STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SEASIDE DEVELOPMENT CORPORATION	:	DECISION DTA No. 808089
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 Seaside Development Corporation, 122 Cuttermill Road, Great Neck, New York 11021, filed an exception to the determination of the Administrative Law Judge issued on June 16, 1994. Petitioner appeared by Certilman, Balin, Adler & Hyman (Howard M. Stein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on October 6, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioner, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUES

I. Whether petitioner's original purchase price for the acquisition of real property included amounts paid pursuant to contracts for the sale of two restaurant businesses.

II. Whether the assignment fee paid for the assignment of five contracts to petitioner was subject to apportionment.

III. Whether maintenance fees paid by petitioner to the cooperative housing corporation after transfer of shares of stock to the cooperative housing corporation may be included in petitioner's calculation of original purchase price.

IV. Whether the determination of the Administrative Law Judge improperly sustained the disallowance by the Division of Taxation of capital improvement costs and should the matter be remitted to the Division of Tax Appeals solely to determine what portion of petitioner's maintenance costs should be included in the origianl purchase price.

FINDINGS OF FACT

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

Petitioner, Seaside Development Corporation ("Seaside"), was the developer and sponsor of a cooperative housing corporation named Hamilton House Owners, Inc. (the "CHC"). Seaside acquired the real property upon which the cooperative apartment buildings were constructed in October 1984. This acquisition came about through a series of contractual arrangements.

Seaside was the assignee of five sales contracts. The assignors of those contracts were actually four separate individuals. For ease of discussion, they will be referred to collectively by the last name of one of the individuals, Pappas. On January 24, 1984, Pappas entered into the following contractual agreements.

(1) Pappas contracted for the purchase of real property, including buildings and improvements, located at 10031 4th Avenue, Brooklyn, New York. At that time, the property included a one-story restaurant called Hamilton House, which was something of a landmark in Bay Ridge, Brooklyn. The sellers of this property were Louis Vames (the restaurant corporation's president), Adelaide Nicholas, George Georges, Gregory Coutoupis and the Estate of Gus Nicholas. The purchase price cited in the agreement was $500,000.00.

(2) The sellers of 10031 4th Avenue were also the sellers of an adjacent property located at 10015 4th Avenue. A building on this property housed a banquet hall and catering business

operated by Narrows Restaurant, Inc. ("Narrows"). The principal shareholders of Narrows were also the owners of the Hamilton House Restaurant. Pappas agreed to purchase the property located at 10015 4th Avenue for a price of $500,000.00.

(3) Pappas entered into a contract with Narrows for the purchase of "the catering and banquet business located at 10015-4th Avenue". The assets purchased under the contract included furniture, fixtures, equipment and merchandise. The sale was conditioned upon the State Liquor Authority's approval of Pappas's application for a liquor license.

(4) Pappas entered into a contract for the purchase of the restaurant business known as Hamilton House Restaurant for the sum of $1,000,000.00. Again, the sale was to include furniture, fixtures, equipment and merchandise and was conditioned upon Pappas's success in obtaining a liquor license.

(5) On April 13, 1984, Pappas entered into a fifth contract. This contract was in the form of a lease with an option to purchase three unimproved parcels of land adjacent to the Hamilton House restaurant, known as 415, 417 and 419 101st Street. The owner of these properties, Adelaide Nicholas, was one of the principals of Hamilton House, Inc. and Narrows Restaurant, Inc.

All of the contracts discussed above contain a similar provision identifying the other four contracts and then stating:

> "The parties in each of said agreements have a community of interest with the parties in this agreement. It is a condition of this agreement that all of the agreements are interdependent and shall close simultaneously and that the assignment of any agreement shall require the assignment of all agreements. A default in the terms of any of the agreements shall be considered a default in all of said agreements."[1]

The contract for sale of the Narrows contains the following provision:

> "In connection with the catering business being conducted by the Seller, Seller agrees that at the time of closing it will assign and

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[1]This provision is from the agreement for sale of the catering and banquet business located at 10015 4th Avenue. The four other contracts contain similar or identical language.

> transfer to the Buyer all such catering contracts scheduled to be fulfilled on dates after the closing of title, together with the sums deposited by the customers under each such catering contract. The Buyer shall in such event assume the obligation to fulfill the Seller's obligations under such catering contract and shall hold Seller harmless for any failure or alleged failure in the performance of such contracts."

On April 13, 1984, Pappas assigned his rights under the five contracts to NVNG Development Corp. ("NVNG"). James Gherardi was the sole shareholder of both NVNG and Seaside, and NVNG later assigned its rights to Seaside. The agreement between Pappas and NVNG contains the following provision:

> "It is the intention of the parties that all five (5) transactions entered into this date are indivisible, mutually dependent and it is the intention of all parties hereto that all transactions close simultaneously. In the event of the failure of anyone [sic] transaction, and at the option of the PURCHASER, all other transactions shall be abrogated and all contract monies deposited by the PURCHASER herein shall be returned to the PURCHASER."

The actual closing on all of these contracts occurred on October 31, 1984. On the closing date, Seaside and Narrows executed a bill of sale by which Narrows conveyed to Seaside "the catering and banquet business" conducted by Narrows together with furniture, fixtures, equipment, and all logos, trademarks and designs used in connection with the business. Among the items transferred were a couch, drapes, loveseats, mirrors, wall sconces, chandeliers, plants, silver, pottery, glassware, ovens, sinks, dishwashing equipment, refrigeration equipment and stainless steel storage shelves. Seaside and Hamilton House, Inc. executed a similar bill of sale.

Seaside filed two real property gains tax transferee questionnaires, dated September 17, 1984. One questionnaire reported the transfer of the property located at 10015 4th Avenue for consideration of $500,000.00 and the other reported the transfer of the property located at 10031 4th Avenue for the same consideration. The questionnaire filed in connection with the transfer of the property at 10015 4th Avenue contained the following statement:

> "The transferee is also acquiring a business being operated on the premises for an additional consideration of $500,000.00.

> Transferee Questionnaire also being filed in connection with premises 10031 Fourth Ave., Brooklyn, N.Y. In addition to the transaction indicated above, Transferee is exercising an option to purchase premises 415, 417, and 419 101 St., Brooklyn. The purchase price for the 3 aforementioned parcels is $200,000.00. The Transferee is an assignee of contracts to purchase the aforementioned properties and is paying to Constantine Spiropoulos, Steve Pappas, Giovanni Aprea, Luigi Silvestri, A.S.P.S. Rest., Inc. and N.R. Rest., Inc. an additional sum of $825,000.00 in consideration for the assignment of their respective interests in the properties above mentioned and premises 10031 Fourth Ave., Brooklyn."

A letter, dated June 12, 1984, enumerates the terms of the agreement for the assignment of the contracts between NVNG and Pappas. As relevant here, it states:

> "[I]t is understood and agreed that the undersigned, NVNG Development Corp., shall pay you, in certified funds simultaneously with the closing of title, the sum of $875,000.00 in addition to paying the Sellers the sums that are required in order to close the various titles and sales.
>
> Said sum of $875,000.00 is arrived at as follows:
>
> $825,000.00 -- consideration paid for the assignments
>
> + 75,000.00 -- adjustment for the deposits heretofore paid by you to the Sellers on signing of the original contracts for which NVNG Development Corp. is to receive credit from the Seller.
>
> - 25,000.00 -- balance of escrow held by Thomas A. Vafides, Esq.
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> $875,000.00"

Seaside purchased the subject properties with the intention of constructing a residential apartment complex and never intended to continue operation of the restaurant businesses purchased. Seaside never operated a restaurant or catering business. Because of zoning requirements, Seaside was required to reserve a portion of the ground floor facing 4th Avenue for commercial space. The original blueprints submitted with Seaside's application for a building permit show a commercial space divided into three stores on the first floor of one of the planned

buildings. The building permit was issued on October 18, 1984. Demolition of the existing buildings began in February 1985 by which time Seaside had decided to put a restaurant in the reserved commercial unit.

Two buildings were constructed on the property acquired by Seaside. A six-story apartment building was built at the corner of 4th Avenue and 101st Street and a three-story apartment building was constructed on adjoining property. Altogether the project, which was marketed under the name Hamilton House, included 106 residential units, a commercial unit, an underground parking garage, and a landscaped plaza.

The offering plan issued by Seaside shows total shares to be issued of 24,228 with an anticipated purchase price for all shares of $12,114,000.00 and mortgage indebtedness of $5,200,000.00, yielding a total acquisition cost of $17,314,000.00. The offering plan contains the following general description of the property:

> "The property will consist of one six (6) story High Rise, the High Rise being a legal 76-family dwelling, and one three (3) story Townhouse, the Townhouse being a legal 30-family dwelling. The adjacent commercial space is not part of the property but is subjacent thereto and all air rights will be owned entirely by the Apartment Corporation."

Building was substantially completed in August 1986 and a certificate of occupancy was issued by the City of New York dated August 19, 1986. Seaside then transferred the property to the CHC. At the time of transfer, 45 to 55 of the residential units were sold.

The Division of Taxation ("Division") issued a schedule of proposed audit adjustments to Seaside.[2] The schedule shows a number of adjustments made by the Division to Seaside's original purchase price and calculates total anticipated gain for the transfer of 24,288 shares of stock in the amount of $2,864,064.00. The parties provided no evidence regarding the event that

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[2]Two such schedules were issued to Seaside. One schedule, dated December 3, 1986, was placed in evidence as an attachment to Seaside's petition. Another, undated schedule, was placed in evidence as an attachment to the Division's answer. Neither party explained the sequence of events that led to the issuance of the two documents. Although they are clearly two different documents, they contain identical calculations; therefore, they are referred to collectively as though there was only one schedule.

triggered the issuance of the schedule. No transferor or transferee questionnaires were placed in evidence regarding the transfer from Seaside to the CHC. Seaside's original submission of its computations of anticipated gross consideration and original purchase price (assuming they were submitted) was not placed in evidence.[3]

The Division issued to Seaside a Notice of Determination, dated June 8, 1988, assessing real property gains tax in the amount of $264,726.18, plus interest and penalty calculated for the period August 29, 1986 through July 7, 1988, for a total amount due of $400,813.58. The notice contains the following statement:

> "For failure to either agree or disagree within 30 days of the date of the Statement of Proposed Audit Adjustment issued on April 4, 1988, has resulted in the issuance of this Notice of Determination of tax due under Article 31-B of the Tax Law, for Real Property Transfer Gains Tax."

In its answer, the Division alleges that it "determined that some 22,394 shares were sold by petitioner with respect to the cooperative conversion . . . ." There is no evidence in the record describing the basis for the Division's determination of the number of shares sold. Assuming that 22,394 shares were sold at the time the notice was issued, it would have to be concluded that over 90% of the shares were sold by July 1988. In its petition, Seaside states:

> "Taxpayer must be given an opportunity to update its calculations during the progress of construction and upon its completion. The NYSDTF Notice of Determination of Tax Due gives the appearance of improperly fixing the tax penalties [sic] and interest without permitting an appropriate adjustment which is required by way of the updating of cooperative and condominium projects."

At hearing and in its brief, Seaside did not follow up this allegation. It offered no evidence or legal argument to support the contention that the assessment includes transfers not subject to tax at the time the notice of determination was issued.

The Division's schedule of adjustments shows a number of adjustments to (presumably) Seaside's calculation of original purchase price consisting of the disallowance of certain expenses

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[3]It appears that petitioner submitted a computation of original purchase price which became the basis for the Division's calculation of tax due; however, there is no evidence in the record of this.

claimed as initial acquisition costs and capital improvements. In its petition, Seaside challenged only five of the adjustments, although it contested the entire amount of tax assessed by the Notice of Determination.

One of the adjustments challenged in the petition was the disallowance of an expenditure for an architectural scale model. Seaside did not address this adjustment at hearing or in its brief; therefore, its original protest

of that disallowance is being considered abandoned. As a result, there are only four audit adjustments at issue in this proceeding.

(a) The Division disallowed amounts paid by Seaside under the contracts for the purchase of the Hamilton House restaurant business and the Narrows catering business. This reduced Seaside's acquisition costs by $1,500,000.00.

(b) The Division determined that Seaside paid $850,000.00 for the assignment of the contracts between Pappas and the sellers of the real property and restaurant businesses. The Division allocated this amount to the real property and to personal property. This reduced Seaside's acquisition costs by $377,740.00. The Division determined that $50,000.00 paid to Pappas by Seaside was attributable to reimbursing the assignors for downpayments made by them on the purchase contracts and was not includable in the assignment fee. As a result, original purchase price was reduced by $50,000.00.

(c) The Division apportioned Seaside's original purchase price to the retained commercial unit and the real property transferred to the CHC. After other disallowances were accounted for, total original purchase price was determined to be $1,672,260.00, and 10.22% of this amount (or $170,905.00) was apportioned to the commercial unit. The percentage figure was obtained by dividing the square footage occupied by the commercial unit by the square footage of what the Division calls "habitable space". These were determined to be 4,354 square feet and 42,592 square feet, respectively. The Division did not explain how these measurements were arrived at

or provide a clear definition of the term "habitable space". The apportionment of the original purchase price to the commercial unit further reduced acquisition costs by $170,905.00.

(d) After the transfer to the cooperative corporation, Seaside retained the unsold shares and was required to pay maintenance charges, representing a proportionate share of the expenses of the corporation. The Division eliminated these expenses from Seaside's calculations of the cost of capital improvements.

With regard to each party's calculation of the total number of square feet apportionable to the commercial unit, neither party offered to explain how it determined the figures it used. Petitioner offered in evidence a blueprint of the first floor of the building in which the commercial unit is located. The Division's representative stated:

> "While we were off the record I reviewed the blueprints submitted by petitioner, in regards to the issue concerning the square feet of the commercial space of the property. And it's agreeable with the Division that we will accept the total square footage, as set out in petitioner's petition, for the project, and that it's discernible, from the blueprints, the square footage of the commercial space. And that based on those numbers, the administrative law judge can make a determination as to what percentage of the commercial space, in relation to the entire building, exists for this property." (Tr., p. 79).

The petition states:

> "The residential space of the project constitutes 68,212.41 square feet. The commercial space constitutes 4,201 square feet, yielding a total of 72,413.41 square feet of saleable space. (See page BB-22 of the Offering Plan)."

Page BB-22 of the Offering Plan shows the number of square feet on each floor of the two buildings. According to the plan, the residential area of the first floor of the six-story building is 3,210 square feet plus a lobby of 1,166 square feet. It is apparent from reviewing the schedule that petitioner calculated 68,212.41 square feet of "saleable space" by including the total square

footage of the residential areas of each floor of each building. Its calculations did not include lobbies, basement rooms, the parking garage or outdoor spaces.[4]

Approximately eight months after a certificate of occupancy was issued for 10031 4th Avenue, a restaurant named Zio's was opened in the retained commercial unit. It bore no resemblance to the previous restaurant, Hamilton House, and it was not owned or operated by Seaside or Seaside's principal owner, James Gherardi. James Gherardi, Jr., Seaside's office manager and bookkeeper, described the layout of the restaurant. He stated that the restaurant occupied a portion of the first floor and the basement underneath, with a full kitchen and serving area on each floor. He testified that the restaurant occupied a little over 3,000 square feet on the first floor and a basement area of approximately the same size. He changed this testimony after reviewing the petition and stated that the restaurant occupied a total of approximately 4,200 square feet. In its petition and brief, Seaside claimed that the commercial unit occupied 4,201 square feet. Mr. Gherardi also testified that local zoning requirements mandated that 50% of the first floor of the building be used as a commercial space. Seaside never described the method by which it determined that the commercial unit occupied 4,201 square feet.

The blueprints do not clearly state the inside dimensions of the various units and common spaces shown. As a consequence, the dimensions of the commercial unit can only be estimated based on the outside dimensions. These are segregated into smaller units which allows some reasonable estimate of the actual dimensions. Using the outside dimensions, it can be determined that the entire building fronting on 4th Avenue is 55 feet wide and 163 feet long. Therefore, the square footage of each floor is approximately 8,965. The commercial unit is less than half this size. The width of the commercial unit is 55 feet. The length of the unit is the sum of the following measurements: 16 feet, 16 feet, 26 feet, 6 inches, 17 feet, 3 inches, 2 feet, 6 inches

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[4]In his testimony, Mr. Gherardi stated that the overall size of the two buildings is approximately 72,000 square feet, giving the impression that the calculation in the petition included all common areas, such as the parking garage. That testimony is in direct conflict with the offering plan (pp. BB-21 - BB-22) which describes over 100,000 square feet, including the parking garage, basement area and lobbies. I consider the offering plan to be the most reliable source of information.

(one-half of an outside measurement of 5 feet) or 78 feet, 3 inches. Based on these calculations, it can be concluded that the commercial unit occupies approximately 4,303 square feet on the first floor. Consistent with Mr. Gherardi's testimony that the restaurant occupies the same amount of space in the basement, it can be concluded that the commercial unit occupies 8,606 square feet.

Seaside continued making capital improvements to the cooperative project after the transfer to the CHC. Carpeting and tiling, painting of the common areas, landscaping and roofing work were among the improvements which took place after the certificate of occupancy was issued in August 1986. The apartment units sold at the time of transfer were completed, but other units needed carpeting, installation of appliances and other work. Seaside maintained a full crew of workers on the site through March 1987. A smaller number of workers continued finish-up work through mid-1988. Invoices offered in evidence by petitioner show that carpeting and tiling were installed, roof work was performed and appliances were delivered and installed after the certificate of occupancy was issued.

As the owner of unsold shares in the corporation, Seaside paid maintenance fees to the CHC after the transfer.

OPINION

In the determination below, the Administrative Law Judge reviewed the definition of "original purchase price" in Tax Law § 1440(5)(a), holding the pertinent part of said definition to be "'the consideration paid or required to be paid by the transferor . . .to acquire the interest in real property . . . .'" (Determination, conclusion of law "B").

The Administrative Law Judge rejected petitioner's argument that the price it paid for the real property included the amounts paid for the restaurant businesses as a required condition of obtaining the real property.

The Administrative Law Judge held that:

> "[i]n determining petitioner's original purchase price for the real property, it is appropriate to look to the terms of the contracts. Three of the contracts were for the purchase of real property and two were for the purchase of the restaurant businesses. The parties apportioned the purchase prices of the real property and personal property by the terms of the contracts" (Determination, conclusion of law "B").

Specifically, the Administrative Law Judge noted that: 1) the sale of furniture, fixtures and equipment were part of the terms of the contracts for Hamilton House and the Narrows with the Narrows bill of sale listing furniture, fixtures, equipment and merchandise as being transferred in the sales; 2) "[p]etitioner's intended use of the property cannot vary the terms of the contracts" (Determination, conclusion of law "B"); 3) while the contracts were mutually dependent, the fact is that the parties agreed to structure this transaction as a sale of real and personal property; 4) even though petitioner was the assignee of the contracts and did not negotiate the terms of the five contracts, it agreed to be bound by the terms of those contracts; and 5) petitioner has failed to present any persuasive evidence showing that the contracts do not contain the full agreement and understanding of the parties at the time of the sales.

The Administrative Law Judge also rejected petitioner's argument relating to the assignment fee holding that "[p]etitioner has not offered any rationale for not apportioning the assignment fee" and, therefore, "it was proper for the Division to apportion the assignment fee to the contracts to buy real property and the contracts to buy personal property" (Determination, conclusion of law "C").

The Administrative Law Judge rejected petitioner's argument relating to the $50,000.00 paid to reimburse the assignors for deposits paid to the sellers holding that it appears this payment was part of the price paid under the contracts and not part of the assignment fee and, further, "[p]etitioner has not proven that the reimbursement to the assignors increased the original purchase price of the real property" (Determination, conclusion of law "C").

The Administrative Law Judge, in addressing petitioner's argument that a portion of the maintenance fees paid to the CHC by petitioner were includable in the calculation of original purchase price, reviewed 20 NYCRR 590.14 and 20 NYCRR 590.16[d] and held that "the maintenance fees were not costs associated with construction of capital improvements, rather they represent a cost of carrying ownership in a cooperative form. As such, they are not includable in the calculation of original purchase price" (Determination, conclusion of law "D"). The Administrative Law Judge also noted that even if she had determined that a portion of the maintenance fees were includable in original purchase price, petitioner had failed to establish the period during which the fees were paid or the exact amounts attributable to various costs and, as a result, would not have been entitled to an adjustment.

The Administrative Law Judge, in discussing the apportionment of the residential and commercial units, found 20 NYCRR 590.19 to be applicable to this issue and held that while the parties did not directly address the applicability of this regulation, concluded that the use of square footage as a measure of fair market value was acceptable under the regulation. The Administrative Law Judge, while not understanding what difference there might be in petitioner's use of the phrase "saleable" space in its calculations and the Division's reference to "habitable" space, held that: 1) the spaces are coextensive and 2) "petitioner failed to carry its burden of proof to overcome the Division's computation of square footage apportionable to the commercial unit and [the Administrative Law Judge did] not find any basis for recalculating the Division's final percentage" (Determination, conclusion of law "E").

On exception, petitioner argues that: 1) the contracts for the restaurants were customary, reasonable and necessary expenses incurred to create petitioner's ownership interest in the subject property; 2) the entire assignment fee paid is includable in its original purchase price; 3) the maintenance paid to the cooperative during construction and attributable to real estate taxes, mortgage interest, accounting/legal expenses and insurance are part of petitioner's capital improvement cost; and 4) "[t]he Determination improperly focused upon the fact that petitioner

did not substantiate the time period and amounts of such portions of the maintenance payments which constitute capital improvement costs, rather than on whether each individual cost constitutes a capital improvement cost as per Regulation 590.16" (Petitioner's brief, p. 25); 5) the matter should be remitted to the Division of Tax Appeals solely to determine the exact portion of petitioner's maintenace costs which should be included in the original purchase price; and 6) the determination of the Administrative Law Judge, dated June 16, 1994, should be reversed in its entirety.

The Division, after reviewing petitioner's brief on exception, opted to file no reply brief and rely on its brief below and the conclusions of the Administrative Law Judge set forth in her determination.

We affirm the determination of the Administrative Law Judge.

We reject petitioner's argument that the Administrative Law Judge improperly sustained the Department's disallowance of capital improvement costs by focusing upon petitioner's failure to substantiate the time period and amounts of such costs. The Administrative Law Judge's determination correctly addressed this issue and there is no reason to remit this matter back to the Administrative Law Judge for further proceedings.

In addition, because the Administrative Law Judge correctly analyzed and weighed all the evidence presented and correctly decided the relevant issues, we uphold the determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Seaside Development Corporation is denied;

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

3. The petition of Seaside Development Corporation is denied; and

4. The Notice of Determination, dated June 8, 1988, is sustained.

DATED: Troy, New York
March 23, 1995

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

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