

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BRITISH AMERICAN DEVELOPMENT CORP.	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 806635
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner British American Development Corp., 3 Cornell Road, Airport Park, Latham, New York 12110, filed an exception to the determination of the Administrative Law Judge issued on February 18, 1993. Petitioner appeared by Tobin & Dempf, Esqs. (Kevin A. Luibrand, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Neither party filed a brief on exception. The Division of Taxation submitted a letter on August 10, 1993 stating it would not be filing a brief in opposition. This date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner is entitled to an additional \$161,740.00 in original purchase price, based on consideration paid for the purchase of the real property at issue.

II. Whether petitioner is entitled to include, as part of original purchase price, additional interest paid on monies borrowed to create capital improvements.

III. Whether penalties should be abated.

IV. Whether the notice of determination adequately apprised petitioner of the basis for the assessment.

FINDINGS OF FACT

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

Petitioner, British American Development Corp., is a real estate developer in the Albany, New York area.

In 1980, petitioner began the development of a project on Old Niskayuna Road in the affluent Estates section of Loudonville, New York. The project was initially named "Old Niskayuna", but was later renamed "Cobble Hill".

The site was a portion of approximately 84¹ acres owned by Bernard F. Connors, a principal shareholder of petitioner, individually and together with his wife, Catherine C. Connors, and British American Operations, Ltd., another corporation in which Bernard F. Connors was a principal shareholder. Mr. and Mrs. Connors owned about 65 acres, while British American Operations, Ltd. owned about 19 acres.

By deed dated September 30, 1980, recorded in the Albany County Clerk's Office on January 2, 1981, Bernard F. Connors, individually, Bernard F. Connors and Catherine C. Connors, as husband and wife, and British American Operations, Ltd. conveyed approximately 49 of the 84 acres to petitioner. Approximately 30 acres were conveyed by Mr. and Mrs. Connors and about 19 acres by British American Operations, Ltd. By another deed also dated September 30, 1980 and recorded January 2, 1981, the same grantors conveyed the balance of the 84 acres to Bernard F. Connors and Catherine C. Connors, husband and wife.

No New York State real estate transfer tax was paid upon the recording of the aforementioned deeds. The consideration recited in each deed was "ONE Dollar (\$1.00) . . . and other good and valuable consideration."

¹While the schedule included in petitioner's Exhibit "3" shows acreage calculated to three decimal places and appears to balance, it is noted that Lot Number 4 is shown as 2.12 acres but the deed and map show it as 1.12 acres.

Petitioner calculated a valuation of the land based on the cost of the land to the grantors, i.e., Mr. and Mrs. Conners and British American Operations, Ltd. The cost of the land transferred by British American Operations, Ltd. was \$75,000.00 and the cost of the land transferred by Mr. and Mrs. Conners was \$84,990.00. The total cost of the property to the grantors, including an appraisal fee of \$1,750.00, was \$161,740.00.

Petitioner's president testified that no payments had actually been made to Mr. and Mrs. Conners or British American Operations, Ltd., but that credits reflecting said amounts had been made on petitioner's books. Petitioner's general ledger account for "Land" shows a debit entry of \$164,490.00 dated May 1980 for "19.22 BAO-30.33 B F Conners."²

Cobble Hill was developed in two phases, each phase involving a section mapped around a separate cul-de-sac. The first section was completed in late 1982 or early 1983; the second section was started in the spring of 1983.

Development work consisted of engineering, obtaining the approval of the Town of Colonie, clearing land, constructing and paving roads, putting in sewer, water and storm drainage facilities, as well as other work.

Financing for the development was through a \$1,100,000.00 mortgage loan made by Marine Midland Bank, N.A. The mortgage, dated September 18, 1981 and recorded on said date, was made by petitioner, Bernard F. Conners and Catherine C. Conners. (The mortgage note is not in the record.) Petitioner received the entire proceeds of the loan at one time, rather than as construction expenses were incurred. The same parties entered into a modification and extension agreement with respect to the mortgage loan on April 29, 1983.

Petitioner sold lots at Cobble Hill at various stages of development. It appears that 24 lots were sold between January 6, 1981 and March 2, 1987.

On October 29, 1986, the Division of Taxation ("Division") wrote to petitioner stating that the records of the Albany County Clerk revealed that petitioner had sold several subdivided

²See, Petitioner's Exhibit "4." A footnote on said exhibit indicates the payment to be \$163,390.00. The figures 19.22 and 30.33 apparently refer to the acreage transferred by British American Operations, Ltd. and Mr. and Mrs. Conners, respectively.

lots at Cobble Hill with aggregate consideration in excess of \$1,000,000.00. The Division advised petitioner that petitioner had not been properly filing gains tax affidavits. The letter stated, in pertinent part:

"This letter is to inform you that you must file a Gains Tax Questionnaire for each parcel of real property sold to date pursuant to 'Old Niskayuna Lands of British American Development Corp.' subdivision and file a transferors questionnaire for each subsequent transfer at least 20 days before the date of transfer of such subdivided lot. Continued use of the affidavit will be a violation of the express language of the Tax Law."³

A reply within 20 days was requested. Petitioner's attorney called the Division requesting additional time to respond to the letter and such request was granted. On January 30, 1987, the Division again wrote to petitioner, stating that the information had still not been received.

After telephone conversations and a meeting on February 18, 1987, petitioner was advised that the subdivision was taxable and a gains tax filing was necessary.

On April 30, 1987, the Division issued a Notice of Determination of Tax Due under Gains Tax Law to petitioner. The notice stated the following:

"On October 29, 1986, we issued a letter advising you that the lot sales in the 'Old Niskayuna Lands Of British American Development Corp.' subdivision required a Gains Tax filing. On January 30, 1987, we issued a follow up letter, again asking you to furnish additional information.

"After various telephone conversations and a meeting with you and your representative on 2/18/87, we advised your representative that in our opinion the sales made pursuant [to] the subdivision were taxable.

"Since you have not filed Gains Tax questionnaires as required by section 1447 of the Tax Law, we have computed your Gains Tax liability using the best information obtainable.

"Gross Consideration	\$2,018,737.00	
Original Purchase Price	-0-	
Gain	2,018,737.00	
Tax (on 21 lots)	201,873.70	
Penalty	65,383.80	
Interest	38,335.48	

Total Tax, Penalty & Interest		305,592.98"

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Exhibit "G-2." The letter also referred to an unrelated transaction which will not be addressed herein.

Petitioner filed a petition with the former Tax Appeals Bureau dated May 15, 1987, received by the Tax Appeals Bureau on July 23, 1987, and also submitted a check for \$9,051.20, representing the amount which petitioner calculated as the tax due.⁴

The Bureau of Conciliation and Mediation Services conferee concluded that, based on information provided to the Division, 18 lots had been transferred between July 7, 1983 and March 2, 1987 and that the \$1,000,000.00 gains tax threshold had been reached with the sale of the Cobble Court lot on September 16, 1985.

Total original purchase price for 19 lots was calculated by the conferee at \$1,002,691.27, as set forth in Appendix "A" hereto. The original purchase price per lot was \$52,773.22. Total original purchase price for the 18 units at issue was \$949,917.96.

The conferee disallowed land costs because of lack of supporting documentation, noting that the deed by which petitioner received title reported zero consideration for purposes of computing the real estate transfer tax. The conferee also disallowed \$562,680.00 of the \$684,356.00 in interest expense claimed by petitioner, as it appeared that interest expense had been accrued on loans where only part of the proceeds was used to make the capital improvements to the property. Since petitioner did not show how much interest was accrued on money borrowed to make the capital improvements, an interest expense of 20% was allowed based on the capital improvements made.

Tax for the 18 lots was recalculated as follows:

<u>Lot</u>	<u>Date of Transfer</u>	<u>Cash Consideration</u>	<u>Broker Fees</u>	<u>Original Purchase Price</u>	<u>Gain</u>	<u>Tax</u>
27	7/7/83	\$ 65,000.00	\$ 6,500.00	\$ 52,773.22	\$ 5,726.78	\$ 572.68
17	7/29/83	120,000.00	12,000.00	52,773.22	55,226.78	5,522.68
25	8/1/83	76,000.00	7,600.00	52,773.22	15,626.78	1,562.68
15	11/28/83	110,000.00	11,000.00	52,773.22	46,226.78	4,622.68
21	12/19/83	77,900.00	7,790.00	52,773.22	17,336.78	1,733.68
35	1/1/84	60,000.00	6,000.00	52,773.22	1,226.78	122.68
41	5/31/84	57,500.00	5,750.00	52,773.22	(1,023.22)	-0-

⁴See, page 2 of Report of Tax Conference, included with Exhibit "D."

23	12/28/84	80,000.00	8,000.00	52,773.22	19,226.78	1,922.68
33	12/28/84	70,000.00	7,000.00	52,773.22	10,226.78	1,022.68
37	1/31/85	65,000.00	6,500.00	52,773.22	5,726.78	572.68
7	3/25/85	173,000.00	17,300.00	52,773.22	102,926.78	10,292.68
11	5/10/85	115,000.00	11,500.00	52,773.22	50,726.78	5,072.68
Cobble Ct.	9/16/85	180,000.00	18,000.00	52,773.22	109,226.78	10,922.68
5	10/22/85	125,000.00	12,500.00	52,773.22	59,726.78	5,972.68
2	4/17/86	90,000.00	9,000.00	52,773.22	28,226.78	2,822.68
42	6/5/86	90,000.00	9,000.00	52,773.22	28,226.78	2,822.68
3	8/11/86	150,000.00	15,000.00	52,773.22	82,226.78	8,222.68
1	3/2/87	147,000.00	14,700.00	52,773.22	79,526.78	<u>7,952.68</u>
				Total	\$71,736.56	

A Conciliation Order reducing the tax due to \$71,736.56, plus penalty and interest, was issued November 23, 1988.

OPINION

The Administrative Law Judge found that petitioner failed to prove that \$161,740.00 was paid to acquire the real property from Bernard F. Connors and Catherine C. Connors and British American Operations, Ltd. The Administrative Law Judge determined that there was insufficient evidence to show that petitioner gave consideration to the grantors, for example, there was no supporting documentation to show a promissory note running to the grantors or ledger entries showing credits to the grantors. In addition, the Administrative Law Judge stated that petitioner was unable to explain why the deeds indicated that no consideration was given and no real estate transfer tax was paid.

The Administrative Law Judge further found that petitioner was not entitled to include in its original purchase price interest paid on a loan for the construction of capital improvements. The Administrative Law Judge determined that petitioner's schedule of "Capitalized Costs" was erroneous. First, the Administrative Law Judge found that the schedule included interest paid for land acquisition costs which is not a cost allowable in computing original purchase price (see, 20 NYCRR 590.15[c]). Second, the Administrative Law Judge found that the schedule included interest that accrued prior to the date of the mortgage. In view of these errors, the Administrative Law Judge held that petitioner could not be granted more interest than was allowed by the conferee.

On exception, petitioner argues that the Administrative Law Judge erred in refusing to sustain any basis for the land acquired by petitioner. Petitioner states that the consideration paid is evidenced by the "credits/debits to the books and records of the Petitioner and the original sellers" (Petitioner's exception, Attachment "A") and by petitioner's president's testimony at hearing.

Petitioner further disagrees with the Administrative Law Judge's conclusions of law "F" and "H" stating that "[t]he calculations and basis presented by Petitioner was a sound and reasonable basis for calculating the interest applicable to the project, and available and applicable to calculating the basis" (Petitioner's exception, Attachment "A").

After reviewing the allegations presented to us on exception and the record before us, we find no basis for modifying the Administrative Law Judge's determination in any respect. The Administrative Law Judge adequately and correctly addressed the same allegations presented on exception to this Tribunal. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of British American Development Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of British American Development Corp. is denied; and
4. The Notice of Determination, as reduced by the conciliation order, is sustained.

DATED: Troy, New York
January 6, 1994

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

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

APPENDIX "A"

"Year	1980	1981	1982	1983 1/1/83 to 3/28/83	1983 3/29/83 to 12/31/83
Costs Claimed:					
Capital Improvements	181301.92	106437.73	30381.72	24.00	242860.31
Management Fees	18130.19	10643.77	3038.17	2.40	24286.03
Interest Expense		214395.57	169758.75	30773.90	81035.01
Mortgage Costs	6551.04	26871.00			
Land Costs	161740.00				
Real Estate Taxes				14466.46	
Legal Fees					
Disallowed:					
Land Costs (see Note 1)	<161740.00>				
Interest Exp. (see Note 2)		<193108.02>	<163682.41>	<30769.10>	<32462.95>
Add: Interest Exp. (see Note 2)	36260.38				
Totals	<u>242243.53</u>	<u>165240.05</u>	<u>39496.23</u>	<u>14497.66</u>	<u>315718.40</u>
[Year]	1984	1985	1986		
[Costs Claimed:]					
[Capital Improvements]	157164.65	69317.41	2187.42		
[Management Fees]	15716.47	6931.74	218.74		
[Interest Expense]	93896.03	62497.28	31999.85		
[Mortgage Costs]					
[Land Costs]					
[Real Estate Taxes]			26773.68		
[Legal Fees]			12206.00		
[Disallowed:]					
[Land Costs (see Note 1)]					
[Interest Exp. (see Note 2)]	<62463.10>	<48633.80>	<31562.37>		
[Add: Interest Exp. (see Note 2)]					
[Totals]	<u>204314.05</u>	<u>90112.63</u>	<u>41823.32</u>		

APPENDIX "A" (Cont.)

Allocation of Costs to (6) Exempt Sales

Costs By Year

1980	\$242243.53		
1981	165240.05		
1982	39496.23		
1983 (1/1/83-3/28/83)		14497.66	
Total	461477.47		
Cost Per Lot (25 Lots)	\$18459.10		
Costs Allocated to (6) Lots		110754.60	
Cost Carried Forward		350722.87	
1983 (3/29/83 - 12/31/83)			315718.40
1984	204314.05		
1985	90112.63		
1986	41823.32		
Total			<u>1002691.27</u>

Note (1) Land costs were disallowed for lack of supporting documentation. It should be noted that on the deed transferring fee title into the Taxpayer, the amount of consideration reported to compute the Real Estate Transfer Tax was none.

Note (2) The interest expense of \$684,356 being claimed, when compared to the capital improvements made of \$789,675, equals 87%. It appears that the interest expense was accrued on loans where only part of the proceeds were used to make the capital improvements to the real property subject to tax. Since the Taxpayer has not provided information on how much interest was accrued on money borrowed to make the capital improvements, we have allowed an interest expense of 20% based on the capital improvements made."