

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. 806636
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 11, 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).

Petitioner did not file a brief on exception. The Division of Taxation submitted a letter stating it would not be filing a brief in opposition which was received on June 29, 1993. This date began the six-month period to issue this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the transfer of three parcels of real property from petitioner to Watervliet Shores Associates constituted a single transfer for purposes of Article 31-B of the Tax Law.

II. Whether petitioner has shown reasonable cause for cancellation of penalties.

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., operates a real estate development business in the Albany, New York area.

By a deed dated and recorded June 20, 1980,¹ petitioner acquired a parcel of land on the south side of Sixteenth Street, at Broadway, in Watervliet, New York. The parcel, which was conveyed by the City of Watervliet, consisted of 1.34 acres of unimproved urban development property.

Petitioner entered into negotiations with McDonald's Corporation ("McDonald's"), proposing to build a restaurant on the parcel and to lease both the land and building to McDonald's. McDonald's, however, decided to lease the land and construct its own building. Accordingly, petitioner entered into a long-term land lease with McDonald's, which then built and operated a restaurant on the parcel. Under the lease, McDonald's has the right to renew at the end of the term. If it does not, ownership of the building will revert to the owner of the land.

By deeds dated October 15, 1982 and October 18, 1982, which were recorded November 3, 1982,² petitioner purchased two additional parcels of urban development land from the City of Watervliet:

(a) One parcel was adjacent to a Price Chopper Supermarket. Price Chopper management wanted to expand the store and also provide additional parking facilities. Petitioner worked out an agreement with Price Chopper for customer parking, purchased the property and built a shopping center known as British American Plaza.

(b) The other parcel was contiguous to the British American Plaza site. Petitioner purchased the land and subsequently erected a bank building for Troy Savings Bank and leased the land and building to the bank.

¹See, reference thereto in paragraph starting with "BEING" on the first page of Exhibit "M."

²See, references thereto in paragraphs starting with "BEING" on the first pages of Exhibits "L" and "N."

On November 29, 1983, petitioner entered into three separate agreements for the sale of the parcels:

(a) Petitioner contracted to sell the British American Plaza parcel and improvements to Watervliet Shores Associates, a New York general partnership, for \$950,000.00.³

(b) Petitioner contracted to sell the Troy Savings Bank parcel and improvements to Morris Massry for \$450,000.00. Mr. Massry was a general partner in Watervliet Shores Associates.⁴

(c) Petitioner contracted to sell the McDonald's parcel to Morris Massry for \$100,000.00.⁵

On December 19, 1983, petitioner filed transferor and transferee questionnaires for the proposed transfer of British American Plaza to Watervliet Shores Associates.⁶ On the transferor questionnaire, the date of anticipated transfer was stated to be December 23, 1983 and the computation of anticipated tax due was shown as follows:

"1. Gross consideration to be paid for transfer by Transferee	950,000.00
2. Brokerage fees to be paid by Transferor	40,000.00
3. Consideration (line 1 less line 2)	910,000.00
Complete lines 4 through 6 or line 7 whichever is applicable	
4. Purchase price paid to acquire real property	102,500.00
5. Cost of capital improvements to real property	_____
6. Original purchase price (line 4 plus line 5)	_____
7. Original purchase price paid to acquire controlling interest in entity which owns real property	_____
8. Gain subject to tax (line 3 less line 6 or line 7 whichever is applicable)	_____
9. Anticipated tax due (10% of line 8) (If exemption is claimed at Schedule A, line 3, leave blank)	_____ "

A copy of the contract and two Contractor's Application for Payment forms completed by P. J. Kenneally Construction Company, Inc. were submitted with the questionnaires.

³A copy of this agreement is attached to Exhibit "G."

⁴Exhibit "K."

⁵Exhibit "J."

⁶Exhibit "G."

No questionnaires were submitted for the Troy Savings Bank parcel or the McDonald's parcel.

On December 21, 1983, the Division of Taxation ("Division") issued a Statement of No Tax Due to petitioner based on the questionnaires.

By deeds dated January 20, 1984 and recorded January 23, 1984, petitioner conveyed each of the three parcels to Watervliet Shores Associates (Morris Massry presumably having assigned his interests in the Troy Savings Bank parcel and McDonald's parcel to the partnership). The deeds reveal the following:

(a) The British American Plaza conveyance was made and accepted subject to an indebtedness secured by two mortgages with a total unpaid principal balance of \$1,040,000.00, plus interest, with the sum of \$705,714.29 being allocated to said parcel. This sum was assumed by Watervliet Shores Associates, which agreed to pay same as part of the purchase price.

The conveyance was also made and accepted subject to another mortgage with an unpaid principal balance of \$95,753.45, plus interest. This mortgage was apparently not assumed by Watervliet Shores Associates.

(b) The Troy Savings Bank conveyance was made and accepted subject to an indebtedness secured by two mortgages with a total unpaid principal balance of \$1,040,000.00, plus interest, with the sum of \$334,285.71 being allocated to said parcel. This sum was assumed by Watervliet Shores Associates, which agreed to pay same as part of the purchase price.

The conveyance was also made and accepted subject to another mortgage with an unpaid principal balance of \$95,753.45, plus interest. This mortgage was apparently not assumed by Watervliet Shores Associates.

(c) The McDonald's conveyance was made and accepted subject to an indebtedness secured by a mortgage on which there was an unpaid principal balance of \$96,009.72, plus

interest. This sum was assumed by Watervliet Shores Associates, which agreed to pay same as part of the purchase price.

On October 29, 1986, the Division wrote to petitioner questioning petitioner's gains tax filing for the above conveyances.⁷ The letter stated that, although the gains tax questionnaire reported consideration of \$950,000.00, the records of the Albany County Clerk showed that petitioner recorded three deeds of contiguous parcels conveyed to Watervliet Shores Associates for a consideration of \$1,500,000.00. The Division asked that petitioner supply an explanation for the discrepancy, including copies of complete agreements for the three conveyances, within 20 days. Petitioner's attorney called the Division requesting additional time to respond and the request was granted.

On January 30, 1987, the Division again wrote to petitioner, requesting a reply within 10 days. There was no response to this letter.

As the information requested by the Division was not submitted by petitioner, the Division issued a Notice of Determination of Tax Due under Gains Tax Law on April 30, 1987.

The explanation for the assessment was, in part, as follows:

"Section 590.42 of the Gains Tax Regulations provides in part that the consideration received by a transferor for transfer of contiguous or adjacent parcels of property to one transferee is added together for purposes of applying the \$1 million exemption.

"Accordingly, since the consideration received for the 3 parcels exceeds \$1,000,000.00 all 3 parcels are subject to the Gains Tax.

"Parcel # 1 [British American Plaza]		
Cash consideration	\$ 950,000.00	
Mortgage indebtedness [sic] (unreported)	<u>705,714.00</u>	
Gross consideration	1,655,714.00	
Broker fees	<u>40,000.00</u>	
Consideration	1,615,714.00	
Purchase Price	\$48,000.00	
Capital Improvements	<u>764,505.00</u>	
Original Purchase Price	812,505.00	
Gain	803,209.00	
Tax		80,320.90

"Parcel # 2 [McDonald's]

Cash consideration (unreported)	100,000.00		
Mortgage Indebtness [sic] (unreported)	<u>96,010.00</u>		
Gross Consideration	196,010.00		
Original Purchase Price	0		
Gain	196,010.00		
Tax		19,601.00	
"Parcel #3 [Troy Savings Bank]			
Cash Consideration (unreported)	450,000.00		
Mortgage Indebtness [sic] (unreported)	<u>334,286.00</u>		
Gross Consideration	784,286.00		
Original Purchase Price	0		
Gain	784,286.00		
Tax		78,428.60	
Total Tax (3 Parcels)			\$178,350.50
Penalty (35%)			62,422.68
Interest (1-23-84 - 6-1-87)			75,725.90"

The total of the tax, penalty and interest assessed was \$316,499.08.

A Bureau of Conciliation and Mediation Services conference was held on December 15, 1987 with respect to the assessment. Pursuant to the conference, the aggregation of the three parcels was found to be proper, but the tax due was reduced to \$19,795.90 by a Conciliation Order dated November 23, 1988. The reduction was primarily due to the elimination of the mortgage indebtedness included in the calculations of gross consideration in the notice of determination and the allowance of original purchase price for the McDonald's and Troy Savings Bank parcels.

Tax, penalty and interest were recalculated as follows:

	Parcel 1 <u>British American Plaza</u>	Parcel 2 <u>McDonald's</u>	Parcel 3 <u>Troy Savings Bank</u>
Tax (10%)	\$10,995.90	\$4,573.30	\$4,226.70
Penalty (35%)	3,848.57	1,600.66	1,479.35
Interest 1/23/84-9/30/88	<u>6,456.23</u>	<u>2,685.21</u>	<u>2,481.71</u>
Totals	\$21,300.70	\$8,859.17	\$8,187.76
Totals on 3 Parcels:			
Tax	\$19,795.90		
Penalty	6,928.58		
Interest	<u>11,623.15</u>		
Total	\$38,347.63		

OPINION

The Administrative Law Judge determined that the consideration received by petitioner for the three parcels should be added together for the purpose of applying the \$1,000,000.00 exemption. The Administrative Law Judge found the transfers of the three parcels of real property to be a single transaction, i.e., there was one transferor and one transferee, and that the parcels were used for a common or related purpose. The Administrative Law Judge next addressed the question of whether the McDonald's parcel was contiguous or adjacent to the British American Plaza and Troy Savings Bank parcels. The Administrative Law Judge, relying on Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), found that they were adjacent as the McDonald's parcel was only separated from the others by a public road.

The Administrative Law Judge sustained the penalties imposed pursuant to Tax Law § 1446(2)(a) as petitioner failed to show reasonable cause for not filing gains tax questionnaires for the Troy Savings Bank and McDonald's parcels and for not paying the tax due. The Administrative Law Judge, relying on Matter of LT & B Realty Corp. v. New York State Tax Commn. (141 AD2d 185, 535 NYS2d 121), found that "consulting with and following the advice of a tax professional does not per se constitute reasonable cause" (Determination, conclusion of law "E").

On exception, petitioner argues that the phrase "common purpose" is vague and to interpret "real estate investment and development" as a common purpose is an over broad interpretation. In its requested findings of fact and conclusions of law, petitioner contends that the three parcels were not used for similar purposes, were not contiguous or adjacent and that the transfers of the three parcels should not be aggregated. Petitioner also argues, in the alternative, that, if the McDonald's parcel is found to be contiguous to the other parcels, then the only correlation between the properties is the contiguity itself and the consideration should not be aggregated.

Petitioner also argues that its failure to file gains tax questionnaires and pay tax was due to reasonable cause and no penalty should be imposed.

Petitioner further argues that "[t]he Decision fails to recognize Petitioner's hearing proof of payment of the tax as he calculated it in 1989, and adds accruing penalty after the payment had been made. Such imposition of penalty after payment is contrary to law" (Exception, Exhibit "A").

In response, the Division relies on its Answer and the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

First, we affirm the Administrative Law Judge's conclusion that the properties were contiguous for the reasons stated in the determination.

We next address petitioner's assertion that to categorize "real estate investment and development" as a common purpose is too broad. Petitioner has failed to acknowledge the gains tax cases dealing with this issue. In Matter of Bombart v. Tax Commn. (132 AD2d 745, 516 NYS2d 989), the Court found that the parcels were used for a common or related purpose where "petitioner operated them through a single management company for the same income-producing purpose, i.e., rental of residential apartment units" and were properly aggregated. In Matter of Iveli v. Tax Appeals Tribunal (145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003), the Court found that there was a common or related purpose where the "buildings on each parcel were held for investment purposes" and, therefore, the parcels were properly aggregated.

With respect to petitioner's argument that if the properties are determined to be contiguous then the only correlation between them is the contiguity itself, petitioner has failed to acknowledge the decision in Matter of Von-Mar Realty Co. v. Tax Appeals Tribunal (191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803). In Von-Mar Realty, the Court held that the petitioner "failed to sustain its burden of proving that contiguity was the sole reason for the determination that aggregation was appropriate [cite omitted] and that no common purpose exists." We find that petitioner has failed to meet the burden of proof set forth in the Von-Mar Realty case. The Court further held that aggregation was appropriate

where "both parcels included industrial buildings, were purchased at the same time from the same grantors and were sold at the same time to one purchaser" (Matter of Von-Mar Realty Co. v. Tax Appeals Tribunal, supra, 594 NYS2d 414, 416). Here, the parcels were used for development and rental purposes, were purchased from the same grantors and were sold to one purchaser at one closing.

Next, we agree with the Administrative Law Judge that petitioner did not sustain its burden of proof to show reasonable cause for not filing gains tax questionnaires and paying the tax due. As the Administrative Law Judge noted, reliance on the advice of an attorney does not constitute reasonable cause, unless that reliance is itself shown to be reasonable under the circumstances (Matter of Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commissioner of Taxation & Fin., 191 AD2d 80, 598 NYS2d 829).

With regard to petitioner's assertion in its exception that "the Division fails to recognize Petitioner's hearing proof of payment," we do not know what petitioner is referring to. The only mention of payment in the hearing transcript states that "[t]here was no attempt made to pay [the tax] because we did not believe . . . that there is a tax due on McDonald's and, up to recently, didn't think there was any tax obligation on the bank or on the plaza" (Tr., p. 29).

Finally, petitioner has raised many issues in its requested conclusions of law and findings of fact but has not put forth any legal arguments, either in the form of a brief, in its exception or at hearing, in support of these assertions. As we do not find any factual basis in the record to support these assertions, we will not address them.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The petition of British American Development Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The exception of British American Development Corp. is denied; and

4. The Notice of Determination dated April 30, 1987, as modified by the Bureau of Conciliation and Mediation Services Conciliation Order, is sustained.

DATED: Troy, New York
December 16, 1993

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

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