

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>106 DEVELOPMENT CORP.</b>	:	DECISION
	:	DTA No. 809803
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.	:	

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Petitioner 106 Development Corp., c/o Sheldon Feinstein, Esq., 42-40 Bell Boulevard, Suite 304, Bayside, New York 11361, filed an exception to the determination of the Administrative Law Judge issued on August 12, 1993. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief on exception and the Division of Taxation filed a letter in lieu of a brief in opposition. The six-month period to issue this decision began on October 28, 1993, the date by which petitioner could have submitted a reply brief. Petitioner's request for oral argument was denied. The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUE***

Whether, for gains tax purposes, certain payments of interest made prior to a closing pursuant to a contract of sale by petitioner, as purchaser, to the seller constituted "consideration" and were therefore properly includible in petitioner's "original purchase price."

***FINDINGS OF FACT***

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

Pursuant to a contract entered into on April 14, 1986 petitioner, 106 Development Corp., agreed to purchase from A. D. Developments, Ltd. certain real property located in the Village of Muttontown, Nassau County, New York. Petitioner purchased the property with the intent of subdividing and developing it.

Paragraph 37 of the rider attached to and made part of the contract of sale provides that the "purchase price" for the property was \$1,930,000.00 payable as follows: (i) \$75,000.00, to be held in escrow, upon the signing of the contract; (ii) \$350,000.00, to be held in escrow, by April 30, 1986; and (iii) \$1,505,000.00 upon delivery of the deed.

Paragraph 30 of the rider provides the following with respect to an adjournment of the closing date:

"If the Purchaser requests an adjournment for any reason other than the inability of the Seller to convey marketable title, the Purchaser agrees, as a condition therefor, that such adjournment shall not be requested nor shall the Seller be obliged to grant such application for adjournment, unless (i) the Purchaser makes such request in writing not later than five (5) days prior to the date hereinbefore fixed for such date of closing; (ii) such application for adjournment be limited to a period not in excess of ten (10) days from the original date hereinbefore set for closing; (iii) all adjustments in such event shall be made as of the original date hereinafter fixed for the closing of title and the Purchaser shall pay to the Seller, at closing, interest at 1% per annum over the prime rate of Chemical Bank from the closing date specified herein to the actual closing date on the cash to be paid at closing. If, however, Seller is unable to close title on the date hereinafter set forth because of the uninsurability of title or for any other reason elsewhere stated in this contract, or if Seller requests an adjournment of title, then and in such event, all adjustments shall be made as of and computed from the adjourned date of closing."

Paragraph 40 of the rider provides the following:

"During the term of this contract until closing of or sooner termination and cancellation of this contract pursuant to the terms hereof, purchaser shall pay to the seller interest on the then balance of the purchase price at a rate per annum equal to 1-1/2% above the rate announced from time to time by Chemical Bank at its principal office in New York City as its prime commercial lending rate payable on the 1st day of the second month following the date of execution of this contract and on the 1st day of each second month thereafter. Any change in the interest rate resulting from a change in the prime rate shall be effective at the beginning of the date on which the prime rate becomes effective. In the event that any such bi-monthly payment of interest is overdue more than ten (10) days, then such failure shall be deemed a default on the part of the purchaser hereunder. At the closing of title or sooner termination or on the earlier date of termination and cancellation of this contract pursuant to the terms hereof, purchaser shall pay to the seller any such interest accrued and unpaid to date thereof. During the period of six (6) months

after date hereof interest shall accrue as follows: In the event that the interest computed as above stated is less than 11% per annum the actual interest rate shall be the above rate plus 50% of the difference between the above rate and 11%. For the period subsequent to said six-month period, interest shall accrue at a minimum rate of 11% and a maximum rate of 16%."

Paragraph 41 of the rider provides as follows:

"Purchaser acknowledges that the subdivision map of Belle Sonia Estates referred to herein is being processed by Frederick W. Kahler, Civil Engineer and Surveyor for final approval by the Planning Board of the Village of Muttontown. In the event that the public hearing before the Village Planning Board for the final approval of said map is not held within six (6) months from date hereof and its approval given to said map, then and in such event purchaser shall have the right to request that the time to obtain such approval shall be extended for an additional period of six (6) months, provided that purchaser shall have given written notice thereof to the seller no later than on a date five (5) months after the date of execution of this contract."

Paragraph 44 of the rider provides, in part, as follows:

"The closing of title hereunder shall take place within fifteen (15) days after the filing and recording of the subdivision map in the office of the Clerk of Nassau County. Purchaser acknowledges that the Village Planning Board may, at its public hearing for the final approval of the subdivision map indicate its approval thereof, but such approval shall be subject to the terms and provisions of the resolution to be issued by the Planning Board thereafter and filed with the Clerk of the Village."

The closing of the contract of sale occurred on July 24, 1987. During the period between the execution of the contract and the closing, petitioner made payments to A. D. Developments, Ltd. totaling \$195,338.34 pursuant to Paragraph 40 of the rider to the contract dated April 14, 1986.

Petitioner filed a real property transfer gains tax transferee questionnaire (Form TP-581) with the Division of Taxation ("Division") in respect of its acquisition of real property from A. D. Developments, Ltd. On said form petitioner indicated that it paid \$1,930,000.00 in consideration to A. D. Developments, Ltd. in respect of said transfer.

Following its acquisition of the property, petitioner subdivided the property and sold six lots between July 1987 and October 1988. Three of the lots were improved with single-family residences and three lots were not.

The Division determined that petitioner owed gains tax on the transfers of the three lots without residences. In connection with such transfers, petitioner filed a real property gains tax

transferor questionnaire (Form TP-580). With respect to the computation of its original purchase price for the subject property, petitioner reported on the Form TP-580 \$1,930,000.00 as the purchase price it paid to acquire the property. Petitioner also listed other acquisition costs, costs of capital improvements and allowable selling expenses in connection with the computation of original purchase price. Petitioner did not include on the Form TP-580 as part of its original purchase price for the subject property the \$195,338.34 paid to A. D. Developments, Ltd. under Paragraph 40 of the Rider.

Petitioner paid gains tax of \$71,095.56 on its transfers of lots within the subdivision.

Petitioner subsequently filed a claim for refund dated March 13, 1989 in the amount of \$74,132.55. By letter dated April 19, 1989, the Division denied petitioner's claim in full. Petitioner subsequently filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). Following a conciliation conference, BCMS issued a Conciliation Order, dated June 7, 1991, which granted petitioner a refund in the amount of \$6,073.96 and denied \$68,058.59 of the claimed refund.

### ***OPINION***

The Administrative Law Judge determined that certain interest payments made by petitioner under paragraph 40 of the contract were not part of the purchase price for the real property. The Administrative Law Judge concluded that the payments were not consideration for the real property transferred but were intended to compensate the seller for the period of time between the execution of the contract and the closing. The Administrative Law Judge found 20 NYCRR 590.13 to be inapplicable in this matter as the payments were not for an extension of the closing date. Such payments for an extension of the closing date were specifically provided for in paragraph 30 of the contract and the payments in question were made under paragraph 40. In addition, the purchase price provided for in paragraph 37 of the contract did not include the interest payments as part of the purchase price, and the gains tax transferee questionnaire filed with the Division did not include the interest payments as part of the purchase price.

The Administrative Law Judge noted that, even if 20 NYCRR 590.13 was applicable in this matter, the payments did not constitute consideration under that regulation. The Administrative Law Judge found that the three-part test provided for therein was satisfied and, therefore, the payments did not constitute consideration when petitioner purchased the property and, thus, could not be included in petitioner's original purchase price.

On exception, petitioner asserts that 20 NYCRR 590.13 is applicable, the three-part test was not satisfied and the subject payments constituted consideration when petitioner purchased the property. Petitioner argues that the first criterion of the regulation, that the agreement between the parties must state that the payments are for time delay, has not been met. Petitioner argues that there is no statement to this effect in the agreement. Finally, petitioner argues that "the ALJ fails to recognize that § 590.13 is in harmony with the legislative purpose of maximizing the 'yield' of the Gains Tax. Instead, he limits such yield by restricting the definition and reach of 'consideration'" (Petitioner's brief on exception, p. 2).

In response, the Division argues that petitioner's reliance on 20 NYCRR 590.13 is misplaced as that regulation applies to payments made in return for an extension of the closing date. The Division contends that the payments were made under paragraph 40 of the contract not under paragraph 30, the postponed closing date provision.

The Division further argues that the applicable regulation here is 20 NYCRR 590.15(a), which defines consideration. The Division states that the regulation provides that the consideration paid to acquire the property is the purchase price paid by the purchaser to the seller. Therefore, the Division asserts that "to determine how much the Petitioner paid to acquire the interest in the real property, we need do no more than look to the purchase price negotiated by the parties and agreed to in their contract" (Division's letter in lieu of a brief, p. 2). As the payments were not reported as consideration on the gains tax transferee and transferor questionnaires, the Division argues that petitioner may not now attempt to recharacterize the payments.

On exception, petitioner has raised the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, 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 106 Development Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of 106 Development Corp. is denied.

DATED: Troy, New York  
April 7, 1994

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

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