, respectively. [FN 10]. The ALJS and the Commissioners found that even though the Suite Unit was not physically combined with or even on the same floor as the Residential Unit, and each unit had a kitchenette and bathroom, the Suite Unit was an integral part of the same residence as the Residential Unit and not a separate unit for the RPTT. Under the Declaration and By-Laws for the Condominium each of the ten Suite Units (except as to the Sponsor) cannot be owned independently of a Residential Unit. A Suite Unit can be occupied only by domestic employees of the Residential Unit's owner or, for up to three months, without the written consent of the Board of Managers, by family members and non-paying guests of the owner.

In Gruber, the Petitioner purchased three condominium units on the same floor under separate contracts by separate deeds. The prices for the units were \$2,341,975, \$1,731,025 and \$1,527,375. The ALJS and the Commissioners found that the transfers did not constitute the conveyance of more than one residential condominium unit. The Petitioner acquired rights that were consistent with using the floor as a single residence, including the designation of Petitioner as a Sponsor-designee entitled to combine the units. Petitioner had the exclusive use of the elevator lobby and other limited common elements. There were no finished floors or interior walls, only walls separating the units installed by the Sponsor over the Petitioners' objections. Except for baths and unfinished kitchens which were installed in each unit to enable the issuance of a temporary certificate of occupancy, the units were unfinished.

Assuming that the facts pertaining to a transfer appear to be substantially similar to those in these cases, or otherwise would appear (based on, for example, prior Letter Rulings of the Department) [FN 11] to merit the Department's application of the Residential Rates, how is one to proceed? One may apply for a Letter Ruling from the Department in advance of closing (which can take a number of months to issue), pay the RPTT at the Commercial Rates under protest and seek a refund, or pay at the Residential Rates and await the possibility of an audit by the Department. Since both the Transferor and the Transferee are potentially liable on audit for payment of RPTT at the Commercial Rate if the Residential Rates are paid, with interest and penalties, the party not responsible for paying the RPTT at closing may not agree to the latter alternative.

The ALJS Determinations led many to anticipate that what they consider an unfair application of the RPTT would end. Such was not to be the case, and the taxpayer is in the same position as before, asserting "facts and circumstances".

Footnotes

1. NYC Adm. Code Section 11-2102 ("Imposition of tax").
2. http://www.nyc.gov/html/dof/html/pdf/00pdf/fm00_6.pdf
3. See Department of Buildings Technical Policy and Procedure Notice 3/97, <http://www.nyc.gov/html/dob/html/reference/tppn0397.shtml>
4. TAT (H) 03-11 (RP)
5. See Berey and Pack, "New York City's Real Property Transfer Tax and Bulk Sales", NYLJ, 1/19/2005.
6. TAT (H) 01-31 (RP)
7. TAT (E) 03-7, 03-08, and 03-09 (RP)
8. The Decisions are posted at: http://www.nyc.gov/html/tat/html/determinations/recent_decisions.shtml

9. N.Y. Rules Title 20, Section 1-12 ("Hearing Before Administrative Law Judges")

10. RPTT was not paid on the transfer of the Wine Cellar and Storage Units presumably since RPTT is due only when amount of consideration exceeds \$25,000. NYC Adm. Code Section 11-2102. Whether RPTT was payable on those Units was not in issue.

11. Such as Letter Rulings of the Department of Finance Nos. FLR 94-4403 (1994), FLR 94-4496 (1994), FLR 994756-021 (2000), FLR-984736-021 (1999), FLR-034801-021 (2003), and FLR 054831-021 (2005).

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