NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petitions	:	**DETERMINATION**
	:	**TAT(H) 03-7(RP)**
of	:	**TAT(H) 03-8(RP)**
	:	**TAT(H) 03-9(RP)**
DAVID GRUBER	:	
	:	
	:	

Hauben, D.C.A.L.J.:

Petitioner, David Gruber, timely filed three petitions for hearing dated March 10, 2003 with the New York City ("City") Tax Appeals Tribunal ("Tribunal") requesting a redetermination of deficiencies of City Real Property Transfer Tax ("RPTT") under Chapter 21 of Title 11 of the Administrative Code of the City (the "Code") in connection with the transfers, on March 13, 2001, of three condominium units located at 25 North Moore Street, New York, New York.

A hearing was held before the undersigned on May 17, 2004. Petitioner and Respondent, the Commissioner of Finance (the "Commissioner" or "Respondent") each filed post-hearing briefs and reply briefs. The final brief was received on November 23, 2004. The parties submitted additional memoranda as a result of the decision in *Emerson Unitrust, et al. v. Commissioner of Finance,* (NYS Supreme Court, Appellate Division, 1st Dept., March 15, 2005), the last of which was received on April 6, 2005. Petitioner was represented by Mario J. Suarez, Esq., of Thompson Hine, LLP. Respondent was represented by Martin Nussbaum, Esq., Assistant Corporation Counsel. Robert Firestone, Esq., Assistant Corporation Counsel, participated in Respondent's briefs.

ISSUE

Whether the transfers of three contiguous residential condominium units by one seller to one buyer are taxable at the lower RPTT rate applicable to "conveyances of one, two or three-family houses and individual residential condominium units."

FINDINGS OF FACT

1. In the summer of 2000, Petitioner examined for possible purchase as a future residence the entire 14th floor, including certain limited common elements (the "Floor") at the Atalanta Condominium (the "Atalanta" or the "Sponsor"), 25 North Moore Street, in Manhattan. The Floor was three separate parcels on the City's tax map,[1] and was being marketed as three separate condominium units: 14A, 14B and 14C (the "Units"). At the time that Petitioner examined the Floor, it was open raw space. There were no internal walls or fixtures of any kind. Petitioner hired Henry Bradford Gustavson, an architect, to determine the feasability of using the entire 14th floor as one residence. Petitioner determined that such use was feasible since the Atalanta allowed purchasers of more than one unit to combine the units and to incorporate all or part of the elevator lobby on the Floor as their exclusive space. Subsequently, Petitioner offered to purchase the Units. The offer was accepted and Petitioner entered into three separate contracts to purchase the Units, which included Petitioner's obtaining the rights to combine the Units as well as the rights to exclusive use of certain limited common elements.

[1] For City Real Property Tax ("RPT") purposes, Unit 14A is designated as Block 190, Lot 1452; Unit 14B is designated as Block 190, Lot 1453; and Unit 14C is designated as Block 190, Lot 1454. Each unit is assessed separately for RPT purposes under Real Property Law Section 339-y. The building class for all three units is R4, a residential condominium unit in an elevator building.

2. After the contracts to purchase the Floor were executed, but before the closings, Mr. Gustavson prepared plans for the combination of the three units and the common elements into one residence.

3. In recognition of the fact that many purchasers, such as Petitioner, would be making substantial changes to their units, Sponsor provided in the Offering Plan, with respect to non-finished units, for "the minimum level of finish needed to enable the Department of Buildings to issue a temporary certificate of occupancy." Thus the Sponsor installed:

> only one complete bathroom containing lavatory, toilet and bathtub and a kitchen containing a sink and stove. THUS, ONLY ONE APPLIANCE, A STOVE, WILL BE PROVIDED ON THE BUILD-OUT FLOORS. The fixtures and appliances in the build-out units will be of a lesser quality than those provided in finished units.

Although it was understood by the Sponsor that Petitioner would remove walls and fixtures after the closing in order to convert the Floor into one residence, Sponsor, in accordance with the Offering Plan, put up walls separating the Units and installed the items noted above in order to obtain a certificate of occupancy as required under the Plan. Under the Offering Plan, Sponsor did not install walls within the units or finish the flooring. Purchasers were "responsible for all cabinetry, specialty items, fixture and appliance upgrades within their Units."

4. Section H of the Offering Plan, which concerned, in part, changes in size, layout and number of units, provided that:

> In order to meet the possible varying demands for number and type of Units, or to meet the particular needs of prospective Purchasers . . . sponsor reserves the right to change . . . (b) the size and/or number of Unsold Units by . . . combining two or more separate Unsold Units into one or more Unsold Units . . . including . . . the use of any portion(s) of the Common Elements adjacent to such Unsold Units to the extent that such portion(s) are not used for ingress or egress by other Unit Owners . . . in which case such incorporated areas will become Limited Common Elements appurtenant to the Unsold Unit . . ..

Section H of the Plan further provided that:

> If the size or configuration of a Unit is changed in compliance with this Plan . . . and, in connection therewith, a wall, space, hallway, or other area forming a part of the Common Elements servicing and benefitting only such Unit and not affecting access to any other Unit is demolished or incorporated in the Unit, then such Common Element shall be deemed to be for the exclusive use and benefit of the owner of such Unit . . ..

These provisions are incorporated in Article 12, Sections (a)(i),(ii) and (iii) of the Declaration to the Condominium set forth in Part II of the Offering Plan.

5. In addition to entering into the three contracts to purchase the Units on the Floor, Petitioner also was designated as a Sponsor-designee in connection with the Sponsor’s right to convert the Floor into one residence under Section H of the Offering Plan and Article 12, Sections (a)(i),(ii) and (iii) of the Declaration to the Condominium set forth in Part II of the Offering Plan.

6. The contracts for the purchase of each Unit contained a Rider with a cross default clause (Clause 5). The cross default clause treated a purchaser's default under one of the contracts to be a default under the other contracts. The cross default provision also provided that if, for any reason other than purchaser's default, purchaser was not obligated to close title on any unit, the contracts for all three units would be deemed canceled at purchaser's option.

7. Separate closings for the Units took place on March 13, 2001 (the "Transfers"). The physical work contemplated by Petitioner to convert the Floor to one residence commenced after the closings.

8. Petitioner filed a separate RPTT Return for each of the Units and calculated the RPTT due based on a tax rate of 1.425%. Petitioner paid the RPTT reported as due.[2]

9. On August 7, 2002, the Department of Finance issued three Notices of Determination to Petitioner asserting additional RPTT due. The first Notice of Determination, concerning Unit 14A, was in the amount of $31,647.53, consisting of principal of $28,828.20, plus interest of $2,819.33. The second Notice of Determination, concerning Unit 14B, was in the amount of $23,391.64, consisting of principal of $21,307.80, plus interest of $2,083.84. The third Notice of Determination, concerning Unit 14C, was in the amount of $20,639.68, consisting of principal of $18,800.99, plus interest of $1,838.69. Interest on the three Notices of Determination was computed to September 6, 2002. Each Notice of Determination

[2] The consideration for unit 14A was $2,369,575. The consideration for unit 14B was $1,751,425. The consideration for unit 14C was $1,545,375. Petitioner paid RPTT of $33,373.14, 24,667.11 and $21,765.10 on the transfers of units 14A, 14B and 14C, respectively.

contained the following explanation for the additional RPTT asserted by Respondent: "[a] transfer of more than one condominium unit between a single buyer and a single seller is subject to a tax of . . . 2.625% for those units where the consideration is in excess of $500,000 . . .."

POSITIONS OF THE PARTIES

The Commissioner asserts that where a sponsor of a condominium conveys multiple residential units to one buyer in a single sale, the lower RPTT rates applicable to transfers of individual residential condominium units under Code §11-2102.a(9)(i) do not apply. Therefore, the Commissioner asserts that the transfers of the Units must be taxed at the higher rates provided under Code §11-2102.a(9)(ii). The Commissioner's position is based on the "bulk sale" policy expressed in Finance Memorandum 00-6 (June 19, 2000). The Commissioner asserts that absent this policy, the word "individual" in the term "individual residential condominium unit" would have no meaning in the statute. Petitioner argues that the bulk sale policy is contrary to the plain meaning of the Code and, by its terms, is merely advisory in nature. Petitioner asserts that the Code clearly and unambiguously provides for the lower rate to apply to transfers of residential condominium units. Petitioner also contends that Respondent's bulk sale policy deprives him of his constitutional rights to due process and equal protection under the law.

Petitioner further contends that even if the bulk sale policy applies, under the circumstance of this case, the purchase of the three condominium units comprising the Floor should be treated as the purchase of one combined residential unit that qualifies for the lower rate. Respondent counters that at the time of the

closing, the three units had not yet been physically combined and, being separate units each capable of being occupied or sold separately, they should not be treated as a single residence.

CONCLUSIONS OF LAW

Code §11-2102.a imposes the RPTT on transfers of title by deed where the consideration exceeds $25,000.[3] The tax rate is dependent on the amount of consideration and the type of property transferred. For "conveyances of one, two or three-family houses and **individual residential condominium units**" (emphasis added), Code §11-2102.a(9)(i) imposes a one percent rate where the consideration does not exceed $500,000 and a 1.425 percent rate for consideration in excess of $500,000 (the "Lower Rate"). For "all other conveyances," Code §11-2102.a(9)(ii) imposes a 1.425 percent rate where the consideration does not exceed $500,000 and a 2.625 percent rate for consideration in excess of $500,000 (the "Higher Rate").

Under the terms of the statute, the Lower Rate applies to conveyances of one-, two-, and three-family houses and "individual residential condominium units" ("Units") and, here, individual residential condominium units were transferred. The Commissioner, however, asserts that the Higher Rate applies to transfers of more than one individual residential condominium unit involving the same buyer and seller (the Bulk Sale Policy).[4] The Bulk Sale Policy is

[3] Code Sec. 2102(a) provides in pertinent part: "[A] tax is hereby imposed on each deed at the time of delivery by a grantor to a grantee when the consideration for the real property and any improvement thereon (whether or not included in the same deed) exceeds twenty-five thousand dollars."

[4] In FLR No.: 004761-021, Respondent acknowledged that neither the Code nor the Department's Rules specifically addresses the proper rate of tax to be applied in the case of a transaction involving the transfer of multiple condominium units.

found in Finance Memorandum 00-6, in which the Commissioner acknowledges that the policy expressed is "advisory in nature . . . and do[es] not have legal force or effect." In announcing this policy, the Commissioner disregards the fact that the statutory language is drafted in the plural to encompass the transfer of units and restates the statute as if it read in the singular. Thus the Memorandum states that the Lower Rate applies only to "**a** transfer of **an** individual . . . condominium unit." [Emphasis added.] The Commissioner next carves out an exception to the Bulk Sale policy for adjacent condominium units that have been physically combined into a single residence prior to the transfer, provided the transferor can provide evidence sufficient to prove that the units had been physically combined prior to the transfer.

The Commissioner's main argument in support of the Bulk Sale Policy is that regardless of the ordinary import of the words used every word in a statute must have meaning,[5] and thus meaning must be given to the word "individual" in the phrase "conveyances of one-, two- or three-family houses and individual residential condominium units" in Code §11-2102.a(9)(i). The Commissioner asserts that by including the word "individual," the Legislature restricted the Lower Rate to a transfer of title to one single residential condominium unit. The Commissioner does not dispute that absent the word "individual," the Lower Rate would apply to sales of more than one residential condominium unit from one seller to one buyer.

Other Administrative Law Judges of this Division have held that the Commissioner's interpretation of the term "individual" in the statute at issue is incorrect. *See, Matter of Cambridge*

[5] *See, e.g.*, Cons. Laws of N.Y., Book 1, Statutes, §231 (McKinney 1971).

Leasing Corporation, TAT(H) 03-11(RP) (September 28, 2004); and *Matter of Daniel and Sheila Rosenblum*, TAT(H) 01-31(RP) (November 8, 2004).[6]

Previously, another Administrative Law Judge agreed with the meaning given to the word "individual" by the Commissioner in the context of the transfers of shares in a cooperative housing corporation ("CHC") attributable to seven cooperative apartments. *Matter of Emerson Unitrust and Mark Emerson*, TAT(H) 99-82(RP), TAT(H) 99-83(RP) (September 30, 2002). That determination was affirmed by the Appeals Division of this Tribunal in TAT(E)99-82(RP), et al., (July 28, 2003), but solely on other grounds. On March 15, 2005, the Appellate Division, 1st Department, affirmed the Tribunal's decision. In doing so, the Court also noted that the sales in *Emerson* were not of "an individual cooperative apartment."

Respondent urges that the Court's decision in *Emerson* is binding precedent. Petitioner counters that *Emerson* concerned transfers of seven apartments on different floors between commercial parties for commercial purposes, which effected a change in the "controlling interest" of the apartment corporation. These were transactions under Code §11-2102.b (not deed transfers under Code §11-2102.a,) which fit within the examples in the Rules promulgated under Code §11-2102.b.[7] Thus, Petitioner asserts that

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[6] As ALJ determinations are not precedential (City Charter, §168(d)) they are being cited solely for their reasoning.

[7] Prior to 1986, sales of shares in CHCs were not subject to the RPTT. Between July 16, 1986 and August 1, 1989, the RPTT applied to the original transfer of the shares by the cooperative corporation or cooperative plan sponsor, as well as subsequent transfers where the shares were held in connection with any business or commercial activity. In 1989, the Commissioner drafted Rules, with examples subjecting to tax transfers of CHC shares in connection with commercial activities. In 1989, the Code was again amended to tax all subsequent transfers of CHC shares (removing the provision taxing transfers of CHC shares that were held in connection with commercial activity). New Code §11-

Emerson merely decided that the "transfer of a . . . 'controlling interest' in the apartment corporation, was not the sale of 'an individual cooperative apartment.'"

The comment in *Emerson* that Respondent relies upon went beyond the Decision of the Tribunal and was not essential to the Court's decision. Thus it is dicta. Moreover, multiple transfers of shares in cooperative housing corporations by investors, such as the transfers in *Emerson*, are addressed by the Commissioner's Rules. No similar Rules exist concerning deed transfers. To the contrary, as noted above, for deed transfers the Code specifically imposes the RPTT separately on "each" deed.

In interpreting a statute, effect should be given to the intent of the Legislature. *Matter of 1605 Book Center, Inc. v. State Tax Appeals Tribunal*, 83 NY2d 240, 244 (1994), *cert. denied,* 513 US 811 (1994). Where the statutory language is clear and unambiguous it should be construed so as to give effect to the plain meaning of the words used. *Patrolman's Benevolent Assn. v. City of New York*, 41 NY2d 205, 208 (1976). Tax statutes must be "construed in favor of the taxpayer and against the taxing authority," *Matter of American Cyanamid v. Joseph*, 308 NY 259, 263 (1955). However, statutes creating tax exemptions are to be

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2102.b(1)(B), dealing with transfers of economic interests in real property provides for lower rates to apply "where the real property, the economic interest in which is transferred is a one, two or three -family house, an individual cooperative apartment, an individual residential condominium unit . . .."

Respondent amended the Rules on November 29, 1990 to explain the taxation of CHC share transfers. 19 RNCY §23-03(h)(8). Example 3 deals with the owner of shares attributable to four separate apartments in one building which are leased to tenants for residential use. The sale of those shares, presumably to another investor, was found not to "constitute the sale of an individual cooperative apartment." Based on this example, concerning an investor selling the shares connected with several apartments to another investor, the Commissioner has decided that sales of more than one apartment is subject to the Higher Rate even if the purchaser will use all the apartments as one residence.

construed against the taxpayer, *Matter of Federal Deposit Insurance Corp v. Commissioner of Taxation and Finance*, 83 NY2d 44, 49 (1993).

The Code taxes transfers of title to individual residential condominium units at the Lower Rate. As Code §11-2102.a imposes the RPTT "on each deed at the time of delivery . . .," the statute clearly applies to every deed individually. The provisions of the Code that follow are based on that premise and must be harmonized with it. Neither Code §11-2102.a nor any other provision authorizes the aggregation of properties to determine the category to which a property transfer belongs, and thus which RPTT rate applies. Since every deed is looked at separately, its classification for RPTT purpose depends on the type of property transferred without reference to other transfers. Code §11-2102.a(9)(i) specifically provides that transfers of title "of . . . individual residential condominium units," are taxed at the Lower Rate. That is, once the type of property is determined, the rate to apply is determined.

Respondent's position gives the word "individual" a quantitative character. However there is nothing in the Legislative history to support that characterization. Rather, where the Legislature has intended different treatment for condominium units, it has done so to distinguish the units from the multiple dwelling (the condominium) of which they are a part. *See*, Real Property Law, Section 339-y and Real Property Tax Law, Section 580, requiring that condominium units be taxed separately for Real Property Tax purposes. *See, also*, Real Property Tax Law, Section 581,[8] which

[8] Real Property Tax Law, Section 581(a) provides:

> . . . real property owned or leased by a cooperative corporation or on a condominium basis shall not be assessed . . . at a sum not exceeding the assessment which would be

demonstrates the Legislature's concern for differences in taxation of similar residential property based on the type of ownership of the property.

In the context of the RPTT law, the word "individual," modifies the **nature** rather than the **quantity** of the subject property.[9] There is no indication that the Legislature intended to provide different treatment to conveyances of the same type of property based on the number of transfers between the same parties, rather than the type of property that was sold. The Legislature made a clear distinction between the transfer tax treatment of small residential properties and all other properties.[10] Its use of the word "individual" in conjunction with "residential condominium units" does not provide any other distinction. By including "individual residential condominium units" in the same provision as "one, two and three family houses," Code §11-2102.a(9)(i)(a) demonstrates a clear intention that, with respect to applying the Lower Rate, "no distinction is to be made based upon the nature of the building's ownership." *See*, *Alamo Associates v. Commissioner of Finance*, 71 NY2d 340, 344, 525 N.Y.S.2d 823, 825 (1988).

The legislative history in this area reflects that all transfers of title to small residential properties are to be taxed separately at the Lower Rate. In 1981, when all deed transfers

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placed upon such parcel were the parcel not owned or leased by a cooperative corporation or on a condominium basis.

[9] *See,* Webster's Third International Dictionary, Unabridged (1993), p. 1152, which defines the word "individual" as "not divisible: of one essence or nature."

[10] Code §11-2102.a thus provides a distinction in the rate of tax on small residential properties, usually owner occupied property or property rented on a small scale, and transfers of larger income producing multiple dwellings such as apartment buildings.

subject to the RPTT were taxed at the same rate, the New York State ("State") Legislature enacted a "City Gains Tax,"[11] which authorized the imposition of a tax on the gain from the transfer of commercial or industrial real property located in the City where the consideration for the transfer was at least $1,000,000. In 1982, responding to criticism of the new tax, the State Legislature retroactively repealed it.[12] As part of the same bill, in order not to lose the revenues that it had hoped to raise with the City Gains Tax, the State Legislature amended the relevant enabling acts to increase the tax rate on both the RPTT and the City Mortgage Recording Tax ("MRT").[13]

However, the tax rates were not raised for transfers of all types of real property. Rather, the increase in the RPTT was imposed on transactions **other than** "conveyances or transfers . . . of one, two or three-family houses, individual cooperative apartments[14] and individual residential condominium units, or interests therein," and certain conveyances or transfers of other types of property where the consideration or value was less than five hundred thousand dollars. The MRT rate was also raised except "with respect to (i) one, two or three-family houses, individual cooperative apartments and individual residential condominium units, and (ii) real property securing a principal debt or obligation of less than five hundred thousand dollars."

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[11] L. 1981, c. 487 and 488. Article 31-A of the State Tax Law.

[12] L. 1982, c. 57 §1.

[13] L. 1982, c. 57 §§2 and 3. In addition, the 1982 legislation authorized the imposition of the RPTT to leasehold transfers and assumable mortgages.

[14] While there was enabling legislation permitting the City to adopt legislation taxing transfers of cooperative apartments under certain circumstances (L. 1981, c. 916), the City did not do so until several years later. L.L. 1986, No. 71.

In his Memorandum of Approval dated April 12, 1982, Governor Carey described the bill as follows:

> The Mortgage Recording Tax will be increased from $.50 per $100 to $1.125 per $100. The $.50 rate will continue to apply, however, for **residences** and real property securing a debt of less than $500,000. The Real Property Transfer Tax will be increased to two percent, but the existing one percent rate will continue to apply to the same categories of property as are subject to the lower Mortgage Recording Tax rate. [Emphasis added.]

The RPTT and MRT rate increases were intended to raise revenue by increasing the tax on the same types of properties that would have been subject to the City Gains Tax that was being repealed. The Governor clearly thought that he was signing a bill to exclude "residences" and small commercial properties from the increases in both taxes. There is no indication whatsoever in the statute or the legislative history that the increases were intended to apply if more than one "residence" was sold as part of the same transaction.

To determine what property constituted residential property not subject to the tax increases, the Legislature, in 1982, promulgated a bright-line test under which certain specifically enumerated smaller types of residential use properties (one, two or three-family houses and individual residential condominium units) are *per se* treated as residential property. Thus, all other properties including industrial and commercial properties and larger than three-family residential buildings (which are generally income producing) are treated as non-residential property and were subject to the increased rate.

The RPTT has been amended subsequently and continues to apply a lower tax rate to conveyances of "one, two and three-family houses and individual residential condominium units" and a higher rate to conveyances of other types of property. The legislative history of the 1989 amendment, which fixed the rates currently in effect, indicates that the City Council also was differentiating between residential properties which were entitled to a lower RPTT rate and other properties subject to a higher RPTT rate. *See*, Report of the Legal Services Division to the New York City Council Committee of Finance entitled "In relation to increasing the rates of the real property transfer tax imposed by chapter 21 title 11 of such code," Int. No. 1274-A (June 30, 1989), which states: "This bill would increase the tax rates for transfers of **residential properties** valued at $500,000 or more to 1.425% and to 2.625% of the consideration for transfers of **non-residential properties** valued at $500,000 or more, effective August 1, 1989." [Emphasis added.][15]

As part of the same legislation that amended the RPTT, the Legislature amended the MRT to add subdivisions (d) and (e) to Code §11-2601. These provisions specifically permit the aggregation of mortgages forming part of the same or related transactions where the transaction or transactions were structured "for the purpose of avoiding or evading a rate of tax imposed under this section in

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[15] After the 1989 legislative changes to the RPTT, the Commissioner issued The Taxpayer's Guide To Real Property Transfer Tax, explaining how the RPTT applies to transfers of different types of property:

> The type of property transferred, its use, and the amount of the consideration are factors in determining the extent of the . . . RPTT. **The tax rates are lower for transfer [sic] of property used for residential purposes, and higher for those used for nonresidential purposes**. [Emphasis added]

Clearly, the Commissioner understood the legislative intent that small residential property was to be subject to the Lower Rate.

excess of the lowest such rate, rather than solely for an independent business or financial purpose." If the Legislature had been concerned that sales of more than one residential condominium unit should be taxed at the Higher Rate, it would have been a simple matter to include a provision specifically doing so in this same piece of legislation. However, the Legislature did not do so.

Where it wanted to do so, the Legislature has enacted laws that provide a different tax treatment when more than one property is transferred. For example, the City Gains Tax that was repealed in 1982 provided an exemption for transfers where the consideration was less than one million dollars.[16] Because of concerns that taxpayers might carve up a transfer into multiple small transactions in an attempt to qualify for this exemption, that statute specifically provided that a "transfer" included:

> the sale, exchange or other transfer of . . . an individual unit in a multiple occupancy building if such transfer is pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article. In the case of a transfer pursuant to such an agreement or plan, consideration for purposes [of determining if the less than one million dollar exemption applied] shall be the aggregate consideration for all such partial or successive transfers. L. 1981, c. 488 §1,¶9.

The New York State Real Property Gains Tax ("State Gains Tax"), enacted in 1983 and since repealed, contained a similar provision.[17]

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[16] Former State Tax Law §1426.1 (now repealed).

[17] Former State Tax Law §1440.7 (now repealed).

Accordingly, based on the clear language of the statute, supported by legislative history and intent, it is held that a conveyance by one grantor of more than one individual residential condominium unit to one grantee is taxed at the Lower Rate. However, for the sake of completeness, the parties' arguments regarding whether the three Residential condominium units constituted a single residence at the time of the closings will be addressed.

Even under its Bulk Sale Policy, Respondent concedes that residential condominium units that have been physically combined into a single residence should be taxed at the Lower Rate even though they technically constitute more than one individual residential condominium unit.[18] The only justification for that interpretation is that the Commissioner correctly believes that the Legislature intended that premises used as a single residence be subject to the Lower Rate.

Here, there is no question that Petitioner purchased the three units for the purpose of combining them into a single residence. There also is no question that the Offering Plan anticipated and provided for the combination of apartments. *See*, Section H of the Offering Plan incorporated in Sections (a)(i),(ii) and (iii) of the Declaration to the Condominium set forth in Part II of the Offering Plan (Findings of Fact 4, *supra*). In addition to entering into the three contracts for the Units, Petitioner also was assigned the Sponsor's rights under Section H of the Plan which would not have

[18] Finance Memorandum 00-6, *supra*, provides: "The Department will not treat a transfer of adjacent cooperative apartments or residential condominium units that have been physically combined into a single residence as a bulk sale. The Department will treat such a transfer as a transfer of an individual apartment or unit taxable under the lower rate schedule. The Department will examine all of the applicable facts and circumstances in determining whether two or more apartments or units have been physically combined."

been done unless the entire 14th floor was to be converted to a single apartment. At closing, Petitioner had all the rights necessary for him to use the 14th floor as a single residence, including the rights to exclusive use of the elevator lobby (and other limited common elements).

Respondent points to the fact that despite Petitioner's intentions and his rights to exclusive use of the fourteenth floor, after the closings, the Units were still three distinct units that could be occupied as separate apartments, and thus they did not constitute a single residential unit at the time of the closings. Petitioner certainly had much work to do to effectuate the combination of the Units.[19] However, the Commissioner's policy regarding combined apartments is not based on a strict legal definition of "apartment" or "unit," since the policy would treat a combined apartment as a single residence even where the papers necessary to identify the property as a single legal residence have not been filed and the space technically remains as multiple legal units.

Instead, the Commissioner's policy appropriately looks to the use of the space; i.e., whether it is used as a single residence. Here, there was no current use at the time of the transfer. The Sponsor never used the Floor. Petitioner's use would be the first use for the Floor as part of the Condominium. The preponderance of the evidence indicates that at the time of the closing the Floor was to be used as one residence, not three separate residences. The transfer of title to the three units along with the assignment of Sponsor's rights to combine the Units and Petitioner's resulting

[19] *See*, Findings of Fact 3, *supra*, reflecting the unfinished condition of the Units.

acquisition of the rights to exclusive use of the Floor effectively made the Floor (including the elevator lobby) one integral residential unit. The transfers of the right to exclusive use of the elevator lobby would not have been made if the Units were not being combined into a single residence. The rights to the fourteenth floor common areas acquired by Petitioner had no purpose other than to be integrated as part of the combined Units on the Floor. Nor does the Sponsor's putting up walls between the Units and installing the minimum necessary fixtures (one bath per unit and an unfinished kitchen) mitigate against the conclusion that the Units were transferred as a single residence. That is because such work, being temporary in nature, was of the minimum quality and amount necessary to obtain the certificate of occupancy needed to allow the transfers at issue.[20]

ACCORDINGLY, IT IS CONCLUDED THAT the transfers of multiple individual residential condominium units (a Bulk Sale) are sales of residential property subject to the Lower Rate. It is further concluded that even if Bulk Sales were subject to the Higher Rate, the transfers in issue were not a Bulk Sale since the Units were to be used as one residence.

The Petitions of David Gruber are granted and the Notices of Determination dated August 7, 2002 are cancelled.

DATED: May 5, 2005
New York, New York

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WARREN P. HAUBEN
Deputy Chief Administrative Law Judge

[20] In view of the above, there is no need to address Petitioner's constitutional arguments.