

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of
BRIDGEHAMPTON INVESTORS CORP. :
for Revision of a Determination or for Refund of :
Tax on Gains Derived from Certain Real Property :
Transfers under Article 31-B of the Tax Law. :

DECISION

Petitioner, Bridgehampton Investors Corp. , c/o S. Greene, 20 Babbitt Road, Bedford, New York 10507, filed an exception to the determination of the Administrative Law Judge issued on November 19, 1987 with respect to its petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 802109). Petitioner appeared by Steven C. Greene, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Neither the petitioner nor the Division of Taxation filed a brief on exception. Oral argument was heard, at the request of the petitioner, on March 8, 1988.

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

ISSUE

Whether the consideration for certain real property transferred by petitioner was less than \$1,000,000.00, thus entitling petitioner to exemption from the tax imposed under Tax Law Article 31-B.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

Petitioner, Bridgehampton Investors Corp., operated an oceanfront beach and tennis club, located in Bridgehampton, New York and known as the Bridgehampton Racquet and Surf Club (the "Club"). The Club consisted of land area totaling 12 acres, and included 14 tennis courts, a large swimming pool, the clubhouse building, cabanas, various other buildings and equipment. The Club was built in 1962 and has been operated continuously since then as a beach and tennis club.

Petitioner purchased the Club in 1972 at a purchase price of \$450,000.00. From the time of petitioner's purchase of the Club in 1972 until its sale, petitioner maintained the facilities and made certain improvements to the Club.

In or about March of 1984, petitioner entered into a contract with one Edward S. Gordon for the sale of the Club by petitioner to Mr. Gordon. This contract called for a selling price of \$3,050,000.00, and included the following clause, relevant hereto:

"The purchase price is solely for the real property, special use permit for the club and the buildings and improvements thereon, which constitute the Premises; no separate portion of the purchase price is attributable to the personal property included in this sale."

Requisite transferor and transferee questionnaires under Tax Law Article 31-B ("gains tax") were filed in connection with the impending transfer of the Club, wherein petitioner sought exemption from the gains tax upon the assertion that the real estate being transferred had a value of less than \$1,000,000.00.

Petitioner's claim of exemption was based upon an appraisal of the premises prepared by one Peter Berger, a licensed real estate appraiser. This appraisal was based on the "replacement method", under which, in general, value is determined as the cost of replacement of any improvements. In this case it consisted of the clubhouse, tennis courts, pool and incidental buildings less accrued depreciation and obsolescence, if any, plus the value of the land. Mr. Berger's appraisal indicated a value for the property of \$983,000.00, more specifically allocated as \$449,000.00 for total improvements to the land and \$534,000.00 as the value of the land. The land was valued as to its potential use for residential real estate development.

The appraisal of the real estate on the basis of its potential for residential development was due to the fact that the land had been rezoned for use as residential land subsequent to the building and operation of the Club. As the result of such zoning reclassification, the Club is now operated under a special use permit, which use permit runs with the land. If the Club were to cease operation as a beach and tennis club, future use of the land would be limited to residential use only.

In response to the aforementioned transferee and transferor questionnaires, the Division of Taxation issued a tentative assessment indicating gains tax would be payable on the basis of the total contract consideration of \$3,050,000.00. Petitioner paid the tax stated on the tentative assessment and then filed a claim for refund of the gains tax paid under protest. By a letter dated May 7, 1985, the Division of Taxation denied petitioner's claim for refund. Petitioner, in turn, timely commenced this proceeding to contest the denial of its claim for refund.

We find as an additional fact, that the separate value of land determined to be \$534,000.00 by the appraisal was based on the potential selling price of the real property as subdivided lots, less selling expenses, development costs and profits.

OPINION

The Administrative Law Judge determined that the appraisal submitted by the petitioner did not establish the fair market value of the property. Lacking any other evidence as to the fair market value of the property, the Administrative Law Judge held that the value of the property was the total contract consideration of \$3,050.00.00.

On exception, the petitioner argues that the issue is the proper allocation of the contract consideration between the real property and the business. The petitioner argues that some value must be attributed to the "going" value of the business. We affirm the Administrative Law Judge's determination for the reasons stated below.

Consideration for gains tax purposes is defined, in part, at Tax Law section 1440(l)(a) as the price paid or required to be paid for real property

Consideration is further defined by Tax Law section 1440.1(c):

"In the case of a transfer which includes other assets which are in addition to real property or an interest therein and for which there is no reasonable apportionment of the consideration for such real property or interest, consideration means that portion of the total consideration which represents the fair market value of such real property or interest..."

Under this special definition, applicable in the case of mixed sales of real property and other property, we are directed to determine the fair market value of the real property only where there is no reasonable apportionment of the consideration to the real property.

In our opinion, on the instant facts, the parties' agreement allocates the entire \$3,050,000.00 consideration to real property interests. To avoid the result of its own contract terms and to reach the question of determining the fair market value of the real property through other means, the petitioner must show that the contract allocation is unreasonable. We conclude that the petitioner has not made such a showing.

As set forth in the facts above, the parties' agreement allocates the entire contract price "solely for the real property, special use permit for the club and the buildings and improvements thereon, which constitute the premises". Of the listed items, certainly the real property and the improvements are interests in real property subject to the gains tax (Tax Law §1440.4).

The special use permit, a zoning permit, which ran with the land would also appear to be within the broad definition of interest in real property which includes but is not limited to, ". . . a beneficial interest, an encumbrance, transfer of development rights or any other interest with the right to use or occupancy of real property . . ." (Tax Law §1440.4). However, even if the special use permit is not an interest in real property, the petitioner has offered no proof to establish the value of the permit. In the absence of such proof, we will not attribute a value to the permit. As a result, we conclude that the contract allocates all of the consideration to real property interests.

Petitioner argues that this allocation is unreasonable because the business had value as an on-going business, However, petitioner also introduced no direct proof on the value of the business. Thus, we conclude that petitioner has not established that the allocation is unreasonable. Without an unreasonable allocation the appraised value of the property is not relevant.

If the appraisal were relevant, we would find, as did the Administrative Law Judge, that it does not establish fair market value as required by the statute. As stated above, the appraisal was based on the replacement method, where the cost of replacing the improvements, less accrued depreciation, was added to the value of the land. The land's value was determined at its potential sales price as subdivided lots, less development costs and profits.

In our opinion, these factors, the replacement cost valuation of the buildings, the deduction for expenses and profits, and the separate valuation of the land and buildings, indicate that the appraisal does not reveal the fair market value of the property, the "price at which a willing seller and a willing buyer will trade." (Black's Law Dictionary 717 [4th ed 1957].) Accordingly, there is no reason to accept this appraised value of the property to establish the consideration for the real property rather than the negotiated agreement of the parties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Bridgehampton Investors Corp. is in all respects denied.
2. The determination of the Administrative Law Judge is affirmed.

3. The petition of Bridgehampton Investors is denied and the Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Albany, New York
AUG 11, 1988

John P. Dugan
President

Francis R. Koenig
Commissioner