

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
149 KING STREET CORPORATION : DECISION
for Revision of a Determination or for Refund : DTA No. 808214
of Tax on Gains Derived from Certain Real :
Property Transfers under Article 31-B of the :
Tax Law. :
:

Petitioner 149 King Street Corporation, R.R. 1, Box 299, Wingdale, New York 12594-9745, filed an exception to the determination of the Administrative Law Judge issued on February 2, 1995. Petitioner appeared by Del Mastro & Company, C.P.A. (Thomas J. Del Mastro, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition which was received on May 5, 1995 and began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUE

Whether petitioner has shown that audit adjustments made by the Division of Taxation with respect to amounts claimed by petitioner as its purchase price paid to acquire certain real property and brokerage fees paid in connection with the transfer of such real property were in error.

FINDINGS OF FACT

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

By letter dated November 29, 1988, the Division of Taxation ("Division") advised petitioner, 149 King Street Corporation, as follows:

"Our records indicate that you are the sponsor of Townhouses located at 149 King Street. Our records also reveal that parcels have been transfered [sic] to individuals not for residential purposes

* * *

"In order for our office to determine any potential tax liability, please fill out the enclosed forms and include any necessary documentation."

Responding through its attorney, Robert E. Pease, Esq., by letter dated December 12, 1988, petitioner indicated that parcels had not been transferred "not for residential purposes."

In response, the Division transmitted a letter to petitioner dated December 29, 1988 which stated, in relevant part:

"Our records indicate that 149 King Street Corporation has transferred several lots to The Edwards Group Limited. The Edwards Group Limited then transferred these lots to a third party. It has been determined that these units were not used for residential purposes by The Edwards Group Limited.

"Pursuant to section 1440-7 of article 31-B of the New York State Tax Law states that 'transfers of real property shall also include partial or successive transfers'.

"In order for our office to determine any potential tax liability, please fill out the enclosed forms and include any necessary documentation."

On April 20, 1989, the Division transmitted a letter to petitioner indicating that it had received no response to its December 29, 1988 letter.

On May 30, 1989, petitioner filed with the Division a Form DTF-700 ("Real Property Transfer Gains Tax Schedule of Original Purchase Price for Cooperatives and Condominiums")

and a Form DTF-701 ("Real Property Transfer Gains Tax Questionnaire for Cooperatives and Condominiums: Transferor").

The transferor questionnaire indicated that it was an initial filing and that it was being filed in respect of the transfer of five units of a condominium project located in Chappaqua, New York. The date of this transfer is not contained in the record. The transferor questionnaire indicates that the condominium plan became effective July 4, 1987.

Among other costs and fees, petitioner's gains tax filings listed a purchase price to acquire the subject property of \$250,000.00 and brokerage fees of \$97,845.00. The gains tax filings indicated no gain subject to tax on the transfer and, in fact, indicated an actual loss "to date" of \$12,755.00 and a total anticipated loss of \$28,270.00.

By letters dated June 1, 1989 and July 13, 1989, the Division requested that petitioner provide certain documents in order to verify the amounts claimed on petitioner's gains tax filings.

In response to these requests as related to petitioner's cost to acquire the subject property, petitioner provided the Division with a copy of the deed dated December 24, 1986 by which "149 King Street Corporation c/o Thomas F. Flood" took title to the subject property from Thomas F. Flood and Charles W. Hatcher. A copy of this deed was entered into the record herein. A document attached to the deed encaptioned "Westchester County Clerk Recording Page" indicates that no real estate transfer tax was received in respect of the deed transfer. The recording page also lists a zero in a space headed "Consid".

On November 24, 1989, following a review of certain documentation provided by petitioner, the Division issued a Statement of Proposed Audit Adjustment which proposed a tax deficiency of \$31,524.70, plus penalty and interest, in respect of the subject transfer.

Petitioner indicated its disagreement with this statement by letter of Charles Hatcher dated December 1, 1989.

On March 23, 1990, the Division issued to petitioner a Notice of Determination which assessed \$31,524.70 in gains tax due, plus penalty and interest, in respect of the subject transfers.

In its calculation of the gains tax deficiency as set forth in the Notice of Determination, the Division started with gross consideration of \$1,297,000.00, as reported on petitioner's gains tax filings. The Division disallowed several claimed expenses including petitioner's claimed brokerage fees of \$97,845.00. In addition, the Division allowed \$25,263.00 of petitioner's claimed \$250,000.00 purchase price to acquire the subject property. The bottom line of the Division's adjustments to petitioner's filed Forms DTF-700 and 701 was the Division's determination that petitioner had gain subject to tax of \$315,247.00 in respect of the subject transfers and a gains tax liability of \$31,524.70.

Subsequent to the issuance of the Notice of Determination, the Division modified its assessment slightly. Specifically, the Division increased the allowable amount of the purchase price to acquire the subject property to \$30,381.00. This adjustment was premised on the \$115,448.00 reported as the "cost or other basis" of the subject property on Schedule D of the 1986 Federal partnership return of King Street Associates. Since the subject transfers involved 5 units of a 19-unit project, the Division multiplied this \$115,448.00 reported cost figure by 5/19 to reach the allowable purchase price for gains tax purposes of \$30,381.00. These computations resulted in a revised calculation of gain subject to tax of \$310,134.00 and a revised gains tax deficiency of \$31,013.40, plus penalty and interest.

A copy of the 1986 U.S. partnership return of King Street Associates referred to above was entered into evidence herein. Schedule D of said return ("Capital Gains and Losses") indicated that the partnership had acquired land located at 149 King Street, Chappaqua, New York on March 15, 1981. As previously noted, the return listed a "cost or other basis" for this property of \$115,448.00. In addition, the return indicated that the property was sold on December 24, 1986 at a sales price of \$892,413.00, with a gain on the sale of \$776,965.00. The partnership return listed \$776,965.00 in long-term capital gain as a distributive share item on

the return's Schedule K ("Partners' Shares of Income, Credits, Deductions, etc."). Petitioner also introduced into the record copies of 1986 Schedule K-1's for Thomas Flood and Charles Hatcher with respect to King Street Associates. These K-1's indicated that Flood and Hatcher were each 50% partners in King Street Associates and that each received a distributive share of long-term capital gain of \$388,482.00.

The record herein contains a deed dated March 5, 1981 pursuant to which property was conveyed from B.C.D. Realty Company to Charles W. Hatcher and Thomas F. Flood, III, as tenants-in-common. A closing statement with respect to this transaction indicates that the purchase price for the property was \$300,000.00 and that deed transfer tax was paid with respect to this transfer at a rate of \$1.10 per \$1,000.00 of the purchase price, or \$330.00.¹

The closing statement indicates that, following the acquisition by Hatcher and Flood on March 5, 1981, title to this property was conveyed to King Street Associates by deed, also dated March 5, 1981.

The record also contains a closing statement with respect to the December 24, 1986 transfer from Flood and Hatcher to petitioner. This closing statement makes no reference whatever to any purchase price for the subject property in respect of the December 24, 1986 transfer.

Petitioner presented neither testimony nor affidavits in support of its position.

With its reply brief petitioner submitted to the Administrative Law Judge several documents "for your information and to facilitate going through all the exhibits." Such documents consisted of a copy of a facsimile transmission dated June 21, 1991 from petitioner's representative to the Division's representative; a photocopy of a Peoples Westchester Savings Bank check dated December 24, 1986 payable to a William Berens in the amount of \$107,182.06; a photocopy of a Peoples Westchester Savings Bank check dated December 24, 1986 payable to a George P. Pavanivi, as attorney, in the amount of \$26,088.83; and a

¹It is noted that the March 5, 1981 deed itself also indicates that \$330.00 in deed transfer tax was paid upon the recording of the deed on March 23, 1981.

photocopy of two checks each dated December 29, 1986 and drawn on a Bank of New York account of King Street Associates signed by C. W. Hatcher and payable, each in the amount of \$250,000.00, to Thomas F. Flood III and C. W. Hatcher, respectively. None of the documents submitted with petitioner's reply brief was included among the exhibits submitted into evidence at the hearing. By letter dated October 17, 1994, the Division objected to the receipt of the documents into evidence in this matter since such documents were submitted after the record had been closed. By letter dated December 14, 1994, the Administrative Law Judge noted that petitioner had not requested an opportunity to submit such documents post-hearing and therefore excluded from the record herein the documents submitted with the reply brief.

OPINION

Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10%. Gain for Article 31-B purposes is defined as the difference between the consideration received for the real property and the original purchase price of such property (Tax Law, § 1440[3]). Tax Law former § 1440(5) defined original purchase price as the consideration paid by the transferor to acquire the interest in real property plus the amount paid for capital improvements made to such real property prior to the date of transfer.

In his determination, the Administrative Law Judge concluded that petitioner did not meet its burden of proof to establish that its claimed original purchase price in the property was \$892,413.00 (with an allocated purchase price to the five units at issue of \$234,845.00). Further, the Administrative Law Judge concluded that there was no source documentation in the record to verify the amount of \$97,845.00 claimed for brokerage fees.

Petitioner raises the same issues on exception that it raised before the Administrative Law Judge at the hearing, i.e., that the claimed original purchase price is amply supported by the 1986 K-1 Forms issued to the two partners of Kings Park Associates (Thomas Flood and Charles Hatcher) and two checks for \$250,000.00 issued to these same partners. (The referenced checks for \$250,000.00 each were excluded from evidence by the Administrative Law Judge since they were not introduced at the hearing but with petitioner's post-hearing reply

brief.) Further, petitioner offers to supply further evidence in the form of affidavits and personal income tax returns as support for its position. Petitioner offers no argument in support of its allegation that brokerage fees should have been allowed in the amount of \$97,845.00.

The Division argues that the Administrative Law Judge was correct in his determination.

As the Administrative Law Judge noted, "the record is bereft of detail regarding the various real property transfers noted herein" (Determination, conclusion of law "B"). Petitioner bears the burden of proof to show, by clear and convincing evidence, that the Division's assessment is erroneous and that petitioner's position is meritorious (20 NYCRR 3000.10[d][4]). The scant evidence submitted by petitioner does not support the original purchase price or brokerage fees claimed as allowable by petitioner. While petitioner now offers to submit additional information in the form of affidavits, copies of tax returns and copies of checks, such documentary evidence, even if relevant to the issues at hand, cannot be submitted after the record in this matter has been closed (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Petitioner claims in its petition that it purchased the property from the partnership, King Street Associates. In fact, the record shows that petitioner acquired title to the property from Hatch and Flood as individuals and not from the partnership (Determination, finding of fact "9"). There is no deed to the partnership in the record nor any evidence that the partnership acquired legal or beneficial ownership of the property. The only evidence that the partnership ever acquired legal title to the property is a reference in the March 1981 closing statement of the purchase by Hatch and Flood, as tenants in common (Determination, finding of fact "17"). Further, there is no deed from the partnership to the individuals, Hatch and Flood.²

If Hatch and Flood sold the property to petitioner for the amount claimed, there would have been transfer tax due on the recording of the deed to petitioner (Tax Law, § 1404[b]). No

²The partnership reported a gain from the transfer of real property on its 1986 income tax return. Assuming that it did acquire title, therefore, it must have transferred the property to the partners who then transferred it to petitioner. Such a transfer by the partnership would have been a "mere change of identity" pursuant to section 1443(5) and 20 NYCRR 590.51(b). As such, the partners would have a carry-over original purchase price from the partnership for real property transfer gains tax purposes.

transfer tax was paid on the recording of this deed (Determination, finding of fact "9") and the closing statement does not state that any consideration was given for the transfer (Determination, finding of fact "18"). As a result, there is no evidence in the record to support an original purchase price in excess of the amount paid by Hatch and Flood to acquire the property in 1981.

The Administrative Law Judge correctly concluded that the proof submitted by petitioner does not support its allegations that its original purchase price is \$892,413.00. However, we find that the documents submitted by petitioner do support a modification to the original purchase price determined by the Division and upheld by the Administrative Law Judge.

"On questions of credibility, it is our policy not to disturb the analysis of the Administrative Law Judge barring compelling reasons" (Matter of Auriemma, Tax Appeals Tribunal, September 17, 1992). Here, however, since there was no testimony by either party, the credibility of witnesses is not an issue. Rather, as we concluded in Matter of Stamas (Tax Appeals Tribunal, May 19, 1994), "we have found the facts as found by the Administrative Law Judge and reached a legal conclusion that we think is harmonious with these facts."

The Administrative Law Judge upheld the Division's reliance on the "cost or other basis" of \$115,448.00 listed on the 1986 partnership income tax return of King Street Associates as the allowable original purchase price. The Division relied on this return as proof of the original purchase price yet found it unreliable as proof of the amount of consideration claimed to have been given on the 1986 transfer to petitioner. We find that the return is unreliable as proof of the original purchase price of the property as well. There is more reliable evidence for the original purchase price in the record.

Based on information contained in the March 1981 closing statement, it appears that Hatch and Flood purchased the property for \$300,000.00 (Determination, finding of fact "16"). The amount of transfer tax shown on the 1981 deed to them (\$330.00) is consistent with this price since at the time of this acquisition, transfer tax was calculated at the rate of \$1.10 per

\$1000.00 of consideration (Tax Law § 1402). Accordingly, we conclude that petitioner has demonstrated that its original purchase price in the property was \$300,000.00.

The Division used a formula to allocate the original purchase price to the five units at issue (Determination, finding of fact "14"). Using that same formula, the original purchase price of \$300,000.00 multiplied by a factor of 5/19 would give an allocated original purchase price for the five units at issue of \$78,947.00 instead of the \$30,381.00, used by the Division.

Except as modified above, we affirm the determination of the Administrative Law Judge. Each of the issues raised on exception were raised before the Administrative Law Judge. In his determination, the Administrative Law Judge correctly dealt with each of these issues. Therefore, except as modified above, we sustain the position of the Division and deny the exception of petitioner for the reasons set forth in the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 149 King Street Corporation is granted to the extent that petitioner's original purchase price is increased to \$78,947.00, but is otherwise denied;
2. The determination of the Administrative Law Judge is modified to the extent that petitioner's original purchase price is increased to \$78,947.00, but is otherwise affirmed;
3. The petition of 149 King Street Corporation is granted to the extent that petitioner's original purchase price is increased to \$78,947.00, but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination dated March 23, 1990 as indicated in paragraphs "1," "2" and "3" above, but such Notice is otherwise sustained.

DATED: Troy, New York
October 5, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner