

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>RIAL REALTY CORP.</b>	:	DECISION
for Revision of a Determination or for Refund of Tax on	:	DTA No. 811643
Gains Derived from Certain Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

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Petitioner Rial Realty Corp., c/o Anthony J. Cincotta, Esq., 100 Crossways Park West, Woodbury, New York 11797, filed an exception to the determination of the Administrative Law Judge issued on August 18, 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 filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner's reply letter brief was received on September 22, 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.

***ISSUE***

Whether petitioner has shown that the Division of Taxation's disallowance of certain expenditures claimed as part of petitioner's original purchase price was erroneous.

***FINDINGS OF FACT***

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

On February 12, 1986, petitioner, Rial Realty Corp., acquired a two-acre parcel of vacant land located on the Oyster Bay Harbor waterfront at West End Avenue, Oyster Bay, New York. The property was purchased at a price of \$575,000.00.

The property was located in a limited-use zone under the Town Code of the Town of Oyster Bay and petitioner determined that none of the permitted uses were feasible. Consequently, petitioner brought an application for a special use permit before the Town Board of the Town of Oyster Bay to construct and operate a private tennis club and public restaurant. The application was filed on May 8, 1986. Petitioner subsequently decided that this proposed use would not generate a sufficient return on its investment and the special use application was withdrawn.

Thereafter, petitioner considered various uses for the subject property and in or about April 1988, petitioner filed an application before the Town Board of the Town of Oyster Bay for a special use permit to erect a three story-office building with a penthouse restaurant.

In or about August 1988, the Town of Oyster Bay declared a moratorium on all waterfront zoning applications for the purpose of conducting a comprehensive study of all of its waterfront. The Town Board was concerned about the environmental and aesthetic impact of further waterfront development on Oyster Bay Harbor. Additionally, at about this time, the owners of the seven-acre parcel adjacent to the subject property were also seeking a special use permit. Various citizens' groups vigorously lobbied the Town Board against further development.

During the period of the moratorium, the Town would not accept any building permit applications for any property within the waterfront zone, nor would the Town afford any applicant a public hearing. The subject property was within the waterfront zone.

The moratorium imposed by the Town Board expired in or about February 1990. At about that time, the Town, through its supervisor, commenced discussions with petitioner's representative regarding the Town's purchase of the subject property on a negotiated basis.

In or about April 1991, a detailed appraisal of the subject property was prepared at petitioner's request. Said appraisal valued the subject property at \$1,550,000.00.

Further negotiations between petitioner and the Town of Oyster Bay resulted in an agreed-upon selling price of \$1,350,000.00. The Town purchased the subject property at this price on August 23, 1991.

In connection with its transfer of the subject property to the Town, petitioner filed a Real Property Transfer Gains Tax Transferor Questionnaire (Form TP-580) on July 16, 1991. As part of its original purchase price, petitioner listed on the questionnaire \$489,485.00 in capital improvements to the subject property.

The Division of Taxation ("Division") subsequently issued to petitioner a Schedule of Adjustments (Form TP-582.1) which indicated the Division's disallowance of \$481,797.00 in claimed capital improvements to the subject property. Petitioner paid gains tax as asserted by the Division in the amount of \$76,202.90 on or about the date of the transfer. The gains tax paid reflected the Division's disallowance of petitioner's claimed capital improvements.

On or about January 31, 1992, petitioner filed a claim for refund of real property transfer gains tax in the amount of \$21,216.00.

By its refund claim, petitioner asserted that the following costs were properly includible in its original purchase price:

Architectural Fees	\$145,166.00
Engineering Fees	29,520.00
Legal and Accounting	31,430.00
Surveyor	4,543.00
Permits and Fees	<u>1,500.00</u>
	\$212,159.00

By letter dated July 17, 1992, the Division denied in full petitioner's claim for refund.

The expenditures in dispute, listed above, were incurred in connection with petitioner's application to the Town Board for a special use permit. Most of the expenditures were thus made prior to the imposition of the moratorium declared in August 1988. The Division does not dispute that such expenditures were made.

Petitioner made no capital improvements to the subject property.

Petitioner contended that the zoning expenditures, listed above, enhanced the value of the property. In support of this contention, petitioner presented as a witness the testimony of Anthony J. Cincotta, Esq., an attorney experienced in real estate, zoning and land development matters and who represented petitioner before the Town Board of the Town of Oyster Bay in connection with the zoning matters referred to herein. Mr. Cincotta testified that, in his opinion, petitioner would likely have prevailed in its special use application before the Town Board and that the expenditures in question were necessary to present the Town Board with as strong a case as possible and to thereby impress upon the Board the seriousness of petitioner's intentions. Mr. Cincotta further testified that, in his opinion, had petitioner "done nothing and left the land vacant and didn't come in with any zoning application we would have gotten substantially less than the price that was agreed upon" (Tr., p. 20). Mr. Cincotta characterized the expenditures at issue as not directly related to a sale, but more related to "developing the potential for sale" (Tr., p. 22).

#### ***OPINION***

In the determination below, the Administrative Law Judge discussed Tax Law § 1441 which imposes a tax on gains derived from certain real property transfers, Tax Law § 1440(3) which defines "gain" and Tax Law § 1440(5) relating to the definition of "original purchase price" for purposes of the gains tax.

The Administrative Law Judge rejected petitioner's contention that the expenditures in question enhanced the selling price of the property and held that petitioner failed to establish that said expenditures resulted in an increase in or had any direct impact upon the value of the property. The Administrative Law Judge also noted that such expenditures did not result in any special use permits.

The Administrative Law Judge also held that the costs were not allowable as acquisition costs, stating that:

"[t]he expenditures at issue were made subsequent to petitioner's acquisition of the subject property. Furthermore, petitioner did not acquire any interest in real property as a result of these expenditures [footnote excluded]. Accordingly, the expenditures at

issue were not properly includible in petitioner's original purchase price of the subject property" (Determination, conclusion of law "D").

The Administrative Law Judge further held that: 1) the above conclusion is consistent with both the Division's regulations (see, 20 NYCRR 590.15) and case law (Matter of Mattone, State Tax Commn., November 20, 1986, affd Matter of Mattone v. State Dept. of Taxation & Fin., 144 AD2d 150, 534 NYS2d 478) and 2) "the courts have recognized that not every cost incurred by a transferor is allowable for gains tax purposes to reduce the taxable gain" (Matter of V & V Props., Tax Appeals Tribunal, July 16, 1992; see also, 20 NYCRR 590.17).

Finally, the Administrative Law Judge, in sustaining the Division's denial of petitioner's refund claim, rejected both petitioner's contention that the subject expenditures must be included in original purchase price since the denial of deductibility results in "gross distortion or inequity" as well as petitioner's economic reality/net profit argument.

On exception, petitioner argues that the expenditures in issue were necessary to effect, and thereby "acquire," the requested zoning relief; therefore, qualifying as "acquisition" costs under section 1440(5)(a)(i) of the Tax Law.

Petitioner further argues that the Administrative Law Judge simply missed the point, in that where the subject property consists of raw land, there is only one acquisition cost, viz., the price paid for the land and where, as here, the subject property is approved or semi-approved land, there are two components of the acquisition, i.e., the price paid for the raw land and the cost of securing approved or semi-approved status.

The Division argues that: 1) the Administrative Law Judge was correct in his conclusion that certain fees claimed as part of petitioner's original purchase price were properly disallowed by the Division; 2) petitioner has failed to meet its burden of proof to show that the amounts expended to secure a special exception to the applicable zoning classification added value to the property or caused the 1991 selling price to exceed the acquisition price by \$775,000.00; and 3) the costs in question are not entitled to be included as part of the original purchase price of the property at issue because they do not meet the statutory or regulatory criteria, namely,

consideration paid or required to be paid by the transferor (i) to acquire the interest in real property or (ii) for any capital improvements made or required to be made to such real property.

In reply, petitioner argues that both the Administrative Law Judge and the Division's reliance on Matter of Mattone (supra) is misplaced as the issue involved here is a question of acquisition expenses and not expenditures qualified as capital improvements.

We affirm the determination of the Administrative Law Judge.

Petitioner has not raised any issues on exception that were not raised before the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rial Realty Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Rial Realty Corp. is denied; and
4. The denial by the Division of Taxation of petitioner's claim for refund, dated July 17, 1992, is sustained.

DATED: Troy, New York  
March 9, 1995

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

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