STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LOREN CROSSROADS ASSOCIATES	:	DECISION DTA No. 806641
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 Loren Crossroads Associates, 237 Mamaroneck Avenue, White Plains, New York 10605 filed an exception to the determination of the Administrative Law Judge issued on December 6, 1990 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 Alfred H. Mattikow, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation resubmitted a letter filed at hearing below in opposition to the exception. Petitioner'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 consideration required to be paid to petitioner on its transfer of certain real property should be reduced by the amount of rent paid by petitioner to the purchaser in a concurrently executed lease agreement.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "1" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

We modify finding of fact "1" to read as follows:

> Petitioner, Loren Crossroads Associates ("Loren"), is a partnership consisting of three individuals. Thepartnership owned a multi-tenanted office building at 33 West Main Street, Elmsford, New York. The building was approximately 65,000 square feet in size. The building was purchased by the partnership in April 1983.[1]

On or about December 6, 1985, petitioner entered into a contract of sale whereby petitioner agreed to sell to Piccadilly Hotel Company the building located in Elmsford, New York. The selling price for the property was $7,250,000.00. The contract of sale contained a provision which provided that simultaneously with the closing of title, and as a condition precedent to the purchaser's obligations under the contract of sale, petitioner was to enter into a lease with the purchaser. The contract provided that petitioner, as lessee, was to enter into a lease to rent from the purchaser, as lessor, 19,554 rentable square feet of unrented space in the building as of the date of the contract of sale. The lease was referred to as the "Master Lease-Back". Petitioner transferred the property to the seller on December 27, 1985.

On December 27, 1985, petitioner, as lessee, and the Piccadilly Hotel Company, as lessor, entered into an agreement of lease for a two-year period commencing on the 27th day of December, 1985 and ending on the 26th day of December, 1987. The agreement provided that petitioner would lease 19,554 square feet of vacant space in the building located at 33 West Main Street for an annual rental rate of $351,972.00, to be paid in monthly installments of $29,331.00. In addition, petitioner was obligated to pay an additional $2.00 per square foot of rental space to cover the cost of electricity consumed in the demised premises. Under the lease, petitioner had the right to use and occupy the rented space as general business offices.

---

[1]The Administrative Law Judge's finding of fact "1" read as follows:

> "Petitioner, Loren Crossroads Associates ('Loren'), is a partnership consisting of three individuals. The partnership owned a multi-tenanted office building at 33 West Main Street, Elmsford, New York. The building was purchased by the partnership in April 1983."

We modified this finding of fact to note the size of the building.

The lease agreement provided petitioner with the right to find other tenants to lease the vacant rental space. If an appropriate tenant was found, the landlord, Piccadilly Hotel Company, was required to execute a substitute lease with the new tenants. Petitioner was responsible for the costs of any alterations to the rental space required by the substitute lease. The substitute lease with the new tenants relieved petitioner of all remaining payments relating to the space covered by such lease. Rental payments made by the new tenants were paid directly to the landlord. During the two-year period of the lease, neither petitioner nor the individual partners occupied the rented space.

On the closing date of the sale of the building, $900,000.00 of the selling price was placed into an escrow account. As to the amount escrowed, $700,000.00 was for rental payments and $200,000.00 was for electricity payments required to be made under the lease agreement. In order to release funds from this account, authorized signatures of both petitioner and Piccadilly Hotel Company were required. During 1986 and 1987, actual expenditures paid out of the escrow account were as follows:

	1986	1987	Total
Rent	$314,871	$190,314	$505,185
Utilities	34,867	17,890	52,757
Tenants Improvements	--	19,229	19,229
Advertising	5,723	--	5,723
Insurance	1,938	--	1,938
Repairs	24,256	—	24,256
Totals	$381,655	$227,433	$609,088

The full amount of the escrow account was not used during the rental period as petitioner was able to rent portions of the demised premises to new tenants. At the conclusion of the rental period, the balance remaining in the escrow account was given to petitioner.

For the tax year 1985, the Federal and State income tax returns of the petitioner and the partners showed a selling price for the property at issue of $7,250,000.00. The amount escrowed was treated on the books and records as an amount due petitioner from the purchaser of the property. During the tax years 1986 and 1987, the payments made from the escrow account were treated as expenses on the Federal and State income tax returns of the partnership

and the individual partners. The accountant for petitioner testified that the returns were filed in such a manner because the selling price of $7,250,000.00 was ascertainable when the 1985 returns were completed, but the expenses under the lease were unknown at such time. The accountant further testified that had the purchase price been reduced in 1986 and 1987 to reflect the expenses paid out of the escrow account, amended returns for the year 1985 would have had to have been filed in 1986 and 1987 to reflect the lower purchase price and reduced capital gains for the partnership and each individual partner. According to the accountant, it is not proper to continuously amend returns to give effect to subsequent events.

On December 23, 1985, the Division of Taxation ("Division") issued to petitioner a Real Property Transfer Gains Tax Tentative Assessment and Return showing the gain subject to tax of $2,699,449.94 and total tax due of $269,945.00. Petitioner paid the total tax due on the date of transfer. On or about December 1, 1987, petitioner filed with the Division a claim for refund of real property transfer gains tax requesting a refund of $60,903.81. The claim for refund was based on the premise that the amount of $609,088.00 expended by petitioner pursuant to the lease agreement reduced the $7,250,000.00 selling price to $6,640,912.00, the amount of gain to $2,090,036.94 and the amount of total tax due to $209,041.19. As a result of the reduction of the selling price, petitioner claimed a refund in the amount of $60,903.81. On February 29, 1988, the Division denied petitioner's claim for refund, stating that a leaseback is not considered a reduction to the consideration received.

OPINION

In his determination below, the Administrative Law Judge determined that the lease arrangement between petitioner and the purchaser was properly classified as a sale-leaseback transaction. Moreover, the Administrative Law Judge found that although the arrangement constituted a sale-leaseback transaction, the leaseback was not a taxable event as the three conditions precedent to the taxability of a lease are not present. Therefore, he concluded that the Division properly denied petitioner's claim for refund.

On exception, petitioner contends that there was a single transaction in this case, i.e., a transfer of the property from petitioner to purchaser. Petitioner contends that the leaseback was a condition precedent to the purchaser's obligation to complete the transaction. Therefore, petitioner argues that the $900,000.00 put into an escrow account, of which $609,088.00 was paid to the purchaser for rent and related expenses under the lease, results in a reduced consideration. As a result, petitioner argues that the $7,250,000.00 consideration originally paid to the purchaser must be reduced by the $609,088.00 subsequently paid to the purchaser over a two year period, resulting in an actual consideration of $6,640,912.00. Furthermore, petitioner argues that its characterization of this transaction for income tax purposes should not be determinative of the character of this transaction for State real property transfer gains tax purposes.

In response, the Division argues that it properly treated the sale and the leaseback as two separate events. The Division contends that petitioner cannot enter into a lease with itself, but rather, petitioner can only become lessee after the property has already been transferred to another owner. Therefore, the Division argues that the $7,250,000.00 paid by the purchaser at the time of the closing was the consideration for the purchase of the building and that the lease transaction was a separate and distinct proposition. Lastly, the Division states that because petitioner characterized the transaction as a sale-leaseback for income tax purposes, it then cannot claim that the transaction is something different for the purposes of the real property transfer gains tax. Accordingly, the Division requests that we conclude that petitioner's claim for refund was properly denied.

We affirm the determination of the Administrative Law Judge for the following reasons.

The real property transfer gains tax (hereinafter the "gains tax") is a 10% tax imposed upon the gain derived from the transfer of real property located within New York State where the consideration received for the transfer of such property is $1 million or more (Tax Law §§ 1441, 1443[1]). Consideration, for purposes of calculating the taxable gain, is defined as

the price paid or required to be paid for real property or any interest therein (Tax Law § 1440[1]).

Primarily, petitioner contends that the findings of fact demonstrate that the sale and the mandatory leasing back of a portion of the subject building constituted a single transaction. Petitioner refers us to the language used in the rider to the Contract of Sale which states, "simultaneously with the closing of title, and as a condition precedent to the purchaser's obligation under the Contract of Sale, petitioner was to enter into a lease with the puchaser" (paragraph 41 of the rider to the Contract of Sale). Petitioner argues that this paragraph, including the balance thereof, further indicates that this was a single transaction. We disagree.

We agree with the Administrative Law Judge that the situation presented in this case involves two separate and distinct transactions. First, petitioner transferred the building to the purchaser. Secondly, petitioner became a lessee under a two-year lease to rent vacant space in the building being transferred to the purchaser. The contract of sale contained a provision that required petitioner to simultaneously enter into a lease with the purchaser. Furthermore, the contract itself refers to the rental arrangement as the "Master Lease-Back." Lastly, petitioner treated this transaction for income tax purposes as a sale-leaseback transaction.

Next, petitioner argues that its characterization of this transaction as a sale-leaseback for income tax purposes should not be determinative of the character of this transaction for gains tax purposes. We agree. Although its characterization for income tax purposes is not wholly determinative, it is certainly a factor that should be weighed in determining what type of a transaction occurred herein.

We also agree with the Administrative Law Judge that the consideration required to be paid by the purchaser for the transfer of the building was $7,250,000.00. The escrow account created by the parties which contained a portion of the selling price in order to insure petitioner's compliance under the two year lease does not result in a changed selling price. The money placed in escrow belonged to petitioner as evidenced by the return of the unused escrowed money to petitioner at the expiration of the lease term. Moreover, petitioner

considered itself the owner of the money in escrow as its books and records reflected such amount as due to petitioner from the purchaser.

We agree with the determination of the Administrative Law Judge and his reasoning set forth therein. Therefore, we conclude that petitioner is not entitled to its refund claim.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Loren Crossroads Associates is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Loren Crossroads Associates is denied; and

4. The denial of petitioner's refund claim by the Division of Taxation is sustained.

DATED: Troy, New York
August 1, 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