STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SOUTH SUFFOLK RECREATION VENTURES, INC.	:	DECISION DTA No. 811079
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 South Suffolk Recreation Ventures, Inc., c/o Donald Rettaliata, Esq., 1770 Motor Parkway, Hauppauge, New York 11788, filed an exception to the determination of the Administrative Law Judge issued on March 10, 1994. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief which was received on May 20, 1994 and 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.

ISSUE

Whether petitioner is entitled to a partial refund of real property gains tax ("gains tax") paid, based on the fact that two years after the sale and transfer of its property, the parties renegotiated and reduced the selling price by $500,000.00.

FINDINGS OF FACT

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

There is no disagreement on the facts. The stipulation of the parties has been incorporated into the Findings of Fact.

On January 5, 1988, petitioner, South Suffolk Recreation Ventures, Inc., entered into a contract to sell certain real property located in Bayport, Suffolk County, New York ("the subject property") to RCP Properties, Inc. ("RCP") for consideration totalling $2,275,000.00. As partof that consideration, petitioner agreed to take back a $1,000,000.00 purchase money bond and mortgage.

The closing of this transaction, including execution of the purchase money bond and mortgage, and the transfer of the subject property to RCP, occurred on August 29, 1989.

On or about September 26, 1989, petitioner reported this real property transfer to the Division of Taxation ("Division"), and paid $134,481.66 in gains tax upon a taxable gain of $1,344,816.55. Neither party disputes that the gains tax, as computed and paid in 1989, was correct at that time.

On August 29, 1991 (i.e., two years after the closing), the parties to the 1989 transaction entered into a memorandum of understanding and executed a modification agreement ("the 1991 agreements") to the 1989 purchase money mortgage. The substance, purpose and intent of the two 1991 agreements was to reduce the 1989 selling price of the property by $500,000.00. This reduction in price was accomplished by petitioner's forgiving $500,000.00 of the original purchase money mortgage debt and reducing the face amount of that mortgage from $1,000,000.00 down to $200,000.00. RCP, in turn, agreed to pay petitioner the principal sum of $100,000.00 as consideration for this amended agreement. The remaining $200,000.00 (which was originally covered by the mortgage) would thereafter be payable by RCP to petitioner as an unsecured debt.[1]

On August 7, 1991, petitioner filed a claim for refund with the Division. This claim urged that since the sale price of the subject property had been reduced by $500,000.00, petitioner's

[1]There is no explanation in the record for petitioner's apparent altruism.

gain had been reduced by the same amount. Therefore, petitioner claimed entitlement to a refund of gains tax in the amount of $33,000.00. The refund claim was filed 22 days before the mortgage note modification agreement was signed. However, once the mortgage note modification agreement had been executed, petitioner forwarded a copy to the Division for consideration as part of the refund claim.

The Division denied petitioner's refund claim by letter dated September 27, 1991, and thereupon petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Petitioner's refund claim was denied by BCMS order (CMS No. 118858) dated June 26, 1992.

OPINION

The Administrative Law Judge determined that the only question to be resolved in this matter was: when is the value of the consideration paid or required to be paid for the transfer of real property measured. The Administrative Law Judge found that this question was answered in Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, affd Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121), where it was held that "the value of the consideration has to be determined at the time of the transfer . . . [and] subsequent events do not alter the value that the consideration had" at that time. The Administrative Law Judge also relied on Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992) where the Tax Appeals Tribunal allowed the petitioner to include certain liabilities in original purchase price because the petitioner was required to pay those amounts at the time of the transfer even though the petitioner may not have ultimately paid those amounts. The Administrative Law Judge thus determined that "[p]etitioner's argument that the calculation of its gain in 1989 must be reduced based on the 1991 reduction in the purchase money mortgage, defies the holding in Cheltoncort" (Determination, conclusion of law "G").

On exception, petitioner continues to argue that "[t]here is simply no support in the statute, or its legislative history, for the novel concept that the Gains Tax is fixed and immutable as of

the date of transfer" (Exception, p. 2). Petitioner also argues that the gains tax was not intended to tax illusory profits and "may only be imposed where there exists 'a net profit' (Trump v. Chu, 65 NY2d 20 [1985], appeal dismissed 474 U.S. 915 [1985]; 995 Fifth Avenue Associates, L.P. v. New York State Department of Taxation and Finance, 963 F 2d 503, 513 [1992])" (Exception, p. 2). Petitioner requests that its consideration be reduced as it will never receive the $500,000.00, the amount of the reduction in the selling price resulting from the 1991 agreements.

In response, the Division argues that a modification to the amount of the mortgage note was not contemplated in 1989 (the time of the transfer) and, therefore, petitioner did not make an erroneous payment of gains tax for which it could claim a refund under Tax Law § 1445(1)(a).

The Division cites to Matter of Cheltoncort Co. v. Tax Appeals Tribunal (185 AD2d 49, 592 NYS2d 121) in support of its position that the value of the consideration has to be determined at the time of the transfer and that subsequent events do not alter this value (see also, Matter of V & V Properties, supra).

With respect to petitioner's argument that the Legislature did not intend the gains tax to tax illusory profits, the Division, relying on Matter of SKS Associates (Tax Appeals Tribunal, January 12, 1991), argues that the gains tax "is different from income tax and there is no authority that requires that they be computed similarly" (Division's brief in opposition, p. 7). The Division also argues that the cases cited by petitioner lend no support for the proposition that the gains tax calculated at the time of the transfer may be reduced by subsequent events.

In its reply brief, petitioner argues that the seller and purchaser are being accorded unequal treatment. Petitioner asserts that "[w]hen purchaser sells the subject property, its OPP would, of course, reflect the $500,000.00 reduction in the purchase price" (Petitioner's reply brief). We reject petitioner's assertion based on Matter of V & V Properties (supra). In V & & Properties, this Tribunal stated "whether petitioner has paid this amount is not determinative, but rather, the determinative factor is whether petitioner was required to pay this amount at the time the transfer

occurred [footnote omitted]. Subsequent events do not affect the amount of liability assumed by petitioner at the time it acquired the property" (Matter of V & V Properties, supra).

We also reject petitioner's remaining argument that Cheltoncort only applies in cases involving fluctuating consideration and does not apply to the present matter which involves an agreed upon reduction in purchase price. The principle for valuing consideration set forth in Cheltoncort is "[i]n calculating the amount of tax due upon a taxable transaction, the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (Matter of Cheltoncort Co., supra). We are unpersuaded by petitioner's argument that Cheltoncort only applies to fluctuating consideration.

All of the remaining arguments raised by petitioner were completely and adequately addressed by the Administrative Law Judge. Therefore, 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 South Suffolk Recreation Ventures, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of South Suffolk Recreation Ventures, Inc. is denied; and
4. The denial of refund, dated September 27, 1991, is sustained.

DATED: Troy, New York
November 3, 1994

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

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