

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

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The chief administrative law judge of the New York City Tax Appeals Tribunal on Sept. 28, 2004 ruled in the *Matter of the Petition of Cambridge Leasing Corp. (Cambridge)*¹ that the transfer of multiple condominium units between the same parties, a so-called "bulk sale" of units, is subject to New York City's Real Property Transfer Tax (RPTT) at the lower, residential transfer tax rates.

The New York City Department of Finance (department) maintained in this proceeding that a bulk sale transfer is subject to the higher, commercial transfer tax rates. If upheld on appeal, the *Cambridge* determination will significantly impact the sale of multiple condominium units between the same parties in the city and, by logical extension, to such sales of multiple cooperative units.

It is increasingly common, particularly in Manhattan, for a single seller or related sellers to sell to a buyer more than one residential condominium unit or cooperative apartment that are intended to be combined, or for such units or apartments to be sold together with a unit or apartment that is used as a maid's room, garage space, wine cellar unit, office or other professional space, or for storage.

Real Property Transfer Tax

The RPTT is generally applied to the transfer of a one- to three-family dwelling, an individual residential condominium unit or an individual residential cooperative apartment at the rate of 1 percent of taxable consideration when it is \$500,000 or less, and at the rate of 1.425 percent of taxable consideration when it is more than \$500,000. These are commonly referred to as the "residential" transfer tax rates. Other types of property are subject to RPTT at the rate of 1.425 percent of taxable consideration when it is \$500,000 or less, and the rate of 2.625 percent when more than that amount. These are referred to as the "commercial" transfer tax rates.²

The consequences of applying the commercial rates to bulk sales are not limited to the tax rate. The Rules of the City of New York (RCNY)³ indicate that when the commercial rates apply to the transfer of a cooperative apartment, taxable consideration includes a portion of the underlying mortgage on the cooperative corporation's property, allocated to the apartment based on the transferor's percentage

ownership interest in the cooperative corporation. In addition, a continuing lien deduction from consideration, applicable to reduce the amount of taxable consideration on the transfer of a one- to-three-family residence for the RPTT, is not available on a bulk sale of a condominium unit. The department has indicated in informal conversations with one of the authors of this article that a bulk sale is not considered the sale of a single-family residence and, therefore, the continuing lien deduction will not apply.⁴

According to a Department of Finance Memorandum issued June 19, 2000 (memorandum),⁵ the aggregate amount of consideration for the sale of multiple cooperative units will be subject to the commercial rates when multiple units are being transferred between the same parties. This was because, as further indicated in a 2003 Letter Ruling of the Department,⁶ the lower, residential rates applied to only the conveyance of an "individual" unit and not a bulk sale of units.

The memorandum also provided that the commercial rates apply to the bulk sale of condominium units, but the rates will be separately applied to the consideration allocated to each deed, provided that the units are conveyed by separate deeds. The "[d]epartment will accept the taxpayer's apportionment of the consideration for the bulk sale to each deed provided the apportionment reasonably reflects the relative values of the units transferred."

In the case of the 2003 Letter Ruling, the commercial rates applied to each of two condominium unit deeds executed between the same parties, at 2.625 percent for the deed transferring the family's apartment unit for an amount in excess of \$500,000 and at 1.425 percent for the deed transferring a maid's quarters in the same building for \$100,000. The condominium units were transferred pursuant to separate contracts of sale.

The 'Cambridge' Determination

In *Cambridge*, the seller sold three condominium units in a building to the same purchaser under a single contract for a purchase price in excess of \$500,000. Two of the condominium units were apartments that had been physically combined and the third condominium unit was a maid's room located 10 floors below the combined units. The maid's room constituted approximately 5.7 percent of the total square footage and approximately 6 percent of the assessed valuation of the three units. Transfer tax was paid using the 1.425 percent tax rate applicable to the sale of individual residential condominium units when the consideration is more than \$500,000.

The department audited the RPTT return, recomputed the tax using

the 2.625 percent rate and issued a Notice of Determination for additional RPTT and interest on the unpaid amount. The petitioner paid the additional tax under protest and sought a refund by filing the petition considered in this case by the administrative law judge.

The administrative law judge construed Administrative Code §11-2102(a)(9), which provides, in part, that

(w)ith respect to conveyances made on or after August first, nineteen hundred eighty-nine . . . the [RPTT] shall be . . . (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 thousands of one percent of the consideration for such conveyances when the consideration is more than five hundred thousand dollars . . . (emphasis added)

The department took the position that the Administrative Code's use of the word "individual" would be rendered meaningless if the transfer of two or more units were allowed to be taxed at the lower residential rate.

Judge's Decision

The administrative law judge reviewing legislative history, applying rules of statutory construction and grammatical interpretation, decided that since "conveyances of . . . *individual residential condominium units* are taxed at the residential rates, bulk sales of condominium units should be taxed at the residential rates." (emphasis added)

According to the judge, "(h)ad the Legislature intended the [residential rates] to apply only to the sale of a single residential property, they would have never drafted the statute in the plural to provide that the [residential rates] applied to the conveyance of individual residential units." Further, according to the judge, "there is no apparent reason why the [residential rates] should not apply with regard to the sale of multiple residential properties between the same seller and buyer. Nor has the Commissioner [of the department] asserted any such reason."

The administrative law judge therefore granted the petition, canceled the Notice of Determination of additional tax and held that the petitioner is entitled to be refunded the amount it paid under protest.

It is submitted that the judge could have found, as the petitioner asserted, that it was simply unfair to apply the department's bulk

sale rules to the sale of the combined units because of the maid's room, as the maid's room constituted only a small fraction of the entire property sold (according to the determination, the commissioner acknowledged that the two combined residential units alone should have been treated as an individual residential unit subject to the residential rates because they were physically combined).

This would arguably be consistent with a 1999 Ruling of the department⁷ in which the residential rates were applied to the transfer between the same parties of a residential condominium unit and a parking space unit, where the consideration for the parking space unit was under \$25,000, the threshold for tax. Instead, in what could only be considered a far-reaching decision, favorable to taxpayers, the judge ruled that all bulk sales of residential units are taxed at the lower residential tax rate.

It should also be noted that the taxation of two combined residential units at the residential rates, without more, if the department's current position was accurately recited by the judge, would constitute a change in department policy. The department has asserted that the residential rates will apply to physically combined residential units only if either a revised certificate of occupancy or a letter of completion from the building department is issued for units following the requirements of the memorandum and the procedures set forth in the building department's Technical Policy and Procedure Notice #3/97 (Notice).

Policy and Procedure Notice

The Notice eliminates for all multiple dwellings the requirement that a certificate of occupancy be amended when apartments are combined to create a larger dwelling unit. An Alteration Type II application is required and, after filing of a completion sign-off by a professional engineer or a registered architect, the building department will issue a letter of completion stating that the "Department of Buildings does not require a new or amended certificate of occupancy for combining these apartments."

Further, according to the Notice, the combining of apartments must meet certain requirements. There must be no increase in the number of rooms; each new room must comply with natural light and air requirements and those requirements may not be diminished for existing non-compliant rooms; egress is not to be altered; and the second kitchen must be eliminated. In addition, when condominium units are being combined, a new tentative tax lot number for the combined units must be obtained from the department before the Alteration Type II Application is filed. The *Cambridge* determination

does not suggest that the combined residential apartments met these standards.

'Cambridge' to Be Appealed

The department and petitioner's attorney, Jack Wilk, have informally advised the authors of this article that the city will appeal the *Cambridge* determination and, pending the outcome of the appeal, the department will continue to apply the commercial rates to bulk sales. The department believes it will be administratively easier to refund overpaid RPTT if *Cambridge* is upheld than trying to collect additional RPTT if it is overturned.

The appeal process involves review of the administrative law judge's decision by the commissioners of the Tax Appeals Tribunal sitting en banc. A decision affirming, reversing or modifying the administrative law judge's determination or remanding the matter for additional proceedings before the administrative law judge or for further action by the commissioner of finance is to be issued within six months from the latter of the date on which an exception to the ruling is filed, the briefs for the appeal are submitted or oral arguments are concluded.⁸

If this determination is upheld by the tribunal the department will not be able to further appeal; if, however, the decision of the tribunal is reversed the petitioner can bring an Article 78 proceeding within four months after issuance of the decision in the Appellate Division, First Department.⁹

While the RCNY provides that "[d]eterminations of administrative law judges shall not be considered precedent, nor shall they be given any force or effect in other proceedings in the tribunal,"¹⁰ the rules also authorize the tribunal commissioners "to rule on the validity of the rules of the commissioner of finance when such rules are at issue."¹¹

'Cambridge' Impact

The outcome in *Cambridge* will impact the RPTT rate that will be applied to the transfer of multiple condominium and cooperative units between the same parties in the city of New York. In the event the determination of the administrative law judge is upheld, payments of RPTT on bulk sale transfers of condominium units and cooperative apartments should now be made "under protest" to reserve rights to a refund.¹²

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Endnotes:

1. TAT (H) 03-11(RP)

2. See Berey, "New York City Transfer Tax on Multiple Residential Cooperatives and Condominiums," NYSBA N.Y. Real Property Law Journal, Spring 2004.

3. 19 RCNY §23-03 (h)(8)

4. For transfers on and after Aug. 28, 1997, a continuing lien deduction has been available under the RPTT when the property being transferred is a one- to three-family house, a residential cooperative or condominium unit or an economic interest in such property. See Berey, "Applying the Continuing Lien Exclusion In Your Practice," The New York Law Journal, Feb. 14, 2001.

5. Department of Finance Memorandum, 00-6, "Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Cooperative Units," (June 19, 2000).

6. Letter Ruling, FLR-034801-021 (May 23, 2003).

7. Letter Ruling, FLR-984736-021,

8. 20 RCNY §1-13

9. 20 RCNY §1-18

10. 20 RCNY §1-12(e)(2)

11. 20 RCNY §1-13 (f)(3)

12. In the Matter of the Petition of Daniel and Sheila Rosenblum (TAT(H) 01-31 (RP), issued Nov. 9, 2003, an administrative law judge in the Tax Appeals Tribunal applied the ruling in Cambridge, holding that the sale of multiple residential condominium units is subject to the residential transfer tax rate.