New York City Tax Appeals Tribunal

In the Matter of DANIEL AND SHEILA ROSENBLUM Petitioners.	DECISION TAT (E) 01-31 (RP)

The Commissioner of Finance of the City of New York (the "Commissioner" or "Respondent") filed an Exception to the Determination of an Administrative Law Judge ("ALJ") dated November 9, 2004 (the "ALJ Determination"). The ALJ Determination: (1) cancelled the Notice of Disallowance, dated July 17, 2001, (the "Notice") issued by the New York City Department of Finance (the "Department") to Daniel and Sheila Rosenblum ("Petitioners") denying Petitioners' request for a refund of New York City Real Property Transfer Tax ("RPTT") in the amount of $144,141; and (2) granted Petitioners' request for a refund of $144,141.

Respondent appeared by George P. Lynch, Esq., Assistant Corporation Counsel, New York City Law Department. Petitioner appeared by Andrew M. Jacobs, Esq. and N. Barry Ross, Esq. of Kaplan Belsky Ross, LLP. Respondent filed a brief and a letter brief and oral argument was held before the Tribunal on a consolidated basis with Matter of Cambridge Leasing Corporation, TAT (E) 03-11(RP) and Matter of David Gruber, TAT (E) 03-7(RP), *et al.*

Petitioners entered into a contract, dated November 7, 1998, (the "Contract") to

purchase: (a) Apartment 36/37 (the "Residential Unit"); (b) Suite Unit 2F (the "Suite Unit"); (c) Wine Cellar Unit 5 (the "Wine Cellar Unit"); and (d) Storage Unit 36 (the "Storage Unit") (collectively, the "Property").[1] The Property is located at 515 Park Avenue, New York, N.Y. (the "Building").[2]

The purchase price paid for the Property was $11,550,000.[3] According to the Contract, the purchase price was allocated: (1) $11,500,000 to the Residential Unit; (2) $40,000 to the Suite Unit; (3) $5,000 to the Wine Cellar Unit; and (4) $5,000 to the Storage Unit.

The Building is a forty-two story above-grade residential apartment building with two

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[1]Except as noted in footnotes 4 and 7, *infra*, the ALJ's Findings of Fact have generally been adopted for purposes of this Decision. Only those findings that are germane to this Decision have been restated herein and, in some instances, those findings have been paraphrased and reordered. The remaining Findings of Fact of the ALJ can be found in the ALJ Determination. Respondent takes exception the ALJ's Findings of Fact as noted in footnotes 2, 3, 4 and 5, *infra*.

[2]Arguing that the ALJ's Findings of Fact are incomplete, Respondent requests that we adopt eight additional findings "necessary to reach a conclusion in accord with applicable law." Respondent's Exception, Attachment A. Except to the extent noted in footnote 4, *infra*, we decline to adopt the additional findings of fact requested by Respondent because either the ALJ adequately addressed the requested findings in her Findings of Fact (footnote 5, *infra*,) or the additional findings are not pivotal to our analysis of the matter at bar.

[3]Respondent takes exception to that part of the ALJ's Finding of Fact 2 stating that "[t]he purchase price paid for the Property totaled $11,550,000." Respondent contends that $11,550,000 is not the amount "paid" for the Property and that the finding should state that the purchase price "stated by the Contract" totaled $11,550,000. Respondent contends that Finding of Fact 8 and footnote 5 in the ALJ Determination support the requested modification because they indicate payment of a different amount than $11,550,000. We decline to make the requested modification because the Record clearly reflects that the purchase price for the Property was $11,550,000. Both the ALJ's Finding of Fact 8 and footnote 5 refer to the amount of RPTT paid with respect to the transfer of the Residential Unit, which was based on the consideration for the transfer. Section 11-2101.9 of the New York City Administrative Code (the "Code") defines consideration as "[t]he price actually paid or required to be paid for the real property or economic interest therein . . . ." The consideration for the transfer of the Residential Unit consisted of the purchase price paid for the Residential Unit ($11,500,000) and the New York State (the "State") and New York City (the "City") transfer taxes paid by Petitioners that were the primary responsibility of the seller.

cellars. It contains 39 apartments, designated "residential units" in the Declaration of 515 Park Avenue Condominium (the "Declaration") and the By-Laws of 515 Park Avenue Condominium (the "By-Laws"). The Residential Unit is an approximately 5,000 square-foot duplex apartment occupying the entire 36th and 37th floors of the Building.

The second floor of the Building contains ten units designated "suite units" in the Declaration and By-Laws. According to the "Description of Property and Improvements" in the Offering Plan for 515 Park Avenue Condominium, each suite unit was to be equipped with a kitchenette and bathroom.[4] The suite units range in size from 278 to 408 square feet. The Suite Unit is 330 square feet. The superintendent's apartment is also on the second floor.

The Declaration and By-Laws contain significant restrictions pertaining to the suite units.[5] Except in the case of the sponsor, the suite units must be owned by owners of residential units. They may be used only for residential purposes and may be occupied only by domestic employees, family members and nonpaying guests of the residential unit owner; occupancy by family members and guests cannot exceed three months without the prior written consent of the Condominium Board.[6] Declaration Article 9.4; By-Laws,

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[4]Respondent requests that the ALJ's Findings of Fact be modified to include an additional finding stating that "[t]he Suite Unit contains living space, a full bath and kitchen." Respondent's Exception, Attachment B. The ALJ's Finding of Fact 4, in relevant part, states that each suite unit "contains two rooms." Attached to the original Petition filed by Petitioners is a copy of what is described as "page 13 of the description of the property and improvements contained in the offering plan" stating, in relevant part, that each suite unit "will be equipped with a kitchenette and bathroom." Thus, we have modified the ALJ's Finding of Fact 4, to more accurately reflect the Record.

[5]Respondent takes exception to the ALJ's Finding of Fact 5, because it "risks misinterpretation by paraphrasing the critical provisions of the [Declaration] and [By-Laws]" instead of quoting such provisions directly. Respondent's Exception, Attachments A and B. We find that the ALJ has adequately summarized and addressed the relevant provisions in her Findings of Fact.

[6]The sponsor may permit unsold suite units to be used for certain other purposes. By-Laws, Section 5.7(G).

Section 5.7(F). Suite units may be sold, but only to the owner of another residential unit.[7]

The Department classified the Residential Unit as Tax Class 2 (generally, residential property with four or more units)[8] and the Suite Unit as Tax Class 4 (other property, not in Classes 1, 2 or 3)[9] for New York City Real Property Tax ("RPT") purposes. Each unit owner is required to appoint the Condominium Board as attorney-in-fact to institute proceedings on behalf of the unit owner for the reduction of the assessed valuation of his or her unit and must agree not to protest the RPT assessments on his or her own behalf. Declaration, Article 14.1(a). There is no indication that the Condominium Board contested the RPT classification of the Suite Unit.

The closing for the Residential Unit, the Wine Cellar Unit and the Storage Unit took place on or about April 24, 2000. The RPTT Return for the Residential Unit indicates that RPTT of $166,865.72 was paid on a total consideration of $11,709,875 at a tax rate of 1.425 percent (the "1.425% Tax Rate"). The consideration consisted of the purchase price for the Residential Unit of $11,500,000 plus State and City transfer taxes paid by Petitioners in the amount of $209,875.[10] The Suite Unit was not ready to close because construction had not been completed at that time.

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[7]We have modified the ALJ's Finding of Fact 5 to remove the sentence stating that "[s]uite [u]nits may not be leased" and the accompanying citation to Section 7.1 of the By-Laws because that prohibition is not clearly articulated in the documents pertaining to 515 Park Avenue Condominium contained in the Record.

[8]Real Property Tax Law §1802.

[9]*Id.*

[10]Copies of RPTT returns for the Wine Cellar Unit and the Storage Unit showing that no RPTT was due with respect to those units were attached to Petitioners' Petition. The question of whether RPTT should be paid with respect to the transfer of the Wine Cellar Unit and the Storage Unit is not at issue in this proceeding.

On May 22, 2000, Petitioners requested a letter ruling from the Department as to the proper RPTT rate to be applied to the transfer of the Property. The Department issued a letter ruling dated August 23, 2000,[11] FLR No.: 004761-021 (the "Letter Ruling"), stating that because Petitioners contracted to purchase two residential units (together with two nonresidential units) as part of a single transaction, the purchase of the Residential Unit and the Suite Unit is not the purchase of "an individual residential condominium unit" and is not eligible for the tax rates provided by §11-2102.a(9)(i) of the Code (the "Lower Tax Rate Schedule"). The Letter Ruling concluded that although transferred pursuant to a single contract of sale, the Residential Unit had already been transferred by a separate deed and the Suite Unit would be transferred by a separate deed when completed. Therefore, as the RPTT is imposed separately on each deed, the applicable tax rate was 2.625 percent (the "2.625% Tax Rate") for the Residential Unit (since the consideration for this unit was greater than $500,000) and the 1.425% Tax Rate for the Suite Unit (since the consideration for this unit was not more than $500,000).

The closing for the Suite Unit took place on January 11, 2001. However, there is nothing in the Record indicating whether a RPTT Return was filed or RPTT paid with respect to the transfer of the Suite Unit. The parties stipulated that a copy of the RPTT Return for the Suite Unit was attached as Exhibit C to the Stipulation and that the tax shown on that return covered all the Property at the 2.625% Tax Rate. However, the document identified as Exhibit C to the Stipulation appears to be an amended return for the Residential Unit only reflecting RPTT due in the amount of $311,006.72 (the "Second RPTT Return"). This amount was computed by applying the 2.625% Tax Rate to a total consideration of $11,847,875. The total consideration shown on the Second RPTT Return consisted of the $11,500,000 purchase price for the Residential Unit plus the State and City transfer taxes

[11]The Parties stipulated that the Department issued the Letter Ruling on August 21, 2000. However, the Letter Ruling is dated August 23, 2000.

paid by the Petitioners of $347,875. Credit was claimed for the $166,865.72 paid with the RPTT Return that had been filed when the Residential Unit was conveyed in April 2000. Thus, an additional $144,141 in RPTT was paid in connection with the Second RPTT Return. Accordingly, the refund requested of $144,141 represents the difference between applying the 1.425% Tax Rate and the 2.625% Tax Rate to the conveyance of the Residential Unit only, with the consideration for that unit consisting of the purchase price and State and City transfer taxes paid by the Petitioners.

On March 1, 2001, Petitioners requested a refund of $144,141, together with interest. On July 17, 2001,[12] the Department issued the Notice denying the refund.

Following the issuance of a Conciliation Decision, dated November 8, 2001, discontinuing a Conciliation proceeding with the Department's Conciliation Bureau based on Petitioners' express disagreement with the Conciliation Bureau's proposed resolution, Petitioners filed a Petition dated December 3, 2001 with the Tribunal protesting the Department's issuance of the Notice and requesting a refund of $144,141, together with interest (the "Petition").

The ALJ concluded that the transfer of the Residential Unit was subject to RPTT at the 1.425% Tax Rate pursuant to §11-2102.a(9)(i) of Code. Furthermore, the ALJ concluded that "the sale of multiple individual residential condominium units (a so-called "Bulk Sale")[13] is a sale of residential property subject to the [Lower Tax Rate Schedule]." ALJ

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[12]The parties stipulated that the Notice of Disallowance was issued on July 7, 2001. However, it is dated July 17, 2001. This difference is not material.

[13]The phrase "Bulk Sale" has been used interchangeably with such phrases as "sale of multiple individual residential condominium units," "transfer of multiple condominium units," and "bulk transfers of condominium apartments". Our use of the phrase "Bulk Sale" in this Decision is for purposes of continuity and does not reflect the adoption of any particular definition.

Determination at 17. Thus, the ALJ granted the Petition, cancelled the Notice and found that Petitioners are entitled to a refund of the amount claimed.[14] The ALJ further concluded that even if Bulk Sales were subject to the tax rates provided by §11-2102.a(9)(ii) of the Code (the "Higher Tax Rate Schedule"), the transfer at issue was not a Bulk Sale because the Suite Unit was part of the same residence as the Residential Unit.

In her Exception, the Commissioner argues that the transfer of the Residential Unit and the Suite Unit did not constitute a transfer of an individual residential condominium unit. Thus, the transfer of the Residential Unit was subject to the Higher Tax Rate Schedule and the Department correctly disallowed Petitioners' refund claim. The Commissioner also contends that the issue of whether a sale of multiple residential condominium units from the same seller to the same buyer is subject to the Lower Tax Rate Schedule was not properly before the ALJ as that issue was not raised by the parties or the ALJ. Thus, according to the Commissioner, the ALJ did not have jurisdiction to determine this issue. In the alternative, the Commissioner asserts that the sale of multiple residential condominium units from the same seller to the same buyer is subject to the Higher Tax Rate Schedule because the plain language of the relevant statutory provision limits the Lower Tax Rate Schedule to "conveyances of . . . individual residential condominium units."[15]

Petitioners did not submit a brief on appeal. In their Memorandum of Law submitted to the ALJ, Petitioners contended that the Residential Unit together with the Suite Unit constituted a single residential unit and, therefore, the Lower Tax Rate Schedule should apply.

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[14]The ALJ did not address the issue of whether Petitioners were entitled to interest on their refund of $144,141. *See*, discussion, *infra*, p. 10.

[15]Section 11-2102.a(9)(i) of the Code.

For the following reasons, we sustain the ALJ's cancellation of the Notice and the granting of Petitioners' refund without interest, but we decline to adopt the ALJ's conclusion that no sale of multiple residential condominium units from the same seller to the same buyer ever could be subject to the Higher Tax Rate Schedule.

Section 11-2102.a of the Code imposes the RPTT "on each deed at the time of delivery by a grantor to a grantee" when the consideration for the real property exceeds $25,000. The applicable tax rate is governed by §11-2102.a(9) of the Code:

> [W]ith respect to conveyances made on or after August first, nineteen hundred eighty-nine . . . the tax shall be at the following rates:
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> (i) at the rate of one percent of the consideration for conveyances of one, two or three-family houses and individual residential condominium units where the consideration is five hundred thousand dollars or less, and at the rate of one and four hundred twenty-five thousandths of one percent of the consideration for such conveyances where the consideration is more than five hundred thousand dollars, and
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> (ii) at the rate of one and four hundred twenty-five thousandths of one percent of the consideration with respect to all other conveyances where the consideration is five hundred thousand dollars or less, and at the rate of two and six hundred twenty-five thousandths of one percent where the consideration for such conveyances is more than five hundred thousand dollars.

In the matter at bar, the dispute involves the proper tax rate to be applied to the

transfer of the Residential Unit.[16] Respondent asserts that under the plain language of §11-2102.a(9)(i) of the Code the sale of more than one residential condominium unit from the same seller to the same buyer is subject to the Higher Tax Rate Schedule. However, Respondent has also acknowledged that the transfer of residential condominium units that have been physically combined into a single residence will not be treated as a Bulk Sale but will be treated as a transfer of an individual unit taxable under the Lower Tax Rate Schedule. Finance Memorandum 00-6, June 19, 2000 "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units". Thus, Respondent's imposition of the 2.625% Tax Rate on the transfer of the Residential Unit is based on the fact that, pursuant to the Contract, Petitioners also purchased the Suite Unit.

Under the facts presented, we find that the Suite Unit is not a separate individual residential condominium unit but is an integral part of the same residence as the Residential Unit. The fact that the Suite Unit was not physically combined with or even on the same floor as the Residential Unit is not determinative of whether the units constituted a single residence. The Appellate Division in Sharp v. Melendez, 139 A.D.2d 262 (1st Dept. 1988), *motion for leave to appeal denied*, 73 N.Y.2d 707 (1989), found that for purposes of the application of the rent regulatory statutes, under certain circumstances, two nonadjacent apartments could constitute a single residence. It is also not determinative that a Suite Unit is not listed as an appurtenance under Real Property Law §339-e.14[17] (as are non-contiguous

[16]There is no separate RPTT Return for the Suite Unit in the Record and, contrary to the Stipulation and the Brief of Respondent Supporting Exception, the Second RPTT Return indicates that it is only for the Residential Unit and does not reflect the total consideration paid for the Property (the Residential Unit, the Suite Unit, the Wine Cellar Unit and the Storage Unit). While the Letter Ruling states that the Residential Unit should be taxed at the 2.625% Tax Rate and the Suite Unit should be taxed at the 1.425% Tax Rate, the Record only contains information as to the tax rate used in computing the RPTT on the Residential Unit. Based on the Record we are unable to determine whether an RPTT Return was filed and tax paid with respect to the Suite Unit. The refund claim only involves additional RPTT paid with respect to the transfer of the Residential Unit and, thus, we will address only the applicable tax rate for that transfer in this Decision.

[17]Contained in Article 9-B of the Real Property Law.

storage rooms and parking spaces). In addition, it is not determinative that each suite unit was to be equipped with a kitchenette and bathroom. The presence of a kitchenette in the Suite Unit does not negate the conclusion that the Suite Unit is an integral part of the same residence as the Residential Unit. A suite unit, except in the case of the sponsor, cannot be owned independently of a residential unit; and may be sold only to an owner of another residential unit; shall be used only for residential purposes and only by domestic employees, family members and nonpaying guests of the residential unit owner; and occupancy by family members and guests cannot exceed three months without the prior written consent of the Condominium Board. Thus, we find, as did the ALJ, that the Petitioners' purchase of the Suite Unit together with the Residential Unit did not transform the transaction into a Bulk Sale.

Attached to the Petition is a letter dated March 1, 2001 to the Department by which Petitioners requested a RPTT refund of $144,141, together with interest. In granting Petitioners' refund request, however, the ALJ did not address the issue of whether Petitioners' RPTT refund should include interest. Section 11-2108.a of the Code provides that no interest is to be paid on a RPTT refund. Therefore, Petitioners' RPTT refund shall be paid without interest.

While we find that the transfer of the Residential Unit and the Suite Unit was not the sale of multiple residential condominium units, we decline to adopt the ALJ'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. For this reason, we need not address whether, or the extent to which, the Appellate Division's decision in Emerson Unitrust v. Commissioner of Finance of the City of New York,

16 A.D.3d 201 (1st Dept. 2005)[18] and the New York State Tax Appeals Tribunal's decision in Lamparelli Construction Company. Inc., DTA No. 819886, May 25, 2006, require the Higher Tax Rate Schedule to apply to a sale of multiple residential condominium units, cooperative apartments or one, two or three-family houses.

However, in declining to address the issue of whether any sale of multiple residential condominium units from the same seller to the same buyer could ever be subject to the Higher Tax Rate Schedule, we disagree with Respondent's contention that the ALJ lacked jurisdiction to address the issue. Respondent asserts that "[n]either of the parties raised this issue, and the ALJ did not raise it *sua sponte* during the proceedings, but instead waited until the issuance of the Determination to address it." Brief of Respondent Supporting Exception at 8. However, Respondent, in the Brief of Respondent filed with the ALJ, stated that:

> The Respondent has thus consistently ruled that a bulk transfer of two or more residential condominium units from a single grantor to a single grantee does not qualify for the lower rate schedule because it is not the conveyance of an individual residential condominium unit, but falls instead under the heading of "all other conveyances" under [§11-2102.a(9)(ii) of the Code]. [Brief of Respondent at 13.]

Thus, Respondent cannot now claim surprise that the issue of the appropriate tax rate to be applied to the sale of multiple residential condominium units from the same seller to the same buyer was discussed by the ALJ in her Determination.[19]

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[18]Confirming the decision of this Tribunal in Matter of Emerson Unitrust and Mark Emerson, TAT(E) 99-82(RP) *et al*., July 28, 2003.

[19]We have considered all other arguments raised by the parties and find them unpersuasive.

The Tribunal sent a letter dated January 13, 2006 to the parties (the "Letter") advising them, in relevant part, that while serving as Assistant Commissioner for Tax Law and Conciliations for the Department prior to her appointment to the Tribunal, Commissioner Hoffman participated in the issuance of Finance Memorandum 00-6, June 19, 2000, "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units" and the Letter Ruling.

The Tribunal is generally the exclusive forum for the resolution of disputes between taxpayers and the Department involving non-property taxes administered by the City. With respect to RPTT refund claims, the Code provides at §11-2108.b, that:

> Any determination of the [Commissioner] denying a refund or credit pursuant to subdivision a of this section shall be final and irrevocable unless the applicant for such refund or credit, within ninety days from the mailing of notice of such determination, or . . . within ninety days from the mailing of a conciliation decision . . . both (1) serves a petition upon the [Commissioner] and (2) files a petition with the tax appeals tribunal for a hearing.

Furthermore, §11-2110 of the Code, provides, with exceptions not relevant here, that: "[t]he remedies provided by sections 11-2107 [determination of tax] and 11-2108 [refunds] of this chapter shall be exclusive remedies available to any person for the review of tax liability imposed by this chapter; . . ." *See also*, Bankers Trust v. New York City Department of Finance, 1 N.Y.3d 315 (2003).

The Tribunal is well aware that the "participation of an independent, unbiased adjudicator in the resolution of disputes is an essential element of due process of law, guaranteed by the Federal and State Constitutions." General Motors Corporation-Delco

Products Division v. Margarita Rosa, 82 N.Y.2d 183, 188 (1993). Thus, generally, a Tribunal Commissioner should disqualify himself or herself if they have any questions about the propriety of their participating in the review of a particular case. However, there exists a Rule of Necessity which provides "a narrow exception to this principle."[20] The Rule of Necessity has been described as:

> . . . an ancient edict, which operates on the principle that disqualification will not be permitted to destroy the only tribunal with power to act in the premises – that is, where disqualification would result in an absence of judicial machinery capable of dealing with a matter, disqualification must yield to necessity. [Citations omitted.][21]

The State Court of Appeals stated in General Motors Corporation-Delco Products Division, 82 N.Y.2d at 188, that:

> . . . where all members of the adjudicative body are disqualified and no other body exists to which the appeal might be referred for disposition, the Rule of Necessity ensures that neither the parties nor the Legislature will be left without the remedy provided by law. [Citations omitted.]

Thus, the Rule of Necessity requires "a biased adjudicator to decide a case if and only if the dispute cannot otherwise be heard."[22]

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[20]General Motors Corporation-Delco Products Division, 82 N.Y.2d at 188.

[21]Richard E. Flamm, JUDICIAL DISQUALIFICATION, Recusal and Disqualification of Judges, 589-590, Little, Brown & Company (1996).

[22]General Motors Corporation-Delco Products Division, 82 N.Y.2d at 188.

Section 168.b of the New York City Charter (the "Charter") provides, in relevant part, that the "tribunal shall be composed of three commissioners." Section 169.d of the Charter provides, in relevant part, that "when the tribunal reviews a matter en banc it must have a majority present and that not less than two votes shall be necessary to take any action." Presently, as well as at the time the Letter was written, the Tribunal has only two Commissioners. Therefore, if Commissioner Hoffman did not participate in the review of this matter, the Tribunal would not have the two votes "necessary to take any action."

The Rule of Necessity is strictly construed and thus is inapplicable where the authority to review a case can be delegated to another person or another body, or a quorum of non-disqualified members is available to conduct the review. *See*, General Motors Corporation-Delco Products Division, 82 N.Y.2d at 188. There is no authority permitting the appointment of a non-Commissioner to hear a particular matter. Thus, if Commissioner Hoffman did not participate in the review of this matter, the Tribunal would be unable to issue a decision and there would be no other body or forum that could hear and decide the matter.

Thus, while Commissioner Hoffman would have disqualified herself from participating in the review of the matter at bar because of her participation in the issuance of the Letter Ruling, she must, pursuant to the Rule of Necessity, participate in the review, because, otherwise, the Tribunal, having only one non-disqualified Commissioner, would be unable to issue a decision.

Respondent argues, regarding the application of Rule of Necessity, that if Commissioner Hoffman does not participate in the consideration of this matter, "the Rule of Necessity should be invoked to permit Commissioner Newman to issue a decision on the merits."[23] We disagree. Section 169.d of the Charter provides that two Commissioners are necessary in order for the Tribunal to rule on a matter. When the disqualification of a Commissioner will leave the Tribunal with only one Commissioner to rule on a matter, the Rule of Necessity, permits the disqualified Commissioner to participate. The Rule of Necessity does not override §169.d of the Charter and permit the remaining Tribunal Commissioner to issue a decision when faced with the disqualification of the only other Commissioner on the Tribunal. The Appellate Division's decision in O'Hagan v. Board of Trustees of the New York City Fire Department Pension Fund, Article 1-B, 81 A.D.2d 818 (1st Dept. 1981), *aff'd*, 55 N.Y.2d 784 (1981), does not provide support for a conclusion that the sole non-disqualified Commissioner may decide the matter in contravention of §169.d of the Charter. In that case, the court remanded the matter to the newly constituted board of trustees for reconsideration of an application for a disability pension that the board had originally denied. The court found that seven of the trustees were disqualified but that the statute permitted the remaining non-disqualified trustees to act on the application. The court's decision does not authorize, as Respondent asserts, one Tribunal Commissioner to issue a decision when the relevant Charter provision specifically requires two Commissioners to take such an action. Unlike the Code provision at issue in O'Hagan, *supra*, which required a specified fraction of authorized trustees to act, the Charter provision governing decisions of the Tribunal requires it to act only when a majority is present and only by not less than two votes.

[23]Both parties were given the opportunity to file submissions with the Tribunal addressing the application of the Rule of Necessity. Respondent filed a letter with the Tribunal, dated February 16, 2006.

Accordingly, we sustain the ALJ's cancellation of the Notice and the granting of Petitioners' refund without interest, but we decline to adopt the ALJ'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.

Dated: September 12, 2006
New York, New York

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GLENN NEWMAN
Commissioner and President

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ELLEN E. HOFFMAN
Commissioner