STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL AND FRANCES SACKS	:	DETERMINATION DTA NO. 822322
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Period January 12, 2005.	:	

Petitioners, Michael and Frances Sacks, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the period January 12, 2005.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 17, 2009 at 10:30 A.M., with all briefs submitted by July 24, 2009, which date began the six-month period for the issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly assessed additional tax on the conveyance of residential property, which occurred on January 12, 2005, pursuant to Tax Law § 1402-a.

FINDINGS OF FACT

The parties entered into a Stipulation of Facts which are incorporated into Finding of Facts 1 through 16. Additionally, the Division of Taxation (Division) submitted four proposed findings of facts, to which petitioners agreed, (with a mere change in phraseology that more

accurately described the situation at hand), which have been incorporated into the findings of fact.

1. Petitioners, Michael and Frances Sacks, are married and were married at all times relevant to this proceeding.

2. On November 18, 2004, Michael B. Sacks, as purchaser, entered into a contract of sale for Unit 34B, 160 East 38th Street, New York, NY 10016, with Bart Swenson and Bibi Rafikh Swenson, as sellers, for a purchase price of $900,000.00.

3. On November 18, 2004, Frances L. Sacks, as purchaser, entered into a contract of sale for Unit 34C, 160 East 38th Street, New York, NY 10016, with Bart Swenson and Bibi Rafikh Swenson, as sellers, for a purchase price of $625,000.00.

4. On January 12, 2005, at the closing of the sale of Unit 34B, 160 East 38th Street, New York, New York 10016, 460 shares of Murray Hill Mews Owners Corp. were issued to Michael B. Sacks.

5. On January 12, 2005, at the closing of the sale of Unit 34C, 160 East 38th Street, New York, New York 10016, 380 shares of Murray Hill Mews Owners Corp. were issued to Frances L. Sacks.

6. At the time of the closing of the respective sales of 160 East 38th Street, Units 34B and 34C, on January 12, 2005, there was a passageway between the units, which continues to exist. In addition, each unit had a separate entrance from the common hallway of the cooperative apartment building. Such entrances continue to exist; however, on the inside of Unit 34, the entrance area has been converted to storage and has a door on the opposite side of the common hallway door entrance that did not exist prior to 1999.

7. The document of the sellers' broker setting forth real estate listing information described Units 34B and 34C, 160 East 38th Street, New York, New York, as being for sale together as one apartment with three full bedrooms and two and a half baths for an original asking price of $1,575,000.00 as of August 16, 2004.

8. On February 25, 2005, Michael B. Sacks filed Form TP-584, Combined Real Estate Transfer Tax Return, reporting a conveyance that occurred on January 12, 2005 between Bart Swenson and Michael B. Sacks of property located at 160 East 38th Street, Unit 34 B, New York, New York, which listed the amount of consideration for the conveyance as $900,000.00.

9. On February 25, 2005, Frances L. Sacks filed Form TP-584, Combined Real Estate Transfer Tax Return reporting a conveyance that occurred on January 12, 2005 between Bart Swenson and Frances L. Sacks of property located at 160 East 38th Street, Unit 34C New York, New York, which listed the amount of consideration for the conveyance as $625,000.00.

10. Unit 34 B and 34C of 160 East 38th Street, New York, New York, were physically combined at some point between June 3, 1999, when a New York City Department of buildings application for construction on the units was filed, and November 10, 2004 when the last action on the construction was signed off on. The job description for the construction project indicated that Units 34B and 34C were to be combined, walls were to be removed, the kitchen appliances were to be removed, and the kitchen piping was to be capped.

11. 160 East 38th Street, Units 34 B and 34 C, New York, New York, has only one shared kitchen.

12. Petitioners occupy and use units 34B and 34C as a single unit and intended at the time of the conveyances of the units on January 12, 2005 to occupy and use the two units as a single unit.

13. The Division performed an audit of the real estate transfer tax returns filed by petitioners for the transfers that occurred on January 12, 2005. The Division determined that such conveyances to petitioners are subject to the additional real estate transfer tax imposed pursuant to Tax Law § 1402-a; therefore, additional tax is due.

14. The Division issued a Notice of Determination, Notice No. L-026975204, dated July 20, 2006 asserting that petitioners owe $15,250.00 in tax plus interest and penalty for the tax period ended January 12, 2005.

15. Petitioners timely requested a conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS) which was conducted on March 1, 2007. By conciliation order dated March 14, 2008 (CMS No. 215958) the conciliation conferee recomputed statutory notice number L-026975204 to cancel the penalty imposed and sustained a modification of the statutory notice whereby the petitioners owe $15,250.00 in tax plus interest and no penalty for the tax period ended January 12, 2005.

16. Petitioners timely filed a petition with the Division of Tax Appeals, to which the Division timely filed an answer in response. A hearing before the Division of Tax Appeals was held on February 17, 2009.

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioners maintain that the Division erred in determining that the transaction in issue should be subject to tax pursuant to Tax Law § 1402-a, since the two apartments that were the subject of two separate conveyances, one to each petitioner, were each less than $1,000,000.00, each was and continues to be owned separately by petitioners, and the apartments are treated as being separately owned by each petitioner in the eyes of the cooperative corporation, municipal tax authorities and the insurer.

18. The Division contends that the conveyance in issue was a single conveyance of two cooperative apartment units which were used by the grantors as a single residential cooperative apartment, and the consideration for the entire conveyance was more than $1,000,000.00, properly subjecting petitioners to the tax pursuant to Tax Law § 1402-a.

CONCLUSIONS OF LAW

A. In pertinent part, Tax Law § 1402-a(a), also known as the "mansion tax," states:

> In addition to the tax imposed by section fourteen hundred two of this article, a tax is hereby imposed *on each conveyance of residential real property* or interest therein *when the consideration for the entire conveyance is one million dollars or more.* For purposes of this section, residential real property shall include any premises that is or may be used in whole or in part as a personal residence, and shall include a one, two, or three-family house, an individual condominium unit, or a cooperative apartment unit. The rate of such tax shall be one percent of the consideration or part thereof attributable to the residential real property (emphasis supplied).

Tax Law § 1401 defines the terms used in Article 31 (and thus Tax Law § 1402-a), in pertinent part, as follows:

> (e) 'Conveyance' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. . . .

B. The regulations setting forth guidance and examples for Tax Law § 1402-a are found in 20 NYCRR 575.3, and the Division particularly points to Example 5 as an indicator that the condition and use of the real property at the time of the conveyance is determinative for purposes of imposition of the mansion tax.

> *Example 5:* A grantor constructs a two-family house which he then sells for $1,000,000. The grantee intends to convert the house to two offices. The grantee is required to pay the additional tax of $10,000 ($1,000,000 x .01) because the property may be used as residential real property at the time of conveyance. After

> purchasing the property, the grantee does in fact convert the property to offices. He later sells the property for $1,200,000. No additional tax is due on the sale because the property, at the time of the sale, had been converted to offices and is no longer considered to be residential real property.

C. Petitioners assert that since the conveyances in issue were of two, not one, separate units to two different individual grantees, the mansion tax should not apply. It has been petitioners' focus all along upon the language of section 1402-a which describes "each conveyance," while the Division considered important the remaining language, "when the consideration for the entire conveyance is one million dollars or more." I believe the statute must be read in its entirety in order to address the more narrow issue of what was actually conveyed in this case.

The "entire conveyance" under these facts seems simple and quite clear. The conveyance was of one cooperative apartment comprised of two units that were side by side, formerly renovated to allow for occupancy as one unit. The fact that the units continued to bear their individual identity by virtue of their respective number of shares of the cooperative corporation does not change the fact that the conveyance in this case was of one apartment comprised of two units that were originally separate. It does not matter that petitioners were married or that the funds for the purchase came from one joint account. A decision that the conveyance looks at the combined apartment is not an affront to the marital rights of women and property ownership by them, as suggested by petitioners.

The usage of the units immediately prior to the transfer was as one cooperative apartment. The advertisement of the apartment by the real estate broker described one apartment. Although not a controlling fact, the intended use by petitioners upon their acquisition of the apartment and thereafter was as a single apartment. The substance of the transaction viewed from each

perspective was the same: the conveyance of one residential apartment at a price which exceeded a million dollars.

D. This is a case where petitioners attempted to substantiate separate transactions on the basis of the preexisting legal structure of the separation of the two units of a cooperative corporation, in the interest of tax planning. Petitioners prepared documents that were consistent with the original legal structure, including the proprietary leases and the cooperative stock certificates, because the opportunity for separate identity of the units in the instant conveyance appeared on paper to be as they once existed, not only in documents, but also as they were actually used, as separate units. However, the conveyance documentation was not consistent with the existing physical structure, real estate sale documentation and actual usage by the sellers of the unit, all of which bear on the applicability of the mansion tax, not to mention petitioners' own intended use. The Division's reliance on Example 5 of 20 NYCRR 575.3(b) is persuasive with respect to the evaluation of the use of the property by the grantor at the time of the conveyance, a fact over which there is no dispute. If the unit had not been previously renovated to become one apartment and still existed as two apartments, and petitioners each bought one, then renovated them in the same or similar manner as was done here, the tax planning to save the mansion tax may have been successful. In that case, the entire conveyance would in fact be two separate conveyances. Unlike that example, what was conveyed in this case was an interest in residential real property, a single cooperative apartment, comprised of two units that were initially separate, properly subjected to the mansion tax imposed by Tax Law § 1402-a. This result is consistent with the statutory provisions of Tax Law Article 31. Accordingly, on the basis of the application of Tax Law § 1402-a to the facts of this case, the mansion tax was properly assessed in this case.

E. The petition of Michael and Frances Sacks is hereby denied, and the Notice of Determination dated July 20, 2006, reduced to eliminate penalties (***see*** Finding of Fact 15), is sustained.

DATED: Troy, New York
January 21, 2010

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE