New York City Tax Appeals Tribunal

In the Matter of	:	
	:	DECISION
DAVID GRUBER	:	
	:	TAT (E) 03-7 (RP)
Petitioner.	:	TAT (E) 03-8 (RP)
	:	TAT (E) 03-9 (RP)
	:	

The Commissioner of Finance of the City of New York (the "Commissioner" or "Respondent") filed an Exception to the Determination of the Deputy Chief Administrative Law Judge ("DCALJ") dated May 5, 2005 (the "DCALJ Determination"). The DCALJ Determination cancelled three Notices of Determination, dated August 7, 2002, (the "Notices") issued by the New York City Department of Finance (the "Department") to David Gruber ("Petitioner") asserting deficiencies of New York City Real Property Transfer Tax ("RPTT") in the principal amounts of $28,828.20, $21,307.80 and $18,800.99, plus interest with respect to the transfer of three contiguous residential condominium units. Petitioner also filed an Exception to the DCALJ Determination because his constitutional arguments were not addressed by the DCALJ.

Respondent appeared by Martin Nussbaum, Esq., Assistant Corporation Counsel, New York City Law Department. Petitioner appeared by Mario J. Suarez, Esq., Thompson Hine LLP. Both parties filed briefs 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 Daniel and Sheila Rosenblum, TAT (E) 01-31(RP).

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"), 25 North Moore Street, in Manhattan.[1] At that time, the Floor was marketed as three separate condominium units: 14A, 14B and 14C (the "Units"), and the Units were three separate parcels on New York City's tax map.[2] At the time 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 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 adjacent common elements, such as the elevator lobby, as their exclusive space. Subsequently, Petitioner offered to purchase the Units. The offer was accepted and Petitioner entered into three separate purchase agreements, which included Petitioner's obtaining the rights to combine the Units as well as the right to incorporate certain adjacent common elements.

After the purchase agreements were executed, but before the closings, Mr. Gustavson prepared plans for the combination of the Units and a portion of the common elements into one residence.

---

[1]Except as noted in footnote 3, *infra*, the DCALJ's Findings of Fact have generally been adopted for purposes of this Decision, although, in some instances, those findings have been amplified or paraphrased. In her Exception, Respondent requested that seven additional findings be added to the DCALJ's Findings of Fact. We decline to do so. Even if we were to adopt Respondent's seven additional findings of fact we do not find them persuasive and they would not affect our analysis of the matter at bar.

[2]For New York 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 §339-y. The building class for all three units is R4, a residential condominium unit in an elevator building.

In recognition of the fact that many purchasers, such as Petitioner, might want different types of residences, North Moore Tower, LLC (the "Sponsor") provided in the Condominium Offering Plan (the "Offering Plan") that units on floors two through four would be finished but that units on floors five through sixteen (the "build-out floors"), "will be provided with the minimum level of finish needed to enable the Department of Buildings to issue a temporary certificate of occupancy for the [u]nit." Offering Plan at xiv. Thus the Offering Plan provided that with respect to the units on the build-out floors the Sponsor would install:

> . . . 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 [u]nits will be of a lesser quality than those provided in finished [u]nits. . . . [Offering Plan at xiv.]

Although the purchase agreements contemplated that Petitioner would remove walls and fixtures after the closing in order to convert the Floor into one residence, the Sponsor, in accordance with the Offering Plan, put up walls separating the Units and installed the items noted above in order to obtain a temporary certificate of occupancy as required under the Offering Plan. The Offering Plan, provided that Sponsor would not install walls within the units on the build-out floors or finish the flooring. Purchasers were "responsible for all [u]nit finishes and for all cabinetry, specialty items, fixture and appliance upgrades within their [u]nits." Offering Plan at xiv.

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 [u]nits, 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 [u]nit 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 [u]nit and not affecting access to any other [u]nit is demolished or incorporated in the [u]nit, then such Common Element shall be deemed to be for the exclusive use and benefit of the owner of such [u]nit . . . .

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

Under the three purchase agreements, Petitioner was designated as a Sponsor-designee in connection with the Sponsor's right to convert the Floor into one residence and to incorporate portions of the common elements into the residence for Petitioner's exclusive use under Section H of the Offering Plan and Article 12, Sections (a) (i), (ii) and (iii) of the Declaration.

Each of the purchase agreements contained a Rider with a cross default clause (Clause 5). The cross default clause treated Petitioner's default under one of the purchase agreements as a default under the other purchase agreements. The cross default provision also provided that if, for any reason other than Petitioner's default, Petitioner was not obligated to close title on any Unit, the purchase agreements for all three Units would be deemed cancelled at Petitioner's option.

Separate closings for the Units took place on March 13, 2001 (the "Transfers"). Petitioner filed a separate RPTT Return for each of the Units and calculated the RPTT due for each of the Transfers based on a tax rate of 1.425% (the "1.425% Tax Rate"). The consideration shown on each RPTT Return consisted of the purchase price for that Unit plus New York State (the "State") and New York City (the "City") transfer taxes paid by Petitioner. Petitioner paid the RPTT reported as due on each RPTT Return.[3]

The physical work to convert the Floor to one residence commenced after the closings.

On August 7, 2002, the Department of Finance issued three Notices to Petitioner asserting additional RPTT due. The first Notice, 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, 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, concerning Unit 14C, was in the amount of $20,639.68, consisting of principal of $18,800.99, plus interest of $1,838.69.

[3]The consideration shown on the RPTT Return for Unit 14A was $2,341,975. The consideration shown on the RPTT Return for Unit 14B was $1,731,025. The consideration shown on the RPTT Return for Unit 14C was $1,527,375. Petitioner paid RPTT of $33,373.14, $24,667.11 and $21,765.10 on the conveyances of Units 14A, 14B and 14C, respectively. We have amended footnote 2 to the DCALJ Determination in order to accurately reflect the consideration shown on each of the RPTT Returns. The consideration shown in footnote 2 of the DCALJ Determination is the amount calculated by Department and used in computing the additional RPTT shown on the Notices.

Interest on the three Notices was computed to September 6, 2002. The additional RPTT shown on each Notice was computed by applying a tax rate of 2.625% (the "2.625% Tax Rate") to a revised consideration of: $2,369,575 for Unit 14A, $1,751,425 for Unit 14B, and $1,545,375 for Unit 14C; and subtracting the amount of RPTT already paid with respect to that Unit. Each Notice 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 1.425% for those units where the consideration is $500,000 or less, and a tax of 2.625% for those units where the consideration is in excess of $500,000 per RCNY Section 23-03 (formerly Article 17 of the [RPTT] Regulations)."

Following the issuance of three Conciliation Decisions, dated January 23, 2003, discontinuing Conciliation proceedings with the Department's Conciliation Bureau based on Petitioner's express disagreement with the Conciliation Bureau's proposed resolutions, Petitioner filed three Petitions with the ALJ Division of the Tribunal, dated March 10, 2003 requesting that each of the Notices be cancelled.

The DCALJ concluded that the Units were transferred as a single residence and, thus, were subject to RPTT at the 1.425% Tax Rate pursuant to §11-2102.a(9)(i) of the Code (the "Lower Tax Rate Schedule"). Furthermore, the DCALJ concluded that "the transfers of multiple individual residential condominium units (a Bulk Sale)[4] are sales of residential property subject to the [Lower Tax Rate Schedule]." DCALJ Determination at 19. Thus, the DCALJ granted the Petitions and cancelled the Notices. The DCALJ further concluded that even if Bulk Sales were subject to the tax rates provided by §11-2102.a(9)(ii) of the Code

[4]The phrase "Bulk Sale" has been used by the parties and the DCALJ interchangeably with such phrases as "sale of multiple individual residential condominium units," "simultaneous sale of multiple residential condominium units," and "bulk transfers of two or more residential condominium units." 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.

(the "Higher Tax Rate Schedule"), the Transfers were not a Bulk Sale because the Units were to be used as one residence.

In her Exception, the Commissioner argues that the Transfers did not comprise a transfer of an individual residential condominium unit because the three residential condominium units were not physically combined prior to the closing. The Transfers were 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."[5] Petitioner contends that the Lower Tax Rate Schedule is applicable to the Transfers.

Petitioner, in his Exception, contends, as he did below, that the Department's "Bulk Sales Policy" as set forth in Finance Memorandum 00-6, June 19, 2000 "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units" ("Finance Memorandum 00-6"), violates Petitioner's rights to due process and equal treatment under law, specifically violates the due process safeguards in the City's Administrative Procedures Act; and violates Petitioner's constitutional rights to equal protection under applicable laws. According to Petitioner, the "Bulk Sales Policy" constitutes a "rule" that violates Petitioner's constitutional due process rights, because it was adopted without public notice and opportunity for comment required by federal, state and local law. In addition, Petitioner argues that the "Bulk Sale Policy" violates Petitioner's constitutional rights to equal treatment under the law because there is no basis to treat the simultaneous sale of multiple residential condominium units differently from the simultaneous sale of other forms of residential property for purposes of RPTT. The Commissioner asserts that Petitioner's constitutional claims are wholly without merit because

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

the Department has maintained a consistent long-standing published policy that mirrors the statutory language and that provides adequate notice to taxpayers. In addition, the Commissioner argues that the statute satisfies the equal protection clause of the United States Constitution and that Petitioner is not treated differently than other similarly situated taxpayers.

For the following reasons, we sustain the DCALJ's granting of the Petitions and cancellation of the Notices.

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:
>
> (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
>
> (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 Transfers. 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. Thus, Respondent's imposition of the 2.625% Tax Rate on the Transfers is based on the fact that the Units were not combined into a single residence at the time of the closings.

Under the facts presented in the record as a whole, we find that the Transfers did not comprise the conveyance of more than one residential condominium unit. The Offering Plan provided for the combination of units. Petitioner acquired certain 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 and exclusive use of the elevator lobby and other limited common elements. Petitioner testified that he asked the Sponsor not to install the walls separating the three Units or the "throw-away" kitchenettes and bathrooms to save himself the cost of removing them but was told that was not possible.[6] The fact that, over Petitioner's objection, the Sponsor put up walls between the Units and installed minimum fixtures (one bath per Unit and an unfinished kitchen) does not require a finding that the Transfers constituted a Bulk Sale. As the DCALJ noted, "the work, being temporary in nature, was of the minimum quality and amount necessary" to obtain the temporary certificate of occupancy required to allow the Transfers. DCALJ Determination at 19. As noted above,

[6]Tr. at 29. We note that the Sponsor's response to Petitioner's request appears inconsistent with Section H of the Offering Plan wherein the Sponsor reserves the right to combine one or more unsold units, however, we have no reason to question Petitioner's testimony on this point.

Respondent has acknowledged that a transfer of residential condominium units that have been physically combined into a single residence will not be treated as a Bulk Sale. Finance Memorandum 00-6. In the matter at bar, the Units were separated to the least degree possible to facilitate the issuance of a temporary certificate of occupancy. The "throw-away" kitchenettes contained only a stove and a sink but no other appliances. The Units had no interior walls or finished floors. Thus, Petitioner would have had to incur additional expense to retain the Units as three separate residences. Therefore, we find, as did the DCALJ, that, based upon the entire record in this matter, the Transfers were not subject to the Higher Tax Rate Schedule.[7]

While we find that the Transfers did not comprise the sale of multiple residential condominium units, we decline to adopt the DCALJ'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)[8] 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.

---

[7]In view of our findings that the Transfers were not a Bulk Sale and that the Lower Tax Rate Schedule applies to the Transfers, it is not necessary for us to address Petitioner's arguments with respect to the constitutionality of the Department's "Bulk Sale Policy" and, thus, we decline to do so.

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

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 and the Department's letter ruling referred to in the Administrative Law Judge's Determination in Matter of Daniel and Sheila Rosenblum, TAT (H) 01-31 (RP) (the "Letter Ruling").

Petitioner submitted a letter to the Tribunal, dated January 24, 2006, in which he objected to the participation of Commissioner Hoffman in the review of the matter at bar and urged that she be recused in this appeal. The letter, which was treated by the Tribunal as a motion to recuse Commissioner Hoffman, indicated that Petitioner believed that it would be "inappropriate" for Commissioner Hoffman to participate in the matter at bar because she participated in the drafting of Finance Memorandum 00-6 as well as the Letter Ruling. According to Petitioner, "[a]n author of the policy in question cannot help but be biased in its favor." Respondent, in her letter dated February 16, 2006 asserts that Petitioner's Motion to Recuse is without merit. Respondent contends that Commissioner Hoffman's involvement in drafting Finance Memorandum 00-6 and the Letter Ruling "is not evidence of bias with respect to this case" and that Commissioner Hoffman is not "otherwise disqualified" from hearing this appeal.

For the reasons set forth below, we find that Commissioner Hoffman must participate in this Decision.

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 determinations of tax, the Code provides at §11-2107 that:

> Notice of such determination shall be given to the person liable for the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after the giving 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 an exception 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."[9] 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

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

necessity. [Citations omitted.][10]

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."[11]

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

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

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

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, if Commissioner Hoffman were disqualified from participating in the review of the matter at bar because of her participation in the issuance of Finance Memorandum 00-6 and 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.[12]

Petitioner asserts that it is premature to invoke the Rule of Necessity as there are only two Commissioners presently appointed to the Tribunal. However, the Charter, while providing for a Tribunal consisting of three Commissioners, also provides that the Tribunal can act with only two Commissioners. Thus, it is not necessary that the Tribunal wait until a third Commissioner is appointed before determining if it is appropriate to invoke the Rule of Necessity.

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." We disagree. Section 169.d of the Charter provides that two Commissioners are

[12]The Charter requires that the Tribunal needs two Commissioners in order to take any action and the Rules of Practice and Procedure of the Tribunal provide at 20 RCNY §1-05(f)(2)(vi) that a recusal motion is to be decided without the participation of the Commissioner whose recusal is sought. If we were to invoke the Rule of Necessity in order for the recusal motion to be decided, Commissioner Hoffman would participate in the decision regarding a recusal motion directed at her. However, it is not necessary to decide the recusal motion, because, even assuming that the outcome of the motion would be that Commissioner Hoffman should be recused from the review of this matter, the Rule of Necessity would require that she participate in the review in order that the Tribunal could issue a decision on the merits. Thus the recusal motion is moot.

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.

Accordingly, we sustain the DCALJ's cancellation of the Notices, but we decline to adopt the DCALJ'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

_____
GLENN NEWMAN
Commissioner and President

_____
ELLEN E. HOFFMAN
Commissioner