

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
<b>SARAH BETH FRIEDMAN TRUST</b>	:	DETERMINATION
	:	DTA NOS. 822346
for Revision of Determinations or for Refund of	:	AND 822347
Real Estate Transfer Tax under Article 31 of the	:	
Tax Law.	:	
_____	:	

Petitioner, Sarah Beth Friedman Trust, filed petitions for revision of determinations or for refund of real estate transfer tax under Article 31 of the Tax Law.

Petitioner, by its representative, Hartman & Craven, LLP (Victor M. Metsch, Esq., of counsel), and the Division of Taxation, by Daniel Smirlock, Esq. (Peter Ostwald, Esq., of counsel), waived a hearing and agreed to submit the matter for a determination based on documents and briefs to be submitted by May 18, 2009, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner is entitled to a refund of real estate transfer tax pursuant to Article 31 of the Tax Law.

***FINDINGS OF FACT***

1. On July 30, 2004, petitioner purchased from Darren Sukenik condominium unit 5L located at 270 West 17<sup>th</sup> Street in New York City.

2. On August 18, 2004, petitioner, Sarah Beth Friedman Trust, filed a combined real estate transfer tax return (Form TP-584) regarding the conveyance of a residential condominium on July 30, 2004. The return reported that the consideration for the conveyance was \$1,195,000.00 and that the “additional tax due on the conveyance of residential real property for \$1 million or more” was \$11,950.00.

3. After the transfer, petitioner commenced an action against Mr. Darren Sukenik and others, seeking rescission of the purchase of the unit. The action was resolved by a Stipulation of Settlement and Discontinuance, dated December 4, 2006, which was signed by a judge as well as the attorneys for the plaintiffs and defendants. Paragraphs A and B of the settlement provided that the contract of sale and the conveyance of the unit from Mr. Sukenik to the plaintiffs were annulled and rescinded *ab initio* and directed the plaintiffs to reconvey the unit to Mr. Sukenik or his designee.

4. In accordance with the settlement, the forgoing property was resold on February 23, 2007 for \$1,300,000.00. A real estate transfer tax return was filed and real estate transfer tax was paid in the amount of \$5,200.00.

5. The Sarah Beth Friedman Trust filed a Real Estate Transfer Tax Claim for Refund of the \$11,950.00 that was paid following the conveyance on July 30, 2004. The claim stated, in part, that it was being submitted to recover the taxes paid at the time of the original conveyance on July 30, 2004 as a result of the court ordered rescission *ab initio* of the original conveyance.

6. The Sarah Beth Friedman Trust filed a Real Estate Transfer Tax Claim for Refund of \$5,200.00 which was the Mansion Tax paid following the transfer on February 23, 2007. The

claim stated, in part, that “the conveyance of the unit was not a transfer subject to tax, but rather a court ordered rescission ab initio of the original conveyance.”

7. In separate letters dated August 30, 2007, the Division advised petitioner that the claims for refund in the amount of \$11,950.00 and \$5,200.00, respectively, were denied. The Division explained that Tax Law § 1412(a) provides for a refund claim by a grantor or grantee who “erroneously paid” the tax imposed by Article 31 of the Tax Law. The Division reasoned that the tax was due at the time that it was paid and the fact that the conveyance was later rescinded does not make it erroneously paid at that time. Therefore, the respective claims for a refund were denied. Additionally, with respect to the claim for a refund of \$11,950.00, the Division noted that the claim was untimely because it was received on July 25, 2007, which was more than two years after the payment of the tax due, which was August 18, 2004.

8. Petitioner also claimed a refund of the transfer taxes which were paid to the City of New York upon the original conveyance and reconveyance of the condominium unit. The City of New York granted petitioner’s application and refunded the transfer taxes.

#### ***SUMMARY OF THE PARTIES’ POSITIONS***

9. Petitioner submits that the refund applications were not based on an “erroneously” made payment and, therefore, the statute of limitations did not begin to run on the date of the original conveyance. According to petitioner, a claim for refund should be granted because the original conveyance was annulled and rescinded “ab initio.” Thus, petitioner submits that the parties are left in the same situation as if a contract had never been entered into. Petitioner also maintains that the right to a refund did not arise until the court order was entered and the unit was reconveyed.

10. The Division argues that New York State is not bound by New York City's determination to grant a refund; that the claim for refund of transfer tax on the transfer dated July 30, 2004 is barred by the statute of limitations; that the claim for refund of the transfer dated February 23, 2007 should be denied because there is no proof that the tax was erroneously paid, and that there is no basis for granting equitable relief.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1412(a) provides, in relevant part, as follows:

A grantor or grantee claiming to have erroneously paid the tax imposed by this article or some other person designated by such grantor or grantee may file an application for refund within two years from the date of payment.

B. With respect to the first conveyance, the date of payment was August 18, 2004 and the claim for refund was filed with the Division on July 19, 2007. On the basis of the foregoing dates, it is clear that the claim for refund was untimely.

C. Similarly, there is no dispute that tax was due at the time of payment on the transfer dated February 23, 2007 in the amount of \$5,200.00. Under the circumstances, the tax was not erroneously paid and there is no basis for a refund claim. The same may be found with respect to the conveyance of July 30, 2004.

D. The arguments raised by petitioner do not warrant a different result. As set forth above, the statute provides for a refund in one situation, when there is a claim that the tax was "erroneously paid." Here, petitioner candidly acknowledges that the tax was not erroneously paid on either transfer. It follows that the claims for refund may not be granted because "[t]here is no authority for the Division of Taxation to approve a claim in a manner inconsistent with the Tax Law." (*Matter of Nierenstein*, Tax Appeals Tribunal, April 21, 1988.)

E. A second reason exists for denying the refund with respect to the conveyance on July 30, 2004. In *Nierenstein* the Tribunal explained that the purpose of a statute of limitations:

is to allow a reasonable time for taxpayers who have erroneously filed or paid taxes to realize their error and make application for refund. The State is thus put on notice that there is [a] . . . period during which it may be liable for such claims. At the end of the period, the matter is settled. Anything less than this degree of certainty would make the financial operation of government difficult, if not impossible. In short, the statute of limitations at issue here is a balance between the needs of the State with regard to the protection of its financial resources and the rights of taxpayers to correct their errors.

F. The rationale set forth in *Nierenstein* is equally applicable to this matter. Accordingly, the Division properly denied the claim for refund on the transfer which occurred on July 30, 2004.

G. In reaching the forgoing conclusion, it is recognized that petitioner has cited a series of cases for the proposition that the effect of rescission of a contract is to eliminate the contract *ab initio* and place the parties in the same position as if no contract had been executed (*see e.g. Rodriguez v. Mower*, 56 AD3d 857 [2008]). Petitioner maintains that the order, which was signed by a judge, placed the parties in the same position as if a contract had not been executed and therefore a refund of the tax is appropriate. The difficulty with this argument is that it is *the parties* that have been placed in the same position as if a contract had not been executed. The Division was not a party to this contract. Therefore, the proposition of law relied upon by petitioner is irrelevant. In this regard, it is noteworthy that none of the cases cited by petitioner presented a situation where a court had granted a refund of a transfer tax which had been paid upon the original execution of a real estate contract.

Secondly, it is recognized that the City of New York granted a refund in these matters. However, the record is silent as to why the refund was granted, and as a result, it is impossible to

consider the reasoning that may have been employed. Moreover, it is clear that the Division of Tax Appeals is not required to defer to the judgment of another jurisdiction (*see e.g. Matter of Dufton*, Tax Appeals Tribunal, April 6, 1995 [federal changes are not binding on the Division of Taxation])). In sum, the refunds claimed by petitioner may not be granted.

H. The petitions of Sarah Beth Friedman Trust are denied and the denials of refund, dated August 30, 2007, are sustained.

DATED: Troy, New York  
November 12, 2009

/s/ Arthur S. Bray  
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ADMINISTRATIVE LAW JUDGE