STATE OF NEW YORK

TAX APPEALS TRIBUNAL

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **K.R.K. CAPITAL, INC.** | : | DECISION<br>DTA No. 812226 |
| 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 K.R.K. Capital, Inc., c/o Rosenfeld et al., P.O. Box 10, New York, New York 10150-0010, filed an exception to the determination of the Administrative Law Judge issued on May 4, 1995. Petitioner appeared by Meyer M. Lieber, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Neither party filed a brief on exception. The Division of Taxation's letter stating it would not file a brief was received on June 20, 1995, which 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 DeWitt dissents in a separate opinion.

## *ISSUE*

Whether the Administrative Law Judge's conclusion that petitioner received additional consideration in the form of the transferee's promise to pay the gains tax was inconsistent with his conclusion that petitioner was not entitled to a refund because it failed to prove that it paid the gains tax.

## *FINDINGS OF FACT*

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

Pursuant to an undated contract of sale (except for the year 1988, the space for insertion of the date was blank) between K.R.K. Capital, Inc. ("petitioner"), as seller, and David Winer and Ehud Cafri, as purchasers,premises located at 420 East 92nd Street in New York City were sold for the purchase price of $950,000.00.[1]

By an Assignment of Contract dated February 20, 1989, the purchasers assigned their interest in the aforementioned contract of sale to Wincaf Properties, Inc. for no consideration.

A rider (in paragraph 14) to the contract of sale stated that the "[p]urchaser does hereby indemnify and hold Seller harmless from any gains tax liability with respect to this contract."

Paragraph 15 of the rider stated, in part, as follows:

> "The Purchaser agrees that, on or before the closing date, it shall obtain a certification from the New York State Department of Taxation and Finance fixing the real property transfer gains tax resulting from such assignment and shall, at the closing, pay such tax, if any, by certified check to the order of the Department and deliver the check and certification to the title company."

A Tentative Assessment and Return dated May 22, 1989 was issued to petitioner by the Division of Taxation ("Division") which determined tax due to be $105,555.56 based upon a gain subject to tax in the amount of $1,055,555.55.

A Schedule of Adjustments, also dated May 22, 1989, stated as follows:

> "THE FOLLOWING ADJUSTMENT TO CONSIDERATION AS SET FORTH IN SCHEDULE B OF FORM TP 580 HAS BEEN MADE:
>
> 1. PURSUANT TO THE TERMS OF THE CONTRACT, THE PURCHASER HAS AGREED TO PAY THE NEW YORK STATE GAINS TAX. THE ASSUMPTION OF THIS OBLIGATION BY THE PURCHASER CONSTITUTES ADDITIONAL CONSIDERATION TO THE SELLER.
>
> 105,555.55
>
> 950,000 X .10 = 95,000
> 95,000 / 9 = 105,555.55 ADDITIONAL CONSIDERATION
>
> REGULATIONS PROVIDE THAT THE SEPARATE DEED TRANSFERS OF CONTIGUOUS OR ADJACENT PROPERTIES IS [SIC] FOR THE PURPOSES OF THE GAINS TAX A SINGLE TRANSFER OF REAL PROPERTY.

---

[1]An Assignment of Contract attached to the Transferor Questionnaire and a letter which was deemed to be a part of the agreement by the parties indicated that the contract of sale was dated December 7, 1988.

WHEN THE CONSIDERATION RECEIVED FORM [SIC] EACH TRANSFER IS AGGREGATED THE TOTAL CONSIDERATION EXCEEDS ONE MILLION DOLLARS, AND THEREFORE, THE GAIN FROM EACH TRANSFER IS SUBJECT TO GAINS TAX."

On July 5, 1991, the Division received a Claim for Refund of Real Property Transfer Gains Tax from petitioner on which petitioner contended:

a. That the sales price for the subject property was $950,000.00 and, therefore, no tax was due;

b. The Division improperly aggregated the sale of the subject property with that of an adjacent property which was owned by a partnership in which petitioner's shareholders owned less than a 50% interest; and

c. The transferor, not the transferee paid all gains tax due on the transfer.[2]

Subsequent to the receipt of petitioner's claim for refund, the Division sent a letter dated July 19, 1991 requesting the following additional information:

"1. A list of the shareholders of K.R.K. Capitol [sic] and partners of Westfield 92nd Associates Limited Partnership and their perspective [sic] ownership interests in each entity. Also, provide independent documentation to support these percentages."

"2. Documentation to support claimants [sic] payment of the Gains Tax."

By letter dated October 15, 1991, the Division stated that because petitioner had failed to acknowledge the July 19, 1991 letter, a second letter was sent on September 10, 1991. This letter further stated that,

---

[2] Based upon the content of the Schedule of Adjustments, the claim for refund and the Request for Conciliation Conference and upon the fact that the selling price of the subject property was $950,000.00 (below the $1,000,000.00 threshold for imposition of the gains tax), it is clear that the Division aggregated the consideration received from the sale of this property with the consideration received from the sale of a contiguous or adjacent parcel. In its petition filed with the Division of Tax Appeals, it appears that petitioner was no longer contesting this aggregation. Moreover, petitioner submitted no evidence relating to aggregation. Therefore, based upon the content of the petition and the failure of petitioner to address this issue, it will be assumed herein that the Division's aggregation of the consideration with the adjacent or contiguous parcels was proper.

since the audit could not be concluded without the requested information, the refund claim of petitioner was being denied in its entirety.

In its brief received by the Division of Tax Appeals on October 27, 1994, the Division indicated that, while petitioner failed to offer any evidence to substantiate its claimed entitlement to $50,000.00 in acquisition costs (thereby reducing its consideration received from the sale of the 420 East 92nd Street property), based upon the Division's unilateral research, it determined that petitioner was, in fact, entitled to acquisition costs in the amount of $50,000.00. Accordingly, the Division concedes that tax due on the present transfer should be reduced from $105,555.56 to $100,000.00 pursuant to the following calculation as set forth in the Division's brief:

| "purchase price | $ 950,000.00 | $ 950,000.00 |
|---|---|---|
| addt'l consideration | 105,555.56* | 100,000.00** |
| gross consideration | 1,055,555.56 | 1,050,000.00 |
| Less: cost to acquire | -0- | 50,000.00 |
| taxable gain | 1,055,555.56 | 1,000,000.00 |
| Multiplied by: 10% | .10 | .10 |
| tax due | 105,555.56 | 100,000.00 |

* $950,000.00 x .10 = 95,000.00
95,000.00/9 = 105,555.56 addt'l consideration (20 NYCRR 590.9)

** $950,000.00 - 50,000.00 = 900,000.00
900,000.00 x .10 = 90,000.00
90,000.00/9 = 100,000.00 addt'l consideration (20 NYCRR 590.9)"[3]

***OPINION***

The issue before the Administrative Law Judge was "[w]hether the Division of Taxation properly determined that the purchaser paid the gains tax due on the transaction at issue herein and, therefore, that this constituted additional consideration to petitioner."

The Administrative Law Judge's treatment of this issue was limited to 1) setting forth the regulation at 20 NYCRR 590.9 which states that an agreement by the transferee to pay the gains

[3]The Division's calculation which determines additional consideration contains an error, i.e., the denominator should be .9, not 9 as was set forth in both the brief and in the Schedule of Adjustments.

tax constitutes additional consideration to the transferor[4] and 2) applying the formula supplied by the regulation to calculate the additional tax due where the transferee agrees to pay the gains tax. In his calculation, the Administrative Law Judge allowed petitioner the $50,000.00 in acquisition costs conceded by the Division in its brief to the Administrative Law Judge. The Administrative Law Judge then concluded that:

> "[b]ased upon the computation of tax due pursuant to the provisions of 20 NYCRR 590.9, it is apparent that an overpayment of gains tax in the amount of $5,555.56 was made. While petitioner contends that it (not the transferee) paid the tax, it has not provided any proof to support that contention. Accordingly, while an overpayment of tax

---

[4]20 NYCRR 590.9 provides as follows:

"Question: If an agreement is negotiated between a transferor and transferee whereby the transferee agrees to pay the gains tax for the transferor, does such payment constitute additional consideration to the transferor?

Answer: Yes. The consideration for the transfer is the price paid or required to be paid for the real property or any interest therein, and includes the cancellation or discharge of an indebtedness or obligation. Since the transferor is personally liable for payment of the gains tax, payment of the tax by the transferee constitutes additional consideration to the transferor. The following equation is used to determine the gains tax to be paid:

.10 (Selling price - Original Purchase Price) = .9X.

X in the equation is the amount of gains tax due when the transferee pays on behalf of the transferor.

Example: A contracts with B to sell real property to B for $1 million and B is required to pay the gains tax. A's original purchase price for the property is $900,000.

| | | |
|---|---|---|
| .10 (1,000,000-900,000) | = .9X | |
| .10 (100,000) = .9X | | |
| 10,000 | = .9X | |
| 10,000 divided by .9 | = X | |
| 11,111 | = X | |
| Consideration received: | | $1,011,111 |
| Less original purchase price: | | -900,000 |
| Gain subject to tax: | | 111,111 |
| Gains tax rate: | x .10 | |
| Gains tax due: | $ 11,111" | |

> was made, petitioner has not sustained its burden of proving that it is the party properly entitled to receive the refund thereof" (Determination, conclusion of law "C").

On this basis, the Administrative Law Judge completely denied petitioner's request for a refund. This result was beyond that requested by the Division which had asked that the Administrative Law Judge deny "petitioner's petition of the denial of the refund claim to the extent it exceeds the $5,555.56 reduction of tax conceded by the Division" (Division's letter in lieu of a brief to the Administrative Law Judge, p. 3). In other words, the Administrative Law Judge denied the refund that the Division had agreed to grant to petitioner.

On exception, petitioner contends that the Administrative Law Judge's conclusion to deny a refund to petitioner on the grounds that it did not prove it paid the gains tax is inconsistent with his conclusion to increase the consideration under 20 NYCRR 590.9.[5] Petitioner asks only that a refund in the amount conceded by the Division, $5,555.56, be granted.

The Division elected not to file a brief in response to petitioner's exception and, thus, has not offered any defense of the Administrative Law Judge's determination.

We agree with petitioner that the conclusions reached by the Administrative Law Judge are inconsistent.

Even if not acknowledged by the Administrative Law Judge, the application of 20 NYCRR 590.9 reflects the rationale that the purchaser's agreement to indemnify petitioner against any gains tax liability constitutes additional consideration to the transferor because it is "the cancellation or discharge of an indebtedness or obligation" within the meaning of section 1440(1)(a) of the Tax Law. This rationale is in accord with the principle, established long ago, that the payment by an employer of income taxes due on the salary of an employee constituted additional income to the employee (Old Colony Trust Co. v. Commissioner, 279 US 716). The Court in Old Colony stated that:

---

[5]Petitioner submitted additional evidence on exception which we have not considered because the evidence was submitted after the record had been closed (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

> "[t]he payment of the tax by the employers was in consideration of the services rendered by the employee and was a gain derived by the employee from his labor. The form of payment is expressly declared to make no difference [citation omitted]. It is therefore immaterial that the taxes were directly paid over to the Government. The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed" (Old Colony Trust Co. v. Commissioner, supra, at 729).

Based on the reasoning of Old Colony, the transferee's payment of the gains tax on behalf of petitioner was equivalent to receipt by petitioner of the payment, followed by petitioner's payment of the amount to the Division. With this understanding of the payment, petitioner is well within the pertinent statutory language which allows "any person claiming to have erroneously paid the tax" to claim a refund (Tax Law § 1445[1][a]).

This reading of the statute is consistent with some Federal courts' interpretation of the similar language of section 6402(a) of the Internal Revenue Code which authorizes a refund to "the person who made the overpayment." The Ninth Circuit Court of Appeals held that this language should not be applied mechanically, but instead that the facts should be analyzed to determine whether the party seeking the refund had a financial interest in it (Bruce v. United States, 759 F2d 755, 85-1 USTC ¶ 9366; see also, Fink Estate v. United States, 852 F2d 153, 88-2 USTC ¶ 9454). Clearly, petitioner has a financial interest in this refund: the tax was solely the tax liability of petitioner (Tax Law §§ 1442[a] and 1447[3][a]);[6] the tax was imposed on petitioner's gain; the gain was determined based on petitioner's original purchase price in the property; the transferee's agreement to indemnify petitioner for the tax increased petitioner's consideration and gave rise to this refund request; and petitioner could have a contractual obligation to reimburse the transferee for any refund due, whether or not petitioner received the refund.

This examination of petitioner's financial interest in the refund reveals a significant practical problem with the result imposed by the Administrative Law Judge and supported by

---

[6]The record reveals no failure by the transferee to comply with the requirements of Article 31-B which would have exposed the transferee to personal liability for the tax.

the dissent. Because the tax is imposed on the gain of the transferor, the transferee would not normally have the information and documentation necessary to obtain a refund.[7] Thus, eliminating the transferor as a party that could obtain a refund in these circumstances could effectively eliminate the possibility of any refund being obtained.

For all of the above reasons, we see no justification to the Administrative Law Judge's decision denying the refund that the Division was willing to grant to petitioner. The dissent offers a justification to support the Administrative Law Judge's determination which is based on a treatment of a transaction that is not before us, i.e., the future sale of the property by the transferee. Because this transaction is not before us, we believe that nothing in our decision determines, or is intended to suggest, how this future transaction should be treated. To decide the present case based on a hypothetical future case would be especially precarious here because we have absolutely no idea that the Division would in fact take the position assumed by the dissent. The Division's willingness to grant petitioner the $5,555.56 refund leaves it open to debate how it would treat the future transfer of the property. In our view, the Administrative Law Judge acted questionably in denying a refund that the Division was willing to grant. The dissenting opinion would exacerbate this by justifying it based on the assumption that the Division would take a position contrary to the transferee in the future. Our role is to evaluate the acts of the Division, not to act for it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of K.R.K. Capital, Inc. is granted;

2. The determination of the Administrative Law Judge is modified to the extent that petitioner is granted a refund of $5,555.56, but the determination is otherwise affirmed;

---

[7]This case is unusual in that the information to reduce the tax was based on the unilateral efforts of the Division. The Division describes this reduction of tax as "a unique and rare occurrence given the circumstances surrounding it. Therefore, the Division considers it prudent to remind petitioner that the statutory imposition of the burden of proof on taxpayers is alive and well, notwithstanding this reduction of tax despite petitioner's complete failure to offer any evidence whatsoever in support of its position" (Division's letter in lieu of a brief to the Administrative Law Judge, p. 3).

3. The petition of K.R.K. Capital, Inc. is granted to the extent indicated in paragraph "2" above, but is otherwise denied; and

4. Petitioner's request for a refund is granted to the extent of $5,555.56, but is otherwise denied.

DATED: Troy, New York
December 14, 1995

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

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

COMMISSIONER DeWITT dissenting:

I respectfully disagree with the opinion of the majority in this matter and would affirm the determination of the Administrative Law Judge. Petitioner contested the denial by the Division of its claim for refund of real property transfer gains tax. Petitioner bore the burden of proof to show, by clear and convincing evidence, that it was entitled to a refund. Yet it did not present one piece of evidence to support its claim.

The Division, sua sponte, uncovered evidence to support a portion of petitioner's claim and, as a result, conceded that the amount of $5,555.56 in gains tax had been overpaid. Petitioner, however, failed or refused to provide evidence to the Division or to the Administrative Law Judge to support its claim that it had paid the gains tax itself so as to be entitled to receive this refund. I believe that the Administrative Law Judge correctly determined that, absent this basic element of proof, petitioner was not entitled to receive a refund of even the agreed amount of overpaid tax.

I believe the majority opinion is unintentionally damaging to the purchaser of the property while giving petitioner a windfall. This can be demonstrated by the example set forth in 20 NYCRR 590.9, which calculates the amount of consideration received and gains tax due when

the purchaser is required to pay the gains tax for the transferor. That example reads as follows:

"Example: A contracts with B to sell real property to B for $1 million and B is required to pay the gains tax. A's original purchase price for the property is $900,000.

| | |
|---|---|
| .10 (1,000,000 - 900,000) | = .9X |
| .10 (100,000) | = .9X |
| 10,000 | = .9X |
| 10,000 ÷ .9 | = X |
| 11,111 | = X |
| Consideration received: | $1,011,111 |
| Less Original purchase price: | -900,000 |
| Gain subject to tax: | 111,111 |
| Gains tax rate: | x .10 |
| Gains tax due: | $ 11,111" |

In this example, the amount received on the sale by A is $1,000,000. The consideration paid by B, however, is $1,011,111. This amount becomes B's original purchase price in the property. If, as in the instant proceeding, A's original purchase price were increased by $50,000, the amount of gains tax due on the transfer is reduced by $5,000 ($50,000 X .10). This reduction in tax does not affect the $1,000,000 given by B to A to purchase the property. If B actually paid the gains tax and the refund of overpaid tax is given to A, A receives an additional $5,000 on the transfer while B's original purchase price in the property is reduced by $5,000. On a subsequent transfer of the property, B's original purchase price will only be $1,006,111.

In Matter of Ziegelman (Tax Appeals Tribunal, October 12, 1995) we stated the following:

> "The Tax Law defines 'consideration' as the 'price paid or required to be paid for real property' (Tax Law § 1440[1][a]). To analyze petitioner's claim, we must not look at the 'consideration' from the perspective of petitioner; i.e., how much was actually received as a result of the transfers. Rather, we must calculate consideration by determining how much was paid or required to be paid by the purchasers for the interests in real property that were transferred."

In the present situation, the amount of tax due on the transfer is part of the consideration paid by the purchaser. A refund of tax in this case is actually a refund of consideration. Since the purchaser was required to pay the tax as part of its consideration pursuant to the contract for sale, any refund due should inure to the benefit of the purchaser, unless it is demonstrated that

the petitioner, rather than the purchaser, paid the tax. Therefore, the Administrative Law Judge's denial of refund to petitioner is not, as claimed by petitioner on exception, inconsistent with his conclusion to increase consideration based on the contractual requirement that the purchaser pay the gains tax.

The reliance by the majority on Old Colony Trust Co. v. Commissioner (supra) does not require a different result. That case supports the inclusion of the amount of gains tax paid by the purchaser as part of the consideration received by the petitioner on the transfer. However, that case did not deal in any way with the proper party to receive a refund of tax paid. Petitioner in this case, having brought a claim for refund, was the party required to produce evidence as to who actually paid the gains tax due on the transfer. Having failed to do so, its claim should be denied.

DATED: Troy, New York
December 14, 1995

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner