

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
I. MILES POLLACK	:	DECISION
	:	DTA No. 813191
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 I. Miles Pollack, 140 Grand Street, Suite 401, White Plains, New York 10601, filed an exception to the determination of the Administrative Law Judge issued on July 3, 1996. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Neither party submitted a brief. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly disallowed certain costs claimed by petitioner with respect to a conversion of premises to cooperative ownership thereby resulting in an assessment of tax against petitioner under former Article 31-B of the Tax Law.

FINDINGS OF FACT

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

Petitioner I. Miles Pollack, together with one Aaron Gelbwaks, sponsored a plan to convert to cooperative ownership certain premises located at 622 West End Avenue, New York, New York. The transfers of shares and proprietary leases to nine apartment units (the "unit sales") which give rise to the tax assessment at issue herein took place between February 18, 1986 and November 7, 1987.

Petitioner originally reported a loss with respect to the transfers at issue. Thereafter, in May 1990, the Division of Taxation ("Division") issued the first in a series of requests for information regarding the subject conversion and unit transfers. These requests continued from such initial request in May 1990 through December 1992. However, none of the requested information was provided to the Division.

On January 4, 1993, the Division issued to petitioner a Notice of Determination assessing tax due under Tax Law Article 31-B ("gains tax") in the amount of \$179,000.00, plus penalty and interest. Due to petitioner's failure to submit information as requested, the amount of tax assessed was computed based on consideration of \$1,790,000.00 for the conversion as reported to the Attorney General's office per petitioner's offering plan. In the same manner, since petitioner had submitted no information in substantiation, the Division made no allowance for original purchase price in reduction of such consideration.

Petitioner responded to the notice by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A conciliation conference was held on November 18, 1993, at which petitioner presented documentation concerning consideration and expenses with regard to the transfers at issue. Additional information and documentation was supplied after the conference.

On July 22, 1994, Conciliation Order 128071 was issued to petitioner sustaining the notice but recomputing and reducing the amount of tax due to \$30,022.50, plus penalty and interest.

Petitioner challenged the assessment, as reduced at conference, by filing a petition with the Division of Tax Appeals. Petitioner specifically challenges three expense items which were not allowed in reduction of the gain on the transfers at issue, to wit, advertising costs of \$42,187.00, appliance costs of \$5,496.00, and the cost of real estate taxes and interest expense on certain loans. This latter item involves expenses incurred and/or paid before or after the ten-month construction period recognized by the Division. Each of these challenged items will be discussed further hereinafter.

With regard to advertising costs (\$42,187.00), petitioner argues that the same represent directly related expenses of sale which should be allowed. Petitioner maintains that advertising expenses are usually borne by the real estate broker, but are recouped through the transferor's payment of the broker's commission. Such commission payments, allowable in reduction of consideration received by a transferor per Tax Law § 1440(1)(a) are, according to petitioner, typically in the range of six or seven percent. However, petitioner argues that in this case, the broker was a small operation, lacked the cash to cover advertising expenses, and that petitioner paid the same while the broker agreed to accept a lower, three percent, commission.

Turning to appliances (\$5,496.00), petitioner's list of expenses included a category "Appliances and Miscellaneous Improvements" wherein a total of \$8,361.00 is reflected. The Division allowed the expense for carpeting under this category (\$2,865.00), but disallowed the balance thereof (\$5,496.00) which consisted of items labelled "personal property, printing, sign, etc." Petitioner apparently maintains these expenses represent the purchase of appliances which were necessary to make the units saleable.

The third adjustment challenged by petitioner involves the length of the construction period. Based on a January 5, 1994 letter from petitioner's co-sponsor, Aaron Gelbwaks, the Division allowed the time frame spanning June 25, 1985 through May 1, 1986 (i.e., ten months) as the construction period for this project. In response, petitioner alleges that construction went on in various phases for more than one and one-half years, as opposed to only ten months. In addition, petitioner maintains that certain changes to Tax Law Article 31-B, enacted April 15, 1993 (the particular changes were not specified by petitioner), make it clear that interest expenses and real estate taxes incurred prior to the start of physical construction may be allowed as part of original purchase price. Petitioner also argued that the end of a construction period depends on the final use and disposition of the property, and that in this case such period would end when the property was sold or leased.

Brokerage agreements with respect to the transfers at issue are not included with the documents submitted herein, nor is there evidence describing the appliances and/or the manner

of their installation at the premises. Finally, other than the reference to changes in the Tax Law, petitioner has not specified any particular construction period in lieu of the June 25, 1985 through May 1, 1986 time frame noted above.

OPINION

In the determination below, the Administrative Law Judge analyzed three separate items which petitioner claimed the Division erroneously disallowed in arriving at gain subject to tax under former Article 31-B of the Tax Law.¹ First, the Administrative Law Judge determined that petitioner had not provided any evidence that the construction period lasted any longer than that allowed by the Division so that interest and real estate taxes incurred during that period would be deductible. Second, the Administrative Law Judge also held that petitioner had not provided evidence as to the nature of amounts listed as expenditures for appliances or the nature of the appliances, noting that 20 NYCRR former 590.16 provided that costs incurred for appliances were a component of original purchase price as a capital improvement if such were built-in appliances. Last, the Administrative Law Judge sustained the Division's denial of a deduction for advertising expenses incurred by petitioner. In this regard, the Administrative Law Judge held that neither Tax Law former § 1440(5)(a), in effect at that time, nor the regulations thereunder provided for the inclusion of advertising expenses incurred by the transferor as a component of original purchase price. The Administrative Law Judge also held that the 1993 amendment to Tax Law former § 1440(5)(a) which allowed such expenses was to be applied prospectively only, and did not apply at the time petitioner's transfers occurred.

On exception petitioner argues that: (1) the construction period was longer than ten months and, therefore, it was improper to deny real estate taxes and interest incurred during the extended period; and (2) the advertising expense it incurred was improperly disallowed because such expense "equates to brokerage commissions where the commissions are lowered to below normal commissions to reflect the advertising component" (Exception, p. 2). Petitioner has not taken exception to that portion of the Administrative Law Judge's determination which

¹The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 31, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

sustained the disallowance for amounts claimed for appliances as a component of original purchase price.

We affirm the determination of the Administrative Law Judge. On exception, petitioner raises the same arguments as made before the Administrative Law Judge. Since the Administrative Law Judge completely and adequately addressed the issues before him, we affirm for the reasons stated in the determination below. We also note that the disallowance of advertising expenses as a component of original purchase price, prior to the amendment of Tax Law former § 1440(5)(a) (see, L 1993, ch 57, § 61), is consistent with our decisions in Matter of Belhara Assocs. Ltd. Partnership (Tax Appeals Tribunal, January 26, 1995) and Matter of 645 East 11th St. Assocs. (Tax Appeals Tribunal, January 21, 1993).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of I. Miles Pollack is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of I. Miles Pollack is denied; and
4. The Notice of Determination dated January 4, 1993 as modified by the Conciliation Order dated July 22, 1994 is sustained.

DATED: Troy, New York
April 17, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner