

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE FORTY SECOND STREET COMPANY	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 811834
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 9, 1994 with respect to the petition of The Forty Second Street Company, c/o Dr. Allan A. Brandt, 85 Viscount Drive, A-51, Milford, Connecticut 06460. Petitioner appeared by Weisman, Celler, Spett & Modlin, Esqs. (Kenneth A. Hicks, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

The Division of Taxation filed a brief on exception and petitioner filed a brief in opposition. The Division of Taxation then filed a reply brief. Oral argument was heard on October 20, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly imposed interest on petitioner's payments of gains tax, made approximately one year and three years after passage of title, where the subject property was taken by eminent domain and payments to petitioner by the New York State Urban Development Corporation also did not occur until approximately one year and three years after passage of title.

FINDINGS OF FACT

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

The Forty Second Street Company ("petitioner") was the owner of certain real property ("the property") located at 225-227 West 42nd Street (Block 1014, Lot 18) in the City and State of New York.

By the order of the Honorable Stanley Parness, Supreme Court Justice, County of New York, dated April 18, 1990, the New York State Urban Development Corporation ("UDC") was authorized to file an acquisition map in the office of the Clerk of the County of New York or the office of the City Register upon which filing title to certain property (including petitioner's property) vested in the UDC.

The aforesaid order directed the UDC to promptly complete vesting date appraisals and make advance payments thereon with nine percent interest from the date of vesting and ordered that the compensation to the owners of the various parcels would be determined by the court without a jury. Therefore, on April 18, 1990, an offer of payment in full or advance payment of the purchase price had not been made by the UDC (the condemnor).

An affidavit of William F. Treanor, an attorney with the firm of Wesiman, Celler, Spett & Modlin (the law firm which represents petitioner), states that, on November 1, 1991, he went to the office of the Clerk of New York County to review the file on the condemnation proceeding at issue herein. Other than the petition and order, there were no copies of the acquisition map or other acquisition papers in the file. He thereupon went to the Hall of Records where he located the acquisition map. In that file was an affidavit of printing and publishing and an affidavit of posting. Upon returning to the County Clerk's office, he consulted the minute book in connection with the condemnation proceeding which contained the following entry: "4/18/90 Condemnation Order, Affidavit and Map (sent to Hall of Records)." Mr. Treanor's affidavit stated that in neither of the two files did he find a gains tax Tentative Assessment and Return or

an affidavit that the condemned parcels had a value of less than \$500,000.00 as required by Tax Law § 1447(f).

On April 27, 1990, the Division of Taxation ("Division") received a Transferor Questionnaire from petitioner which indicated thereon that the gross consideration to be paid for this transfer was "to be determined." The original purchase price was listed as \$645,282.00. Also on April 27, 1990, the Division received a Supplemental Return from petitioner on which it elected to pay the tax due in installments.

Attached to the Transferor Questionnaire was an affidavit of Allan A. Brandt, president of Forty Second Street Resources Corporation, the court-appointed manager of petitioner. This affidavit, sworn to on April 26, 1990, stated, in part, as follows:

(a) As of the date of condemnation, petitioner had a contract to sell the property to a third party for a selling price of \$3,500,000.00 (the date of the contract was March 31, 1990). A copy of the contract along with a Transferor Questionnaire (dated March 28, 1990) and a Transferee Questionnaire (dated March 31, 1990) were previously filed with the Division; and

(b) As of the date of transfer pursuant to the condemnation, no advance payment or final award had been received nor had the same been determined.

On June 1, 1990, petitioner executed a Notice of Extension of Period of Limitation for Assessment of Tax on Gains Derived from Certain Real Property Transfers (the extension was received by the Division on June 12, 1990 and was signed by the Division's authorized representative on July 6, 1990) which provided as follows:

"1. The transferor intends to transfer any interest in the real property listed above on or about the date stated above.

"2. The transfer is or may be subject to the gains tax.

"3. The total consideration, as defined in §1440 of the Tax Law, for the transfer is not yet determinable.

"4. The Tax Department agrees to issue a Tentative Assessment and Return, Form TP-582, based upon the consideration determinable at this time.

"5. The transferor agrees to file a supplemental questionnaire, hereinafter referred to as the 'questionnaire', pursuant to §1447.1(b) of the Tax Law, to report any additional consideration received for the transfer and pay any additional tax due, no later than 10 days after the date such additional consideration was received, until the total consideration for the transfer is finally determinable.

"6. The transferor agrees that the Tax Department may assess additional gains tax, pursuant to §1444 of the Tax Law, by issuing a Notice of Determination for the transfer within 90 days after the date the Tax Department receives the questionnaire or, if the transferor fails to file the required questionnaire, at any time.

"7. The transferor agrees that, if the Tax Department assesses additional gains tax on the transfer in accordance with paragraph six above, the transferor shall not raise and is prohibited from raising any claim that the assessment is barred by the period of limitation provided by §1444.3 of the Tax Law."

A Tentative Assessment and Return, dated July 6, 1990, was issued by the Division showing no tax due as of the date of its issuance.

On March 19, 1991, the UDC made an advance fee offer of \$3,500,000.00 which was accepted by petitioner as advance payment but not as payment in full.

A revised Transferor Questionnaire, dated March 27, 1991 and received by the Division on April 4, 1991, was submitted by petitioner showing anticipated tax due of \$285,471.80 (gross consideration was listed as \$3,500,000.00 and original purchase price as \$645,282.00).

On April 11, 1991, the Division issued a Tentative Assessment and Return showing a total amount due of \$318,240.82 which represented tax due of \$285,471.80, plus interest in the amount of \$32,769.02.

On April 25, 1991, the UDC paid the advance fee payment to petitioner less the amount of gains tax and interest shown on the Tentative Assessment and Return which amounts were paid, on the same date, by the UDC directly to the Division.

On August 2, 1991, the Division received a Claim for Refund of Real Property Transfer Gains Tax from petitioner seeking a refund in the amount of \$32,769.02, the amount of interest assessed by the Division.

By letter dated October 16, 1991, the Division denied petitioner's refund claim in its entirety.

On January 7, 1994 and January 10, 1994, respectively, petitioner and the Division, by their duly appointed representatives, entered into a written stipulation whereby it was agreed that the present matter would be amended to include an additional claim by petitioner with respect to additional interest in the amount of \$7,255.22. As explained in letters attached to the written stipulation, this additional interest resulted from a second and final payment to petitioner by the UDC. The record does not disclose the actual amount of additional consideration received by petitioner or the date on which the UDC made such payment. Once again, interest was assessed on petitioner's additional gains tax liability and such interest was paid, under protest, on July 19, 1993.

OPINION

The Administrative Law Judge concluded that:

"at the time of transfer, the consideration was unknown and contingent, the gain could not be computed and the amount of gains tax due was, therefore, indeterminable. Accordingly, no interest could accrue between the date of the taking of the property by eminent domain and the date on which the UDC made the advance payment to petitioner.

"Tax Law § 1446(1) imposes interest 'on the amount of any tax not paid.' Here, 'the amount of any tax not paid' was indeterminable until the consideration was paid by the UDC. At the time of the passage of title to the UDC, the amount of tax due could not be computed and, therefore, there could be no amount of tax not paid and no imposition of interest" (Determination, conclusion of law "D").

On exception, the Division argues that a transferor who elects, under section 1442(c) of the Tax Law, to pay the tax in installments is required by section 1446(3) to pay interest on the installments. The Division states that petitioner elected to pay the tax in installments and that there is no reason to treat petitioner differently from other taxpayers who elected to defer payment of the tax. The Division also argues that petitioner's receipt of interest from the UDC on the deferred receipt of its compensation supports the Division's right to interest on the tax due. Next, the Division argues that the consideration was not determined at the time of transfer, but that it could have been determined at or prior to the date of transfer based on the fair market value of the property. Finally, the Division contends that the instant transaction is analogous to

certain acquisitions of a controlling interest in an entity (entity transactions) where it may not be possible to determine the fair market value of the real property owned by the entity (the consideration in such a transaction) until some time after the acquisition has occurred, but the Division's policy is that interest is due on the tax from the time the acquisition occurred.

Petitioner asserts that the Administrative Law Judge correctly decided this case. Petitioner also contends that section 1446(3) of the Tax Law which imposes interest on installments does not advance the Division's case because that section only applies to any tax that has been paid. Petitioner also argues that the Division is not authorized to assess interest in this case and this result is not affected by petitioner's receipt of interest on the condemnation award. Petitioner also notes that the Division admitted in its answer to the petition that at the time of the transfer petitioner could not determine what its compensation for the property would ultimately be and that the Division issued a tentative assessment stating that no tax was due. Finally, petitioner argues that entity transactions are not analogous to the instant transaction because in an entity transaction the consideration has changed hands and all that is required is to determine how much relates to the real property. In the present case, petitioner states that the consideration did not change hands and petitioner could not, at the time of transfer, determine what the ultimate consideration would be.

Although we are sympathetic to petitioner's circumstances in this case, we cannot find a basis in the law to hold that interest was not due from the date of transfer.

The gains tax is imposed on the gain derived from the transfer of real property in the State (Tax Law § 1441). Section 1442(a) of the Tax Law provides that tax is due no later than 15 days after the date of transfer. There is no special rule in Article 31-B that establishes a different date for payment of tax when the consideration is contingent, not determinable or not determined.

Section 1446(1) of the Tax Law provides that interest is due on any underpayment of tax. Although underpayment is not defined, we think its obvious meaning is a payment that is less than the amount of tax due. Because tax was due on these transfers 15 days after the date of

each transfer and no tax was paid at this time, we conclude that there was an underpayment of tax upon which interest accrued.

We appreciate that petitioner could not precisely calculate the amount of tax due at the time of transfer. However, for the taking of its properties, petitioner was entitled to receive the market value of its properties at the time the properties were appropriated (Matter of Town of Islip, 49 NY2d 354, 426 NYS2d 220). Given this standard, petitioner could have estimated the tax due on the transfer and paid the tax within 15 days of the transfer. If petitioner overestimated the amount of tax due, it would receive interest under section 1446(1) on this overpayment of tax.

The fact that petitioner was entitled to receive interest on the condemnation award under section 514 of the Eminent Domain Procedure Law does not authorize the Division to assess interest on the tax due (section 1446[1] of the Tax Law does), but the rationale underlying petitioner's right to receive interest payments is consistent with the reason interest is due on the tax. "Interest on the value of the property taken is required by the just compensation clauses of the Federal and State Constitutions as a substitute for the beneficial use of the property during the period between the date of the taking and the date of final judgment" (Adventurers Whitestone Corp. v. City of New York, 65 NY2d 83, 489 NYS2d 896, appeal dismissed 474 US 935). The condemnee's right to interest reflects the fact that the transfer of the property took place at the date of the appropriation and at that date the condemnee was entitled to the market value of his property, even though that value may not have been determined at that date. Similarly, interest on the gains tax is due because the transfer occurred and tax was due on the date of transfer.

Contrary to the suggestion by the Administrative Law Judge, our decision in Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992) did not decide this issue adversely to the Division. The Administrative Law Judge's determination in V & V Properties held that interest did not accrue on gains tax due from contingent consideration; however, the correctness of this ruling was not raised in the exception filed in V & V Properties. Therefore, we did not rule on

this issue and our decision is not precedent on this point (Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin., 152 AD2d 87, 547 NYS2d 444).

With respect to petitioner's point that the Division issued a tentative assessment stating that no tax was due, at the most this was an administrative error upon which petitioner cannot rely to bind the Division (see, Matter of Turner Constr Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78; see also, Matter of Westbury Smoke Stax, Ltd. v. New York State Tax Commn., 142 AD2d 878, 531 NYS2d 65, lv denied 73 NY2d 706, 539 NYS2d 299).

The result in this case appears particularly harsh because the transfer was not voluntary on the part of petitioner. In a case where the transferor had freely negotiated the consideration that would be subsequently determined it would not seem so harsh to require the transferor to pay interest on the tax related to the delayed consideration. However, we can find no basis in Article 31-B that would allow us to treat the consideration received in this involuntary transfer differently from that in a negotiated transfer. In our view, if there is to be relief for these types of transactions it requires a legislative change.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed; and
3. The petition of The Forty Second Street Company is denied.

DATED: Troy, New York
April 6, 1995

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

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