STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LEHAL REALTY ASSOCIATES	:	DECISION DTA No. 810377
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 Lehal Realty Associates, c/o Barr & Rosenbaum, 664 Chestnut Ridge Road, P.O. Box 664, Spring Valley, New York 10977, filed an exception to the determination of the Administrative Law Judge issued on August 18, 1994. Petitioner appeared by Barr and Rosenbaum (Harvey S. Barr and Elizabeth A. Haas, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief on December 6, 1994, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to consider the petition of Lehal Realty Associates since petitioner did not apply for a hearing with the Division of Tax Appeals or request a conference with the Bureau of Conciliation and Mediation Services within 90 days of the issuance by the Division of Taxation of a gains tax refund denial letter.

II. Whether the trustee's filing pursuant to 11 USC §§ 505 and 1146 was the equivalent of filing a petition seeking refund of the taxes paid by the trustee in bankruptcy since the Division of Taxation was placed on notice of the claim for refund.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

On February 2, 1989, an involuntary petition in bankruptcy was filed in the matter of Lehal Realty Associates ("Lehal") pursuant to Title 11 of theBankruptcy Code. According to a document entitled Certificate of Commencement of Case, such matter was still pending as of January 11, 1994. On August 11, 1989, John Scheffel, Esq., was appointed the Chapter 11 Trustee in Bankruptcy in the matter of Lehal. A certified copy of the Notice of Appointment of Trustee was submitted into evidence.

In accordance with his duties as trustee and pursuant to a court order dated December 27, 1989, Mr. Scheffel sold Lehal's principal asset, a parcel of real estate located in the Village of New Hempstead, Town of Ramapo, Rockland County, New York. Such sale resulted in the real property gains tax assessment in issue.

The New York State Real Property Transfer Gains Tax Tentative Assessment and Return introduced into evidence reflects John Scheffel as operating trustee of Lehal Realty Associates, Chapter 11 Debtor, and the transferee as Three Little Willows Corporation. It is dated February 12, 1990 and reflects gain subject to tax of $6,463,288.50, with total tax due of $646,328.85. As a consequence of the sale and in compliance with the New York State real property gains tax law, the trustee remitted $646,328.85 on February 13, 1990. Petitioner asserts such payment was made under protest with the understanding that the trustee would commence proceedings to recover the funds.

A Claim for Refund of Real Property Transfer Gains Tax was filed with the Division of Taxation ("Division") dated November 6, 1990. The claim for refund asserts that, pursuant to 11 USC § 1146(c) and a pertinent U.S. Bankruptcy Court decision, petitioner's real property transfer is exempt from New York State transfer gains tax as a stamp or similar tax imposed on

an instrument transferring an interest in property within the context of a confirmed plan of bankruptcy.

By correspondence dated May 13, 1991, the Division denied petitioner's refund claim and provided the following explanation:

> "The basis of the claim is that the transfer of real property pursuant to a confirmed plan of bankruptcy under Chapter 11 of the United States Bankruptcy Code is exempt from Real Property Transfer Gains Tax. Your claim is based on the provisions of Section 1146(c) of the United States Bankruptcy Code which provides in pertinent part that '. . . the making or delivery of an instrument of transfer under a plan confirmed under Section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax'.
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> "The Department has and continues to take the position (affirmed by the United States Bankruptcy Court decision in New York's Eastern District - In Re Jacoby Bender Inc.) that the Gains Tax is not such a stamp or similar tax and therefore a transfer pursuant to a plan of bankruptcy is not exempt pursuant to the provisions of Section 1146(c) of the United States Bankruptcy Code.
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> "Based on the foregoing, the refund claim of $646,328.85 is hereby denied in its entirety.
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> "In accordance with Section 1445.2 of the Tax Law, this determination shall be final and irrevocable unless claimant within ninety (90) days files with [sic] a request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition for Tax Appeals Hearing with the Division of Tax Appeals. The enclosed Form TA-9.1 explains this procedure."

The trustee thereafter on June 3, 1991, commenced a proceeding in the Bankruptcy Court pursuant to 11 USC §§ 505 and 1146 to recover the gains tax paid in full at the court-ordered sale of petitioner's property. The Division, by Robert Abrams, Attorney General, defended this action.

The U.S. Bankruptcy Judge in that action, by decision dated October 23, 1991, concluded that the Bankruptcy Court had the authority to determine the amount or legality of the gains tax pursuant to 11 USC § 505, but had no authority to compel the refund of any portion of the tax because the Division had not waived its Eleventh Amendment right of sovereign immunity, which is accomplished when the Division files a proof of claim in a bankruptcy matter. An order in conformity with such decision was entered by the court on November 14, 1991.

On December 13, 1991, the Division of Tax Appeals received petitioner's petition dated December 10, 1991, which sets forth the merits of petitioner's refund claim. The envelope in which the petition was mailed bears a U.S. postmark dated December 11, 1991.

The Division raised the issue of the timeliness of the filing of the petition in this matter with the Division of Tax Appeals. In support of its position that the jurisdictional document (which in this case is represented by the refund denial letter of May 13, 1991) was mailed to petitioner, the Division submitted the affidavit of Anne Kasson and a document from the U.S. Postal Service. The affidavit of Ms. Kasson provided the following information:

(a) Ms. Kasson, as a principal clerk in the Real Property Transfer Gains Tax Unit of the Division, bears the responsibility for supervision of the clerical staff of such unit with respect to the generation and issuance of notices of determination to taxpayers. Her affidavit set forth the procedures for the issuance of such notices.

(b) She states that after a determination is made that a transferor applying for a refund of real property transfer gains tax is not entitled to such refund, the gains tax unit prepares a notice of determination denying such application. In this case, correspondence dated May 13, 1991 was issued to John F. Scheffel, as Trustee for Lehal Realty Associates.

(c) A prepared notice is brought to the clerical staff of the gains tax unit for mailing where an envelope is prepared in which the notice is placed. Two items of certified mail documentation are then prepared: Postal Service Form 3877 (a firm registration book) and Postal Service Form 3811 (a domestic return receipt). Introduced into evidence are the original forms 3877 and 3811 in this matter.

(d) After Postal Service Form 3877[1] is prepared and attached to the envelope containing the notice of determination, both are delivered to the registry unit of the Division's mailroom located on the W. A. Harriman Campus, Albany, New York. It is at this location that metered postage is affixed to the envelope containing the notice.

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[1]Although the affidavit mentions attaching a Form 3877 to the envelope, it is Form 3811 (Domestic Return Receipt) which is actually attached to the envelope.

(e) Once proper postage is affixed to the envelope, together with its completed forms 3877 and 3811, the envelope is delivered by a Division mailroom employee to the United States Postal Service. In this case the postmark on the pertinent Form 3877 indicates that the notice in this matter sent to John F. Scheffel was delivered to the Roessleville Branch of the U.S. Postal Service on May 14, 1991 with 14 other documents. A Postal Service employee reviews the Form 3877 and verifies that the mail pieces listed on such form were received by the post office. The postal employee handwrites the number of pieces listed on the Postal Service Form 3877 and the total number of pieces received. Thereafter, the employee signs his name to Form 3877 and affixes a U.S. Postal Service date stamp to the form.

(f) Ms. Kasson's examination of the Form 3877 submitted in this case reveals that P. Guynup, a Postal Service employee, received 15 pieces of mail on May 14, 1991, including the notice at issue herein. Although the refund denial letter was dated May 13, 1991, Ms. Kasson certifies that such notice was actually mailed on May 14, 1991. Form 3811, the domestic return receipt, further reveals that the notice in question sent to John F. Scheffel on May 14, 1991 was actually received by petitioner on May 16, 1991.

We make the following additional finding of fact:

> After the decision in In re Lehal Realty Assocs. v. New York State Dept. of Taxation & Fin. (133 B.R. 9) was rendered, the United States Court of Appeals for the Second Circuit in In re 995 Fifth Ave. Assocs., L.P. v. New York State Dept. of Taxation & Fin. (963 F2d 503) held that a bankruptcy trustee is responsible for the New York State transfer gains tax. This Court of Appeals decision resolved the conflict between the holdings of the bankruptcy courts in In re Jacoby-Bender (40 B.R. 10, appeal decided by 758 F2d 840) and In re Lehal Realty Assocs. v. New York State Dept. of Taxation & Fin. (supra). Subsequent to the Circuit Court's holding, the trustee sought to abandon its claim filed with the Division of Tax Appeals. Pursuant to an Order of the Bankruptcy Court dated April 6, 1993, petitioners George Lebovits and Israel Halpern,
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> continuing as Lehal Realty Associates, assumed the place and stead of the Trustee as petitioner in this action.

OPINION

The Administrative Law Judge determined that since petitioner did not file a petition within 90 days of the refund denial letter, as required by Tax Law § 1445(2), the Division of

Tax Appeals has no jurisdiction to provide a hearing to consider the substantive merits of petitioner's refund claim. The Administrative Law Judge further determined that there was no legal authority that would allow an action under section 505 of the Bankruptcy Code to replace an action before the Division of Tax Appeals. While the Administrative Law Judge acknowledged that the State (of which the Division is a part) defended the claim, the Administrative Law Judge found that the choice of forum and the resulting consequences could not be ignored. The Administrative Law Judge concluded that neither the Division of Taxation nor the Division of Tax Appeals was put on notice of a claim for refund by the complaint filed in the bankruptcy proceeding.

The Administrative Law Judge further concluded that section 362 of the Bankruptcy Code would not stay a proceeding in the Division of Tax Appeals because the proceeding was initiated by petitioner, not against it.

Petitioner, on exception, requests that the Tax Appeals Tribunal's (hereinafter "Tribunal") rules of practice and procedure be liberally construed so as to find that the complaint filed in the bankruptcy proceeding constitutes a timely petition. Petitioner asserts, "the Complaint identified the petitioner and the petitioner's representative, the department which sent the denial notice, and the nature and the amount of the tax in controversy . . . the Complaint contained separately numbered paragraphs which clearly and concisely set forth the Trustee's allegations and the relief sought by the Trustee with requisite specificity" (Petitioner's brief on exception, p. 7). Petitioner argues that the State was placed on notice of the claim by virtue of its participation in the Bankruptcy Court litigation. Petitioner further points out that after the decision of the Bankruptcy Court was rendered, a petition was promptly filed with the Division of Tax Appeals. Petitioner further asserts that it pursued in bankruptcy an appropriate alternative remedy to filing a petition with the Division of Tax Appeals and that this is consistent with a statement made by the Administrative Law Judge in the determination to the effect that, "[s]ubsequent to the issuance of the refund denial letter, petitioner had two options to pursue its refund claim" (Determination, conclusion of law "B").

On exception, the Division argues that the precedent of this Tribunal does not support petitioner's argument that liberal construction of the Tribunal's rules of practice should apply. The Division further contends that despite the Administrative Law Judge's statement referenced above, petitioner ultimately has only one option to choose in order to challenge the refund denial.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1445(1)(a) provides that:

> "A person claiming to have erroneously paid the tax imposed by this article may file an application for refund within two years from either the date of transfer or the date of payment, whichever is later."

Tax Law § 1445(2) provides, in pertinent part, that:

> "The tax [commissioner] may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the [division of tax appeals] for a hearing."

We have recently applied the general principles that govern an informal claim for refund to the matter of whether a request for a conciliation conference under Tax Law § 170(3-a)(a) was timely filed (see, Matter of Crispo, Tax Appeals Tribunal, April 13, 1995). Likewise, we find the same principles to be applicable in determining whether a taxpayer has timely filed a petition with the Division of Tax Appeals.

In determining whether a taxpayer has made an informal claim for refund, the United States Supreme Court has stated:

> "a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period" (United States v. Kales, 314 US 186, 194).

What distinguishes this matter from cases where a taxpayer is deemed to have made a valid informal claim is the notice requirement. With respect to refund claims, we have required that such notice be submitted to the Division of Taxation or a duly appointed agent (see, Matter

of Greenburger, Tax Appeals Tribunal, September 8, 1994; Matter of Rand, Tax Appeals Tribunal, May 10, 1990). The purpose served is to put the government entity on notice of a claim for a refund so that the government can make financial provision for the possible refund (see, Mercury Mach. Importing Corp. v. City of New York, 3 NY2d 418, 165 NYS2d 517). When the matter, however, concerns receipt of a petition for a hearing before the Division of Tax Appeals, notice serves an additional purpose, which is to confer jurisdiction on this administrative body to hear the matter a taxpayer seeks to address. It is necessary that the taxpayer provide some manner of notice to the Division of Tax Appeals within the prescribed period so as to preserve a claim.

Turning to the matter before us, the record reflects that petitioner sought to determine its liability for payment of the transfer gains tax in the United States Bankruptcy Court. There is no principle from which we may rationally determine that petitioner's filing with the Bankruptcy Court put the Division of Tax Appeals on notice that petitioner intended to pursue a claim with this agency. To the contrary, the bankruptcy claim only indicated that petitioner intended to pursue a claim in the Bankruptcy Court. With respect to petitioner's assertion that the complaint filed in bankruptcy satisfies the requirements of 20 NYCRR 3000.3(b) for information contained in a petition, we cannot overlook the fact that no effort was made to comply with part (c) of that section, which requires the filing of a petition with the Division of Tax Appeals within the time limits prescribed by the applicable statutory section, i.e., 90 days. To allow the filing of a claim in another jurisdiction to satisfy the requirements set forth in the Tribunal's rules of practice and procedure undermines the integrity of the Division of Tax Appeals by expanding its rules to the point of non-recognition.

As a final matter, we wish to comment on the Administrative Law Judge's observation that petitioner had two options to choose in pursuing its claim for refund. We agree, but point out that both options required filing a timely petition with the Division of Tax Appeals. If petitioner chose not to pursue its claim with the Division of Tax Appeals, petitioner could have requested an adjournment under 20 NYCRR 3000.10(b) or made a motion under CPLR 2201

for a general stay of proceedings. Either would have preserved petitioner's claim in the Division of Tax Appeals while allowing petitioner to litigate in the Bankruptcy Court as well. Pursuing the course petitioner had chosen, however, did not afford such an opportunity. The Division of Tax Appeals was the only body capable of fully determining petitioner's rights in this matter because during the period at issue[2] the Bankruptcy Court did not have concurrent jurisdiction with respect to the issue before us. As pointed out by the Court in In re Lehal Realty Assocs. v. New York State Dept. of Taxation & Fin. (supra, at 11), "[t]he State's possessory interest in the funds is sufficient to invoke the doctrine of sovereign immunity in opposition to the trustee's refund claim because the State is being sued for money which the State maintains was properly assessed and collected under existing law."

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lehal Realty Associates is denied;

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

3. The petition of Lehal Realty Associates is dismissed; and

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[2]As pointed out by petitioner, subsequent to the decision in In re Lehal Realty Assocs. v. New York State Dept. of Taxation & Fin. (supra), the Bankruptcy Code was amended as follows:

> "§ 106. Waiver of sovereign Immunity.
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> "(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
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> "(1) Sections . . . 505 . . . of this title.
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> "(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
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> "(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery . . . ."

4. The denial of refund dated May 13, 1991 is affirmed.

DATED: Troy, New York
May 18, 1995

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

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