

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROBERT J. RANDELL</b>	:	
<b>AS EXECUTOR OF</b>	:	DECISION
<b>THE ESTATE OF PHYLLIS MILLSTEIN</b>	:	DTA NO. 827359
<b>AND AS TRUSTEE OF</b>	:	
<b>THE IRVING AND PHYLLIS MILLSTEIN</b>	:	
<b>CHARITABLE TRUST FOR ANIMALS</b>	:	
	:	
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Period July 14, 2015.	:	

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Petitioner, Robert J. Randell, as Executor of the Estate of Phyllis Millstein and as Trustee of the Irving and Phyllis Millstein Charitable Trust for Animals, filed an exception to the determination of the Administrative Law Judge issued on June 28, 2018. Petitioner appeared by Meltzer, Lippe, Goldstein & Breitstone, LLP (Jason K Blasburg, Esq., and Jeffery A. Galant Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on January 24, 2019, in New York, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund of real estate transfer tax with respect to a transaction occurring on July 14, 2015.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioner is the duly appointed executor of the Estate of Phyllis Millstein (Estate), and is the trustee of a trust, known as the Irving and Phyllis Millstein Charitable Trust for Animals (Trust), established under Article FIFTH of the May 1, 2001 Last Will and Testament of Phyllis Millstein (Will). The purposes of the Trust, as described in Article FIFTH of the Will, are to provide “. . . for the care of neglected and homeless animals and for the prevention of cruelty to animals, which may include public and private education, and research in connection therewith . . . .”

2. Phyllis Millstein died a resident of New York, New York, on March 21, 2009, owning real property situated at 22 East 81st Street, New York, New York (Property). Her Will was duly admitted to probate by the Surrogate's Court, New York County, on March 18, 2010. Letters testamentary and letters of trusteeship were duly granted to petitioner on March 18, 2010.

3. Pursuant to Article FIFTH, Paragraph 1A of the Will, the residuary Estate passed to the Trust established by the Will. Title to the Property vested in the Trust.

4. By a letter dated May 30, 2014, the Internal Revenue Service (IRS) informed petitioner that the Trust was exempt from federal income tax under section 501 (c) (3) of the Internal Revenue Code (IRC) (26 USC), such that contributions, bequests, devises, transfers or gifts to

the Trust are tax deductible under IRC (26 USC) §§ 170, 2055, 2106 and 2522. This letter further advised petitioner that organizations that are exempt under IRC (26 USC) § 501 (c) (3) are classified as either public charities or private foundations, that the Trust was classified as a private foundation within the meaning of IRC (26 USC) § 509 (a), and was required to file form 990-PF on an annual basis.

5. Similarly, the Trust was granted New York State and local sales and use tax exempt status with regard to its purchases, pursuant to an exempt organization certificate (form ST-119) issued by the Division on May 19, 2014.

6. On July 14, 2015, the Property was sold and transferred to 22 East 81st LLC (Purchaser), for the sum of \$15,600,000.00.

7. In connection with the sale of the Property, the Estate filed form TP-584 (combined real estate transfer tax return, credit line mortgage certificate, and certificate of exemption from the payment of estimated personal income tax), and paid, under protest, New York State real estate transfer tax (State Tax) under Tax Law article 31 in the amount of \$62,400.00.<sup>1</sup>

8. On July 31, 2015, the Estate assigned the right to make and file a refund claim, including the proceeds of any refund of the State Tax, to the Trust. In turn, petitioner filed form TP-592.2 (real estate transfer tax claim for refund), seeking a refund of the State Tax based upon the provisions of Tax Law §§ 1405 (a) (1) and (2) and 1405 (b) (1).

9. By a refund claim determination notice, dated September 4, 2015, the Division of Taxation (Division) denied petitioner's claim in full.

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<sup>1</sup> There is no dispute as to the computation of the amount of real estate transfer tax that was paid and that would be due, assuming the transaction is properly subject to such tax.

10. In connection with the sale of the Property, the Estate also filed form NYC-RPT (real property transfer tax return), and paid, under protest, the New York City real property transfer tax (City Tax) in the amount of \$409,500.00.<sup>2</sup>

11. On July 31, 2015, the Estate assigned the right to make and file a refund claim, including the proceeds of any refund of the City Tax, to the Trust. In turn, petitioner filed an application to claim a refund of real property transfer tax, seeking a refund of the City Tax.

12. By a letter dated August 19, 2016, the New York City Department of Finance denied petitioner's claim for refund in full. Petitioner challenged this denial by filing a petition with the New York City Tax Appeals Tribunal, dated November 9, 2016, on the basis that the deed was made by the Trust (citing certain New York City Department of Finance letter rulings in support).<sup>3</sup> On January 17, 2017, the New York City Department of Finance issued to petitioner a check, refunding the full \$409,500.00 amount of the City Tax paid.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began his determination by reviewing the Tax Law provisions relating to the payment, and exemptions from payment, of the real estate transfer tax. As petitioner is seeking an exemption from payment of tax, the Administrative Law Judge determined that petitioner bears the burden of demonstrating entitlement to the exemption.

The Administrative Law Judge next determined that, regardless of whether the Estate or the Trust is considered the transferor with respect to the subject conveyance, neither of them

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<sup>2</sup> There is no dispute as to the computation of the amount of New York City real property transfer tax that was paid and that would be due, assuming the transaction is properly subject to such tax.

<sup>3</sup> The specifically cited letter rulings were: FLR- (13) - RP - 2/84 (February 3, 1984) and FLR 94-4392 (November 7, 1994) [title to the Property vested in the Trust and deed was made by the Trust], and FLR - (47) - RP - 7/87 (July 1, 1987) [Estate was nominee for the Trust with respect to the Property].

comes within the terms of the exemptions pertaining to governmental bodies as specified under Tax Law article 31. He found that neither the Estate nor the Trust is the State of New York or the United States of America, or an agency or instrumentality of either of those governmental bodies. Further, he found no evidence that any governmental body had consented to have the Trust act on its behalf as an agency or instrumentality. He determined that the fact that the Trust is a charitable organization that is exempt with respect to income tax and sales tax does not concomitantly qualify the Trust for exemption from the real estate transfer tax. The Administrative Law Judge also found no evidence or claim that the purchaser to whom the property was conveyed was in any manner a governmental body, meaning that, in any event, the conveyance would be subject to tax.

Finally, the Administrative Law Judge reviewed the New York City Administrative Code provision that provides for exemption from the New York City real property transfer tax and found that, although the transaction in issue may have been properly exempt from the New York City tax, New York State does not provide the same exemption with respect to its real estate transfer tax under Tax Law article 31. Petitioner did not raise this argument on exception.

#### ***ARGUMENTS ON EXCEPTION***

As it did below, petitioner argues on exception that it is exempt from payment of the real estate transfer tax because it is an agency or instrumentality of the State of New York and the United States of America. It also argues that the real estate transfer tax should not apply to the subject conveyance since the government and general public directly benefitted from the net proceeds of the sale of the property.

Petitioner claims that the Trust is closely related to the government since the goal and purpose of the Trust is in alignment with the public policy of the State of New York and the United States. It claims that the financial burdens of the government are reduced by the work of the Trust. It further contends that because of its charitable and tax exempt status at the federal and state levels, the property of the Trust is dedicated to the public and the government exercises extraordinary control and oversight over the Trust, resulting in the Trust acting in a representative capacity with respect to the government. It claims that the Trust and trustee are fiduciaries charged with assuring that trust funds are maintained and expended for public use or in support of a public purpose subject to the control and oversight of the government.

Petitioner disagrees with the Administrative Law Judge's determination that the government must consent in order for an agency relationship to exist and, instead, contends that the agent must consent to act for the principal and the principal must authorize the agent to act subject to the principal's control. Petitioner argues that here, the Trust consented to act on behalf of the government and that the government authorized the Trust to act subject to its oversight and control. Petitioner claims that the government's authorization was implicit in the relationship since the government oversees the Trust and places certain requirements on the Trust, such as the requirements to expend its resources solely for charitable purposes, to refrain from self dealing, and to make minimum distributions of its assets annually.

Finally, petitioner states that animal welfare and protection is an important public policy of both the federal and state governments. It claims that since the key purpose of the Trust is in effect providing direct and substantial financial support to the government in furtherance of that

public policy, the imposition of a tax on the Trust places an undue burden on the implementation of the public policy and, therefore, is not valid.

The Division asserts that the burden of proof is on petitioner and that it has failed to establish entitlement to the exemption. The Division contends that the Trust was not a party to the sale, but in any event, neither the Estate nor the Trust is an agency or instrumentality of the State of New York or the United States of America such that either would be entitled to exemption from payment of the real estate transfer tax. The Division further argues that the conveyance itself is not exempt from tax, as the grantee is not one of the governmental entities specified in Tax Law Article 31.

The Division does not disagree that the work of the Trust is in the public interest, but contends that the fact that the Trust does good work and reports to the government does not make it an instrumentality of the government. It contends that many, if not most, charitable organizations provide assistance that may indirectly reduce the burdens placed on government and that to accept petitioner's position would mean that all 501 (c) (3) tax exempt charitable organizations were instrumentalities of the government, a result that only the Legislature can effect. Lastly, the Division argues that even if the Trust were exempt, transfer tax would still be owed because the purchaser and grantee is not tax exempt and is clearly not an instrumentality of the government.

### ***OPINION***

Tax Law § 1402 imposes a real estate transfer tax “on each conveyance of real property or interest therein” (Tax Law § 1402 [a]) and Tax Law § 1404 provides that all conveyances are presumed subject to the tax (Tax Law § 1404 [b]). Tax Law § 1404 (a) specifies that the real

estate transfer tax shall be paid by the grantor, unless the grantor is exempt from payment of the tax, in which case, the grantee shall be liable for the tax.

Tax Law § 1405 (a) and 20 NYCRR 575.9 (b) specify certain transferors as exempt from the payment of the foregoing tax, as follows:

“(a) The following shall be exempt from payment of the real estate transfer tax:

1. The state of New York, or any of its agencies, instrumentalities, political subdivisions, or public corporations . . . .
2. The United Nations, the United States of America and any of its agencies and instrumentalities.

The exemption of such governmental bodies or persons shall not, however, relieve a grantee from them of liability for the tax.”

Tax Law § 1405 (b) (1) provides, in relevant part, as follows:

“(b) The tax shall not apply to the following conveyances:

1. Conveyances to the United Nations, the United States of America, the state of New York, or any of their instrumentalities, agencies or political subdivisions (or any public corporation, including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada); . . . .”

Exemption from the payment of the real estate transfer tax, like all tax exemptions, must be strictly and narrowly construed. It is well established that the taxpayer bears the burden of proving any exemption from taxation (*Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.*, 19 NY3d 1058 [2012] *rearg denied* 20 NY3d 1024 [2013], *cert denied* 571 US 952 [2013]). Furthermore, in construing a tax exemption statute, the well settled rule is that any ambiguity or uncertainty must be resolved against the exemption (*id.*). A statutory exemption from tax will never be implied from language which will allow any other reasonable construction (*see City of Rochester v Union Free School Dist. No. 4 of Town of Livonia*, 255 App Div 96,

98 [4th Dept 1938], *affd* 280 NY 531 [1939]). Here, petitioner seeks the benefit of the exemption and, therefore, bears the burden of demonstrating that the subject conveyance, or the parties thereto, come within the language of the statute granting exemption (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]).<sup>4</sup>

Petitioner first contends that the Trust is eligible for exemption from payment of the real estate transfer tax because it is an agency or instrumentality of the United States of America and the State of New York under Tax Law §§ 1405 (a) (1) and (2). It bases that contention on its belief that the Trust is providing direct and substantial support to the government in furtherance of the government's responsibility to protect the welfare of animals. It cites to provisions found in the Animal Welfare Act (7 USC § 2131) and the New York Agriculture and Markets Law (NY Agri and Mkts Law §§ 106 and 353) as support for its contention. Petitioner contends that the Trust, in carrying out its purpose to protect the welfare of animals, is acting in a representative capacity on behalf of the public-at-large and, thus, the United States of America and the State of New York.<sup>5</sup>

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<sup>4</sup> The Administrative Law Judge did not make a determination on the issue of whether the Estate or the Trust is the proper party in interest, deciding that neither of them is one of the specified entities that are entitled to exemption from payment of the real estate transfer tax under Tax Law article 31. Since the Division took no exception to the determination, for the limited purposes of deciding upon this exception, we will accept petitioner's position that the title to the property had vested in the Trust and that the Estate was acting as nominee or agent for the Trust with respect to the sale of the property.

<sup>5</sup> It is noted that for purposes of exemption from sales and use taxes pursuant to Tax Law § 1116, the Division's regulations provide that the phrase "[A]gencies and instrumentalities of the State" means any authority, commission or independent board *created by an act of the Legislature for a public purpose* (*see* 20 NYCRR 529.2 [a] [1] [emphasis added]). Similarly, "[A]gencies and instrumentalities of the United States" means any authority, commission or independent board *created by an act of Congress for a public purpose, and which is immune from state taxation* (*see* 20 NYCRR 529.3 [a] [1] [emphasis added]).

Petitioner argues that the federal and state governments authorized the Trust to act on their behalf. Petitioner explains that such authority was implicit in the relationship since the government was aware of the Trust and exerted supervision and control over the Trust by requiring, for instance, that the Trust not engage in self dealing, that it expend its assets solely for public and charitable purposes and that it make an annual minimum distribution of assets (*see generally* IRC [26 USC] subtit D ch 42 sub ch A; EPTL ch 17-B, art 8; 13 NYCRR ch V, for requirements related to IRC [26 USC] § 501 [c] [3] tax exempt and charitable organizations). Petitioner contends that by virtue of the government’s “extraordinary” control over the Trust, the Trust property is dedicated to the public and the trustee is a fiduciary owing a duty to the government and the public to properly manage and administer the trust funds for the public benefit. As such, petitioner contends that an agency or instrumentality relationship exists between the Trust and the government as the Trust consented to act on behalf of the government and the government authorized the Trust to act subject to its control (*see Matter of Friends of the Town of Pelham Public Lib., Inc.*, Tax Appeals Tribunal, September 3, 1992). We do not agree.

“‘Agency’ is the fiduciary relationship that arises under New York common law when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act” (2A NY Jur 2d, Agency § 1). “An agency relationship arises where one party is specifically authorized to act on behalf of another in dealings with third persons” (2A NY Jur 2d, Agency § 2). The authorization of the principal is necessary to establish an agency

relationship (*see Matter of Hooper Holmes, Inc. v Wetzler*, 152 AD2d 871 [3d Dept 1989], *lv denied* 75 NY2d 706 [1990]).

While the public policy of the federal and state governments may be to support the protection and welfare of animals; while the Trust funding may reduce the financial burdens placed upon the government; and while the public-at-large may benefit from the work of the Trust, there is no evidence indicating that any governmental body specifically authorized the Trust to act “on its behalf” as an agency or instrumentality (*see Philadelphia Nat. Bank v United States*, 666 F2d 834 [3d Cir 1981], *cert denied* 457 US 1105 [1982] [finding that the term “on behalf of” would require the organization seeking government status to be a “wholly governmentally controlled entity, performing a wholly governmental function”]).

The Trust was not created by an act of the Congress or the State Legislature, or by an executive action of either the President of the United States or the Governor of New York. There is no evidence of any legislative, executive or contractual delegation to exercise any authority or function “on behalf of” the federal or state governments (*cf. State of Michigan v United States*, 40 F3d 817 [6th Cir 1994] [Michigan education trust is a public agency explicitly authorized to exercise contracting powers “on behalf of the state”]; *see Commr. of Internal Revenue v Shamberg’s Estate*, 144 F2d 998 [2d Cir 1944], *cert denied* 323 US 792 [1945] [Port Authority of New York created by states of New York and New Jersey and approved by Congress is a political subdivision of the state]; *Commr. of Internal Revenue v White’s Estate*, 144 F2d 1019 [2d Cir 1944], *cert denied* 323 US 792 [1945] [Triborough Bridge Authority created by statute is a subdivision of the state empowered to exercise governmental functions “on behalf of” the City of New York]; *Matter of American Socy. for Prevention of Cruelty to Animals v Tax Commn.*

*of City of N.Y.*, 113 Misc 2d 427 [Sup Ct, NY County 1981] [ASPCA organized by special legislative act and the City of New York transferred its police and licensing function regarding animals to the ASPCA].

Further, we cannot say that the Trust is so closely related to the government or governmental activity as to become a tax exempt agency or instrumentality (*see Dept. of Empl. v United States*, 385 US 355 [1966] [finding that American National Red Cross is an instrumentality of the federal government]; *Hudson Val. Fed. Credit Union v New York State Dept. of Taxation & Fin.*, 20 NY3d 1 [2012] [finding federal credit union is not so closely connected to the federal government that they cannot realistically be viewed as separate entities]; *Director of Revenue of Missouri v Cobank ACB*, 531 US 316 [2001] [an instrumentality is entitled to implied tax immunity only when it is so closely connected to the government that the two cannot realistically be viewed as separate entities]).

The Trust was created and authorized by Phyllis Millstein in her Last Will and Testament, which outlines the objectives of the Trust (*see* finding of fact 1). The Trust document details, in over 15 paragraphs, the explicit powers given to the trustee. The Trust is primarily under the control of the trustee who manages the Trust assets and who acts independently in determining how to allocate the Trust funds subject to the regulatory oversight of the government. Neither the federal nor state government has the power and interest of an owner.

While it is true that the Trust is subject to various requirements at the state and federal levels, they are merely general regulations that apply to all charitable organizations similarly classified by the IRS and the State of New York. Indeed, Mrs. Millstein recognized the need to

abide by those regulations. Article FIFTH of her Last Will and Testament, which is part of the record below, directs in the second subsection thereof that:

“It is my intention that this trust qualify as a ‘charitable trust’ under Article 8 of the New York Estate, Powers and Trust Law and under the Internal Revenue Code of 1986, as amended, as a section 501 (c) (3) ‘tax exempt organization’, and that this devise and bequest of my residuary estate to the within trust qualify for Federal and New York State estate tax deductions as a charitable organization. Accordingly, any provision under this paragraph FIFTH or elsewhere in this Will, that would serve to disqualify this trust and/or this devise and bequest of my residuary estate for such treatment, shall, without affecting the validity of any other provision hereunder, be deemed to be invalid and a nullity. My Trustee, acting alone and without the approval of any court or any person interested in this trust, shall have the power to amend this trust in any manner required for the sole purpose of ensuring that the trust qualifies and continues to qualify as a ‘charitable trust’ as above.”

Thus, we cannot agree that the Trust is “controlled” by the government in any ownership sense when the only involvement of the government is to ensure the Trust’s adherence to rules that are regulatory in nature and that are intended to protect the public interest. Simply put, the regulatory scheme set up by the federal and state governments to protect and safeguard against improper expenditure of charitable funds does not transform the Trust into a government agency or instrumentality for purposes of the exemption under Tax Law article 31.

Petitioner further argues that the subject conveyance itself is exempt pursuant to Tax Law § 1405 (b) (1) since the government and public at large “directly” benefitted from the net proceeds realized on the sale of the subject property. Again, we cannot agree. To be sure, the general public is benefitted by the funding that the Trust provides and such funding very well may serve to reduce the financial burdens placed upon the government. The assets of the Trust, however, are not federal or state money and, although petitioner contends that the government directly benefitted from the proceeds of the sale, there is no evidence that any part of the sale

proceeds were distributed to the state or federal governments or counted as federal or state revenue. There is no evidence or indication that legislative appropriations for animal welfare and protection would be increased in the absence of the Trust. Further, on dissolution of the Trust, its assets would be distributed to other charitable organizations, not to the federal government or State of New York. Tax Law § 1405 (b) provides an exemption when the grantee is one of the specified government parties to the transaction. Since there is no evidence that the purchaser, to whom the property was conveyed, was one of the specified governmental bodies, petitioner's claim must fail. As stated above, the language of a tax exemption statute must be strictly and narrowly construed and we may not extend it to encompass the meaning asserted by petitioner.

Finally, petitioner argues that imposing a tax on an otherwise tax-exempt organization that is engaged in furthering an important public policy places an undue burden on the implementation of that public policy and is not a valid tax. We cannot construe a policy to protect animals as giving petitioner an exemption from the real estate transfer tax without the existence of a statute by which an exemption from this specific tax is granted by the Legislature.

Upon due consideration of the arguments put forth on exception, we find that petitioner has failed to meet its burden to establish its entitlement to an exemption from tax and we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert J. Randell, as Executor of the Estate of Phyllis Millstein and as Trustee of the Irving and Phyllis Millstein Charitable Trust for Animals, is denied.
2. The determination of the Administrative Law Judge is affirmed.

3. The petition of Robert J. Randell, as Executor of the Estate of Phyllis Millstein and as Trustee of the Irving and Phyllis Millstein Charitable Trust for Animals, is denied; and

4. The Division of Taxation's denial of petitioner's application for refund, dated September 4, 2015, is sustained.

DATED: Albany, New York  
July 24, 2019

s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner