

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PLYMOUTH TOWER ASSOCIATES : **DECISION**
AND MACARTHUR TOWERS DEVELOPMENT CO., INC. : **DTA No. 804714**
: :
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. :

Plymouth Tower Associates and MacArthur Towers Development Co., Inc., c/o Bay Colony Property Company, Inc., 125 Summer Street, Boston, Massachusetts 02110 filed an exception to the determination of the Administrative Law Judge issued on May 9, 1991 with respect to a 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. Plymouth Tower Associates and MacArthur Towers Development Co., Inc. appeared by Kronish, Lieb, Weiner & Hellman (William Jay Lippman, Esq. and Michael C. DeLisa, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Neither party filed a brief on exception. Plymouth Tower Associates' and MacArthur Towers Development Co., Inc.'s request for oral argument was denied.

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

ISSUE

Whether the Administrative Law Judge properly added MacArthur Towers Development Co., Inc. to this proceeding as a petitioner.

OPINION

The Administrative Law Judge sustained the imposition of penalties asserted by the Division of Taxation (hereinafter the "Division") on the Notice of Determination issued to Plymouth Tower Associates (hereinafter "Plymouth"). The Administrative Law Judge also added

MacArthur Towers Development Co., Inc. (hereinafter "MacArthur") as a petitioner to the proceeding.

In an exception filed on behalf of Plymouth and MacArthur it is asserted that Plymouth is not a proper party to this proceeding and that the taxpayer/petitioner is MacArthur. It is also asserted that the Administrative Law Judge erred in not abating the penalty.

In response, the Division asserts that the request to delete Plymouth as a party should be rejected since the Notice of Determination was issued to Plymouth, this proceeding was commenced in that name and when the Administrative Law Judge informed the parties at the hearing that the determination would relate to both Plymouth and MacArthur, no one objected. The Division also requests that the determination of the Administrative Law Judge be sustained in full.

In a footnote to the caption of his determination, the Administrative Law Judge added MacArthur as a petitioner to this proceeding based, according to the Administrative Law Judge, on the consent of the parties. Included in this footnote was a reference to the Administrative Law Judge's finding of fact "2." This finding stated that:

"Prior to the transfer of the real property to the cooperative housing corporation, Plymouth Tower Associates had transferred the building to MacArthur Towers Development Co., Inc. in exchange for other real property. MacArthur Towers Development Co., Inc. and the partners of Plymouth Tower Associates are subsidiaries of Bay Colony Property Company, Inc."

This is the only factual or legal basis given by the Administrative Law Judge to support his conclusion to add MacArthur as a party to this proceeding.

Our review of the file indicates that the Notice of Determination was issued only to Plymouth and that only Plymouth filed a petition to this Notice. Given this information and the legal principle that subject matter jurisdiction cannot be conferred by any consent or stipulation of the parties (Robinson v. Oceanic Steam Nav. Co., 112 NY 315, 19 NE 625), we are uncertain of the basis upon which the Administrative Law Judge determined that MacArthur could be added as a party to this proceeding. Therefore, we sever this matter into two cases and hold in abeyance our decision with respect to Plymouth, while we remand the case with respect to

MacArthur to the Administrative Law Judge so that he may reconsider his conclusion that MacArthur could be made a party to this proceeding.

In his amended determination with respect to MacArthur, we request that the Administrative Law Judge set forth fully the factual and legal basis upon which he bases his conclusion as to the status of MacArthur as a petitioner. We request that the Administrative Law Judge issue his amended determination on MacArthur within 30 days of the date of this decision without the submission of further briefs by the parties. The parties will have an opportunity to brief the issue, if exception is taken to the Administrative Law Judge's amended determination issued with respect to MacArthur. If an exception is taken to the Administrative Law Judge's determination on MacArthur, we will consolidate it with the matter of Plymouth. If no exception is taken to the amended determination, we will issue our decision with respect to Plymouth as quickly as possible after the expiration of the exception period.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. This matter is severed into two cases: the Matter of Plymouth Tower Associates and the Matter of MacArthur Towers Development Co., Inc.;
2. The Matter of MacArthur Towers Development Co., Inc. is remanded to the Administrative Law Judge for the issuance of an amended determination consistent with the foregoing decision; and

3. The Tribunal decision in Matter of Plymouth Towers Associates is stayed, in accordance with the above decision, pending the issuance of the amended determination in MacArthur Towers Development Co., Inc.

DATED: Troy, New York
December 27, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner