STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
58 REALOPP CORP.	:	DECISION DTA No. 806464
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	:	

Petitioner 58 Realopp Corp., 162 West 34th Street, New York, New York 10001 filed an exception to the determination of the Administrative Law Judge issued on June 27, 1991 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. Petitioner appeared by Kantor, Davidoff, Wolfe, Rabbino & Kass, Esqs., P.C. (Lawrence A. Mandelker, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in response. Oral argument was not requested.

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

ISSUE

Whether petitioner is entitled to an exemption under Tax Law § 1443(6) in connection with the transfer of its interest in certain premises located on Eighth Avenue in New York City.

FINDINGS OF FACT

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

On March 16, 1981 petitioner, 58 Realopp Corp., entered into a written agreement under which it granted to 59th Street Equities Corp. an option to acquire petitioner's leasehold interest in certain property located at 987-989 Eighth Avenue in Manhattan. The property in question

consisted of a five-story building contiguous to which was a small hotel. 59th Street Equities Corp. was a "shell" corporation of one William Zeckendorf nominated by him to be the optionee under the option agreement.

The option agreement granted the optionee the right to acquire all of petitioner's leasehold interest in the described realty for a price of $4,000,000.00. As consideration for granting this option, petitioner received the sum of $150,000.00 simultaneously with the execution of the option agreement. The option agreement expressly provided that the $150,000.00 was not to be credited against the $4,000,000.00 purchase price for the leasehold interest, but rather was a separate price paid for the option. The option agreement, by its own terms, required that the option be exercised by 5:00 P.M. on September 15, 1982, further specifically providing that "time was of the essence" regarding such exercise. The agreement recited that any change, waiver or modification of the option was to be made only in writing. The option agreement was recorded in the office of the Register of the City of New York, in New York County, in April 1981.

Petitioner, the holder of the lease on the property in question, was a subsidiary of National Restaurant Management Corporation, which in turn is a subsidiary of National Restaurant, Inc. National Restaurant, Inc. is an organization operated by the Riese family (referred to in testimony as "the Riese organization"). The option and ultimate acquisition of the subject leasehold interest was a part of the acquisition or assemblage of several properties on Eighth Avenue (between 57th and 58th Streets) by William Zeckendorf, a well-known New York City real estate developer (referred to in testimony as "the Zeckendorf organization"). Mr. Zeckendorf planned to construct a large combined office and residential structure at the site of the property mentioned in the option agreement.[1] Mr. Zeckendorf was known to the officers of petitioner not only because of his reputation in the New York City real estate community, but also because of several substantial real estate transactions previously consummated between the Riese organization and the Zeckendorf organization.

---

[1]The site was ultimately developed to become what is known as Worldwide Plaza.

The Zeckendorf organization was unable to complete acquisition of the surrounding properties as of the September 15, 1982 specified expiration date of the option. As testified to by petitioner's vice-president, one Larry Abrams, prior to the expiration date Mr. Zeckendorf telephoned the Riese organization and requested a waiver or extension of the exercise termination date for the option. Mr. Abrams testified that petitioner, via the Riese Organization, agreed to waive the expiration date for the option until such time as Mr. Zeckendorf was ready to proceed with the assemblage of the properties at which time a new expiration date would be established. Mr. Abrams testified that the period of extension contemplated was "somewhere in the nature of six months to a year". Petitioner and Mr. Zeckendorf further agreed to an additional payment of $250,000.00, allegedly as consideration for waiver of the expiration date and agreement to fix a new date. These arrangements were finalized during several telephone conversations which occurred prior to the September 15, 1982 expiration date.

Subsequent to the expiration date, petitioner made no efforts to sell the leasehold interest to any other purchaser. Mr. Abrams testified that to have made any such efforts would have resulted in extremely negative consequences and impact on the reputation of petitioner's officers within the real estate community in Manhattan. It was noted, moreover, that the purchase price of $4,000,000.00 remained attractive to petitioner notwithstanding the lapse of time.

By the summer of 1983, Mr. Zeckendorf was ready to proceed with assembling the properties. A second option agreement was executed on July 25, 1983. Although characterized at hearing (by petitioner) as a modification of the first option agreement to reflect the oral agreement made by the parties prior to September 15, 1982, the document executed indicates by its terms that it is the granting of an option for the purchase of the property in question. It does not reference or otherwise deal with the prior option executed in March of 1981. The second option does, however, reflect itself to be an option on the identical property interest as that covered by the first option, and also maintains the same purchase price of $4,000,000.00. A new optionee, namely Circle West Development Corp., also a shell corporation of Mr. Zeckendorf, was nominated to be the optionee under the option contract. As with the first optionee, Circle

West Development Corp. was described as being a New York corporation having an office in care of Milgrim, Thomajan, Jacobs and Lee, Esqs., 405 Lexington Avenue, New York, New York.

The payment for the second option was $250,000.00, and a new date for exercise of the option was established, to wit January 25, 1984. The option document specifically provides that the $250,000.00 amount, similar to the $150,000.00 amount, was not to be paid as a reduction of the $4,000,000.00 purchase price for the property interest, but rather was paid for the granting of the option.

In both instances, the Riese organization caused no searches or other checks to be made as to the ability of the Zeckendorf nominee corporations to carry out the obligations under the lease (as assignee), and made no inquiries into the sufficiency of capitalization of such nominees. As described by Mr. Abrams, the Riese organization knew they were dealing with Mr. Zeckendorf and knew him, from prior dealings, to be responsible. Within the time prescribed, the second option was exercised and the transaction eventually proceeded to a closing. At the time of transfer (the closing), petitioner paid gains tax under Tax Law Article 31-B in the amount of $436,246.40. Thereafter, petitioner filed a timely claim for refund of such tax paid, premising such claim upon the position that the transaction was exempt from tax pursuant to Tax Law § 1443.6.

By letter dated May 19, 1987, the Division of Taxation denied petitioner's refund claim in full upon two bases. The Division first argues that the March 1981 option expired as of September 1982, thus leaving the July 1983 option as a new contract entered into after the March 28, 1983 effective date of the gains tax. Alternatively, the Division argues that even if the second option were a modification of the first, the increased consideration for the second option and the change of the name of the buyer constitute substantial changes to the contract sufficient to deny exemption under Tax Law § 1443.6. In this latter regard, the Division cites specifically to regulations found at 20 NYCRR 590.21.

OPINION

In the determination below, the Administrative Law Judge held that the oral modifications alleged by petitioner did not meet the writing requirement set out in Tax Law § 1443(6). Further, the Administrative Law Judge rejected petitioner's assertions that the initial option remained in effect and that the modifications made were insubstantial, instead determining that a new option contract had been executed. Therefore, the Administrative Law Judge determined that the first option lapsed and that a second option was executed after the effective date of the real property transfer gains tax.

Also, the Administrative Law Judge interpreted the additional consideration paid for the option to reflect either an increase in value of the property or a substantial change in the amount of consideration paid for the option which, in conjunction with the change in name of the optionee, presents further support to conclude that a new contract had been formed.

On exception, petitioner asserts that the oral agreements by the parties, i.e., to waive the requirement that all modifications be in writing and to extend the option period, constituted valid option contract modifications. Petitioner further asserts that the amount of consideration was changed before the effective date of the tax at issue; thus, the change was not substantial.

In the alternative, petitioner states that the change in the amount of consideration was not substantial because the $250,000.00 increase over the purchase price of $4,150,000.00 is only six percent, and because Zeckendorf Corporation was the real optionee, regardless of which shell corporation was named in the option agreement.

In opposition, the Division of Taxation (hereinafter the "Division") relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

The gain from the transfer of certain real property in New York State which occurs after March 28, 1983 are subject to a tax (Tax Law § 1441). Several exemptions to this tax are allowed. The exemption at issue in the present case is Tax Law § 1443(6), the "grandfather exemption," which states:

> "A total or partial exemption shall be allowed in the following cases:
>
> * * *
>
> "6. Where a transfer of real property occurring after the effective date of this article [March 28, 1983] is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts or circumstances as determined by the tax commission. A written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for the purposes of this subdivision" (emphasis added).

As a general rule, statutes which provide for exemptions from tax must be strictly construed, and the taxpayer must clearly demonstrate that it is entitled to the exemption (see, Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158).

Based on this, we find that petitioner has failed to demonstrate that it qualifies for the exemption set out in Tax Law § 1443(6). The first option agreement ("option") entered into by petitioner, dated March 16, 1981, states that the option expires "at 5:00 p.m. on September 15, 1982" and that it "may not be altered, amended, modified or changed orally, but only by an agreement in writing . . ." (Ex. "B-1," clauses 2 and 22, respectively). Petitioners allege that the parties orally agreed to waive these terms, and to extend the option deadline to some point in the future when Mr. Zeckendorf was ready to consummate the deal (Tr., p. 25). However, these alleged oral modifications fail to satisfy the writing requirement of the statute. Therefore, petitioner has not established that the first option agreement did not lapse on September 15, 1982.

Petitioner makes several arguments on exception regarding the period of extension for the option, the consideration paid by the optionee, and the optionee named in the options.

Petitioner relies on Nassau Trust Co. v. Montrose Concrete Prod. Corp. (56 NY2d 175, 451 NYS2d 663) for support of its position that the deadline and writing requirement of the first option were orally waived by the parties. This reliance is misplaced. Nassau Trust addresses the application of general principles of contract law to a dispute between the parties to a mortgage.

In contrast, petitioner's present situation concerns the requirements of Tax Law § 1443(6), i.e., that the contract be in writing and be confirmed by independent evidence. Petitioner's argument amounts to a claim that the parties could waive a requirement of the Tax Law, which is clearly without merit.

Petitioner further alleges that the second option "constitutes the memorialization" of the oral amendments to the first option, referring to the reasoning in Matter of Goldome Capital Invs. (Division of Tax Appeals, March 8, 1990) for support (petitioner's memorandum on exception, p. 9). This reference to an Administrative Law Judge's opinion is improper, as:

> "[d]eterminations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state" (Tax Law § 2010[5]; see also, Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Airport Indus. Park, Tax Appeals Tribunal, April 11, 1991).

Additionally, petitioner is referred to this Tribunal's decision in Matter of Goldome Capital Invs. (Tax Appeals Tribunal, May 16, 1991) which reversed the Administrative Law Judge's determination on which petitioner relies.

We do not agree with petitioner's characterization of the second option agreement as being a modification of the first option. Several factors lead to this conclusion. First, the second option agreement was executed on July 25, 1983, many months after the September 15, 1982 expiration date of the first option.

Second, the option contains no language discussing its alleged purpose as a modification of the first option.

Third, petitioner's assertion that the second option is virtually identical to, and lacks any substantial changes from, the first option is incorrect (see, petitioner's memorandum on exception, p. 4). Rather, after reviewing the documents line by line, several significant differences become apparent. Specifically, the second option: changes the option expiration date in clauses 2 and 3; changes language in clause 4; inserts additional language into clause 6; omits language from and changes language in clause 7; omits clauses 7(B)-(D) entirely; inserts

additional language into clause 8; changes the interest rate in clause 9; changes almost all of clause 11; omits language from clause 12; inserts additional language into clause 13; omits clauses 14-17 entirely; omits language from and inserts language into clause 19 (clause 15 in second option); omits language from, as well as changes and inserts language into, clause 19 (clause 16 in second option); and, finally, changes the name of the optionee and the amount of the consideration to be paid throughout the agreement. Clearly, these changes are more substantial than the modification of the expiration date, consideration, and optionee described by petitioner.

In sum, the timing and content of the second option agreement contradicts petitioner's assertion that it serves as a simple modification of the first option.

The next point to be addressed is the additional consideration paid to petitioner for the option. The option agreements state that the consideration paid is solely for the grant of the respective options, and is not to be considered part of the purchase price. In contrast, in its exception, petitioner states that "an increase of $250,000 over a purchase price of $4,150,000 is only 6%, hardly substantial" (petitioner's exception, point 4). The treatment of the consideration as stated on exception, i.e., as an increase in the purchase price, would result in petitioner losing its exemption under Tax Law § 1443(6) (see, 20 NYCRR 590.21[a]).

The treatment of the consideration in the manner set out in the option agreements also appears to cause the exemption to be lost. Payments made for option agreements are not expressly addressed in the regulations, but 20 NYCRR 590.13 is relevant to the issue.
20 NYCRR 590.13 addresses payments made in exchange for a postponement of a closing date, setting out the requirements for excluding those payments from the consideration paid for the property. Under the facts of this case, petitioner received $150,000.00 in exchange for granting the optionee eighteen months (March 16, 1981 to September 15, 1982) to exercise the option (see, Ex. "B-1," clauses 1 and 2).

Petitioner subsequently received an additional $250,000.00 in exchange for granting the optionee additional time in which to exercise the option. Based on petitioner's allegations, this

period was sixteen months (September 1982 to January 25, 1984) (see, Tr., pp. 25-26; Ex. "B-2," clauses 1 and 2). Under our interpretation, this period was only 6 months (July 25, 1983 to January 25, 1984) (see, Ex. "B-2"). Regardless, it is difficult to reconcile how an additional $250,000.00 was paid for an option period which is shorter than the previous option period unless the $100,000.00 increase was, in fact, an increase in the consideration being paid for the property, since the previous, longer option period was secured for only $150,000.00. Although this matter has been resolved on other grounds, and a final resolution regarding the discrepancy is not necessary, the above numbers suggest that the additional compensation was being paid for the property, and not the option (see, 20 NYCRR 590.13[2]).

Finally, petitioners allege that, in reality, Mr. Zeckendorf was the actual nominee, regardless of which shell corporation was named as optionee on the option agreements. While it is true that the Tax Law will, in some instances, look to the identity of the beneficial owners rather than the legal entity, our resolution of this case on other grounds renders this point moot (see, Tax Law § 1443[5]; 20 NYCRR 590.50).

To summarize, we find that the first option contract lapsed on September 15, 1982. The second option agreement was not a modification of the first, but rather a new, independent contract. Therefore, petitioner fails to qualify for an exemption under Tax Law § 1443(6). Further, the additional consideration paid under the second option would also cause the exemption to be unavailable.

Therefore, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 58 Realopp Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed:
3. The petition of 58 Realopp Corp. is denied; and

4. The request for refund of tax on gains derived from certain real property transfers under Article 31-B by petitioner is denied.

DATED: Troy, New York
January 30, 1992

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

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

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