

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AARON ZIEGELMAN	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 812030
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner Aaron Ziegelman, 152 West 57th Street, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on April 6, 1995. Petitioner appeared by Ziegler, Sagal & Winters, P.C. (Alan Winters, Stephen S. Ziegler and Lanny M. Sagal, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a letter indicating its intent not to file a brief in opposition. Had the Division filed a brief in opposition, such brief would have been due on July 7, 1995, 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. Commissioner Donald C. DeWitt took no part in the consideration of this decision.

ISSUES

I. Where the transferee defaults on a purchase money mortgage and the property is transferred in lieu of foreclosure back to petitioner, is petitioner entitled to continue making installment payments.

II. Whether petitioner has established reasonable cause to abate the imposition of penalties for failure to pay the balance of the transfer gains tax upon return of the property from the transferee.

FINDINGS OF FACT

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

Petitioner, Aaron Ziegelman, and the Division of Taxation ("Division") signed a Stipulation Admitting Certain Facts, dated April 13, 1994. These stipulated facts are incorporated into Findings of Fact "2" through "10", and "13".

On or about May 31, 1985, petitioner sold 17 condominium apartments located at 504-510 110th Street, New York, New York (the "apartments") to an unrelated partnership (the "purchaser").

As consideration for such sale, the purchaser issued to petitioner notes secured by 17 purchase money mortgages in the combined face amount of \$1,178,540.00 (the "notes"). Each note required that no payment of principal was required until the sale of the apartment to which the note related. Interest payments were required to be made monthly. The notes imposed personal liability on the purchaser for payment of interest for the first five years and, thereafter, said notes were without recourse against the purchaser for payment of either interest or principal.

The Division issued a Tentative Assessment with respect to the transfers assessing real property transfer gains tax of \$63,475.13. The parties agree that petitioner is liable for this gains tax. The sole issue presented in this case is when such tax is due to be paid.

Petitioner timely elected under Tax Law § 1442(c) to pay the gains tax on the sale of the apartments in 15 annual installments of \$4,231.67 each with payments commencing on May 31, 1986. The Division approved this election.

Tax Law § 1442(c) provides:

"(c) Installment payments

"Notwithstanding the foregoing, if the tax due exceeds fifty percent of the cash portion of the consideration received by the transferor on or before the date of

transfer and also exceeds ten thousand dollars, the transferor shall in accordance with subdivision (f) of this section not later than the fifteenth day after the date of transfer elect (i) to pay the entire tax, or (ii) where the cash portion of the consideration exceeds the tax due, to pay fifty percent of such cash portion, or (iii) where the cash portion of the consideration is equal to or less than the tax due, to pay the lesser of fifty percent of the tax due or such cash portion, and (iv) in the case of payments pursuant to clauses (ii) and (iii) hereof, to pay the balance over three years or, in the case of a purchase money mortgage given by the transferee to the transferor, the lesser of the term of the purchase money mortgage or fifteen years, in equal annual installments payable on the anniversary date of the transfer, provided however that no such annual installment shall be in an amount less than the total tax due on the transfer multiplied by a fraction, the numerator of which is the payments received by the transferor during the annual period and the denominator of which is the total payments due to the transferor for the transfer, and further provided that such payments shall be limited to the total tax due plus interest as provided in subdivision three of section fourteen hundred forty-six of this article. Notwithstanding the foregoing provisions of this section with respect to payment of the tax due in installments on an anniversary date of the transfer, if prior to such date the transferor receives ninety percent or more of the balance of the cash portion of the consideration required to be paid to such transferor for the real property transferred, the balance of the total tax due shall be payable on the receipt of such consideration." (Emphasis added.)

The Division's regulations require a taxpayer who elects to pay the gains tax in installments to file a Tentative Assessment and Return (Form TP-582) along with a Supplemental Return (Form TP-583). Petitioner filed both forms. The Supplemental Return contained the following printed language:

"If the transferor fails to pay any installment on the date on which it is due, the Tax Department may declare the entire unpaid balance of the tax due and owing."

Petitioner timely paid the installments due in 1986, 1987, 1988, 1989, 1990 and 1991. After these payments, petitioner paid no further installments.

The purchaser defaulted on the notes and, on or about January 17, 1990, the apartments were transferred back to petitioner by deed in lieu of foreclosure. Petitioner had no recourse against the purchaser for further payments under the notes. Petitioner did not report to the Division the transfer of the property back to him in lieu of foreclosure.

In a Notice of Determination, dated October 17, 1991 (Notice No. L-002937251-4), the Division asserted that all gains tax due with respect to the transfers, which remained unpaid on January 17, 1990 (i.e., the date the apartments were transferred back to petitioner) in the amount of \$38,085.11, became due and payable on that date. In addition, the Division assessed interest (\$8,709.69) and penalties (\$15,572.57) for the failure of petitioner to pay unpaid gains tax on January 17, 1990.

The Division's position was that the return of the apartments by the purchaser to petitioner was in satisfaction of the balance of the cash consideration payable to petitioner under the notes, so that for purposes of the last sentence of Tax Law § 1442(c), petitioner should be considered to have received "ninety percent or more of the balance of the cash portion of the consideration required to be paid." The Division contended that for purposes of the last sentence of Tax Law § 1442(c), the "balance of the cash portion of the consideration required to be paid" is the amount which was actually received by petitioner in satisfaction of the notes, even if this amount was less than the amount of cash the transferee promised to pay at the time of the original sale pursuant to the notes. Further, the Division reasoned that section 1442(c) allows payment of the gains tax in installments over three years, except in the case of a purchase money mortgage when payments may be made for the lesser of the term of the mortgage or 15 years, and that when a purchase money mortgage is satisfied, there is no longer any basis to continue the installment payment of tax beyond the normal three-year period, and instead, the

balance of deferred tax is due on satisfaction of the mortgage.

A conciliation conference was held. The conferee issued a Conciliation Order, dated April 2, 1993, sustaining the statutory notice.

Petitioner filed a petition, dated June 17, 1993, and the Division filed an answer, dated November 8, 1993.

Petitioner's position is that, notwithstanding the transfer of the apartments back to him, he may continue to pay installment payments on the gains tax due from the initial sale. Petitioner reasons that after the purchaser defaulted on the notes, petitioner ceased to receive further cash payments under the notes, so that he should not be considered, for purposes of Tax Law § 1442(c), to have received "ninety percent or more of the balance of the cash portion of the consideration required to be paid"; that is, for purposes of the last sentence of the Tax Law § 1442(c), the "cash portion of the consideration required to be paid" is the amount of cash the transferee promised to pay at the time of the original sale pursuant to the notes, even if subsequent events result in the transferee actually paying less cash than was required under the notes. Petitioner asserts that the fact that the notes were satisfied in the foreclosure does not change this result.

OPINION

The Administrative Law Judge first analogized the situation in Matter of Fazkap Assocs. (Tax Appeals Tribunal, October 6, 1994) where the transferor defaulted on installment payments to the instant matter, where the transferee defaulted and petitioner took the property back in lieu of foreclosure. The Administrative Law Judge stated that this Tribunal's decision in Fazkap stood for the proposition that "a taxpayer is liable for the full amount of the transfer gains tax owed based on the face value of a purchase money mortgage given by a transferee even though the property was returned to the transferor in satisfaction of the unpaid portion of the mortgage" (Determination, conclusion of law "A").

The Administrative Law Judge held that because Tax Law § 1442(c) allows for deferred payment of the gains tax "for the lesser of the term of the purchase money mortgage or 15

years" and since petitioner no longer holds a purchase money mortgage, there is no further "term" left on the mortgage and, thus, no basis for deferring the gains tax.

Petitioner, on exception, argues that Matter of Fazkap Assocs. (*supra*) bears no relation to this matter. Petitioner further asserts that he satisfied the statute's requirement of taking a purchase money mortgage at the time of the transaction and what occurred subsequently is irrelevant. Petitioner argues that there is no basis in the statute for accelerating payment where the transferor defaulted on the note and the transferee continues to make payments.

We agree.

Accelerating petitioner's payments because he no longer held a purchase money mortgage is inconsistent with the overall scheme of the transfer gains tax the focus of which is the transfer of real property. As we stated in Matter of Starburst Dev. Co. (Tax Appeals Tribunal, May 5, 1994), "the moment that the taxable event occurs, i.e., the transfer of the real property, is the temporal restriction underlying the entire gains tax." We held in Starburst that to consider subsequent events to determine whether a transaction was a transfer of real property for purposes of Article 31-B would be contrary to the entire scheme of the tax. Similarly, 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), we concluded that consideration was fixed at the time of transfer and was not affected by subsequent events. In our view, this principle applies with equal force to determining whether a taxpayer qualifies for paying the tax in installments, except to the extent that Article 31-B explicitly provides exceptions to this general rule. In this matter, petitioner qualified for payment of the gains tax in installments pursuant to subsection (c) of section 1442 because the only consideration received by petitioner for the transfer was the purchase money mortgages. In determining whether acceleration is required, the Legislature has explicitly set forth the three events that may occur subsequent to the transaction that will affect the transferor's payment schedule: where the transferor receives 90% or more of the balance of the cash portion of the consideration required to be paid, the 90% rule (section 1442[c]); where the transferor has received payments during the annual period that

are proportionately larger than an amount calculated as if equal annual payments were received over the term of the deferral period (section 1442[c]); and where the transferor defaults (section 1442[e]). Not contemplated as a basis for acceleration was the default of the transferee. Therefore, the only relevant event in this matter was petitioner taking a purchase money mortgage at the time of the sale to the transferee. As a result, we reject the Administrative Law Judge's conclusion that petitioner was required to pay the balance of the gains tax owed based on the fact that petitioner no longer holds a purchase money mortgage.

As a final matter, while we agree with the Administrative Law Judge that one may draw from our decision in Fazkap that a taxpayer is liable for the full amount of gains tax owed despite a transferee's default, our decision cannot be construed as validating acceleration because of a transferee's default, but merely that, consistent with the principles set forth above, the tax was determined at the time of the transaction and the taxpayer's subsequent hardship is not controlling. Our decision in Fazkap rested on the limited principle that the Division is entitled to accelerate payment of the gains tax because the transferor defaulted in making gains tax payments, a result provided for by statute (Tax Law § 1442[e]).

The Administrative Law Judge's second basis for affirming acceleration of petitioner's payments was the section 1442(c) 90% rule. As noted earlier, the 90% rule provides that where the transferor receives 90% or more of the balance of the cash portion of the consideration, the balance of transfer gains tax likewise becomes due. The Administrative Law Judge held that the 90% rule is satisfied because the property was presumably transferred at "fair market value," which is the price at which a willing buyer and a willing seller will trade.

Petitioner asserts that the Administrative Law Judge has simply ignored the explicit language of section 1442(c) and that in order for the 90% rule to be triggered, petitioner would have had to receive "cash." Petitioner goes on to point out that the term:

"'cash portion' has the same meaning in the context of the 90% rule as it does earlier in the statute where eligibility for installment treatment is conditioned on the 'cash portion' being not more than 50% of the

total consideration utilized to arrive at the tax liability. Thus, for purposes of both the 50% test and 90% test, the denominator is fixed at the outset when the tax liability is determined. A reduction in the denominator as a result of a default by the purchaser would be inconsistent with the rule that the tax liability is fixed at the time of transfer and cannot be reduced based on a subsequent default by the purchaser" (Petitioner's brief on exception, pp. 7-8).

Petitioner further disputes the Administrative Law Judge's conclusion that the fair market value of the property was equal to at least 90% of the principal and also challenges whether the property's value was even relevant to the instant matter.

It is settled that "when the language of a statute is clear, effect should be given to the plain meaning of the words used" (Matter of Lloyd v. Grella, 83 NY2d 537, 611 NYS2d 799). Further, "words will not be expanded so as to enlarge their meaning to something which the legislature could easily have expressed but did not" (People v. Shafer, 30 AD2d 213, 291 NYS2d 221). The term "cash" is defined as "[m]oney or the equivalent; usually ready money. Currency and coins, negotiable checks, and balances in bank accounts" (Black's Law Dictionary 196 [5th Ed 1979]). As correctly pointed out by petitioner, "the ALJ has simply ignored the explicit requirement that Petitioner must have received cash" (Petitioner's brief on exception, p. 7). The use of the term "cash" in the 90% provision by the Legislature clearly had a limiting purpose; consequently, the Administrative Law Judge's position, which would expand "cash" to include "or property in the value thereof," is in error. By providing for acceleration upon receipt of 90% of the "cash" portion of the consideration, the Legislature hinged payment on the transferor having liquid assets to satisfy his tax obligation. To accelerate in this matter, where property has been taken back on default in lieu of receipt of the balance of cash due, is therefore inconsistent with the legislative intent because petitioner is still not in receipt of funds to satisfy the balance of tax due. Therefore, we reverse the Administrative Law Judge on the issue of acceleration.

As a result of the foregoing, penalty and interest are cancelled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Aaron Ziegelman is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Aaron Ziegelman is granted; and
4. The Notice of Determination dated October 17, 1991 is cancelled and the Division of Taxation is directed to reinstate petitioner's installment payments consistent with the terms of the deferred payment control sheet.

DATED: Troy, New York
December 28, 1995

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

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