STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
31/32 LEXINGTON ASSOCIATES	:	DECISION DTA NOS. 813845
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.	:	AND 814194

Petitioner 31/32 Lexington Associates, c/o Philips International, 417 Fifth Avenue, New York, New York 10016, filed an exception to the determination of the Administrative Law Judge issued on November 14, 1996. Petitioner appeared by Robinson Brog Leinwand Greene Genovese & Gluck, P.C. (Babcock MacLean, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner filed a brief and reply brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation, in calculating consideration for the transfer of a certain interest in real property, properly included the face value of a purchase money mortgage despite its subsequent devaluation, so that the Division of Taxation's denial of petitioner's refund claims was justified.

II. Whether the imposition of gains tax in this matter violates petitioner's rights under the Equal Protection Clause of the United States Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact "1" through "7" which have been modified. We have also made an additional finding of fact.

The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

We modify findings of fact "1," "2" and "3" of the Administrative Law Judge's determination to read as follows:

> The record on submission is extremely bare. It does not include a copy of a transferor questionnaire filed by 31/32 Lexington Associates to report its anticipated transfer of the property at issue, 205-215 Lexington Avenue in New York City ("Manhattan property"). Rather, Exhibit "M" of the Division of Taxation ("Division") is a photocopy of a transferee questionnaire filed by Philip Pilevsky, as transferee, c/o Philips International,[1] dated March 22, 1988. This questionnaire was filed and signed by Mr. Pilevsky in an individual capacity. This transferee questionnaire reported the anticipated transfer on May 26, 1988 of the Manhattan property by a transferor identified as Lexington Associates for consideration to be paid by Philip Pilevsky of $45,100,000.00.[2] Mr. Pilevsky reported that the type of interest to be acquired from Lexington Associates in the Manhattan property was (i) a fee interest and (ii) a leasehold assignment or surrender.
>
> The Division's Exhibit "L" is a photocopy of a transferor questionnaire also filed by Philip Pilevsky, as transferor, c/o Philips International, dated April 1988 (without a specific day designated). This questionnaire was filed by Mr. Pilevsky in an individual capacity. This transferor questionnaire reported the anticipated transfer on May 26, 1988 of the Manhattan property to a transferee identified as 205-15 Lex Associates. Mr. Pilevsky reported that the type of interest to be transferred in the Manhattan property was a "contract assignment." Consequently, it appears that Mr. Pilevsky assigned his contract to purchase the Manhattan property from Lexington Associates over to an entity known as 205-15 Lex Associates.
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> Petitioner's Exhibit "1" is a short affidavit dated March 28, 1996 of David Werner, who described himself as "a general partner" in petitioner. According to Mr. Werner, petitioner "transferred an interest in 205 and 215 Lexington Avenue . . . to 205-15 Lex Associates . . . on or about May 26, 1988." Mr.

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[1]Petitioner's address shown at the beginning of this decision is also in care of Philips International.

[2]The Administrative Law Judge found, inter alia, that Mr. Pilevsky apparently purchased the Manhattan property from petitioner. He also found that the property was being transferred by a transferor identified as Lexington Associates, presumably 31/32 Lexington Associates. These findings are deleted, since there is nothing in the record to support them.

> Werner provided no facts that would establish a relationship between Mr. Pilevsky and petitioner or Mr. Pilevsky and himself. Mr. Werner provided no details to show how petitioner came to own the subject property, and he did not provide any details concerning Mr. Pilevsky's assignment of his contract rights to purchase the property from Lexington Associates to the entity described as 205-15 Lex Associates. There is no evidence that Philip Pilevsky had an ownership interest in petitioner or was authorized to act on its behalf. If Mr. Pilevsky was associated with petitioner, there is no explanation for his failure to submit an affidavit showing that fact. There is nothing in the record to show a relationship between Lexington Associates and 31/32 Lexington Associates or to show whether or not they are the same entity. Other than as a mailing address, there is no information whatever about Philips International. In brief, the facts concerning petitioner's involvement with this real estate transaction have not been made part of the record.[3]

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> The transferee questionnaire filed by Philip Pilevsky (Division's Exhibit "M") shows consideration to be paid to Lexington Associates by Mr. Pilevsky of $45,100,000.00. In addition, Mr. Pilevsky reported brokerage fees to be paid by him to a real estate broker of $450,000.00. In comparison, the transferor questionnaire filed by Philip Pilevsky (Division's Exhibit "L") shows consideration to be paid to Mr. Pilevsky by 205-15 Lex Associates, c/o Arnold Schotsky, Esq., of the Long Island law firm of Gandin, Schotsky & Rappaport, of $49,100,000.00.
> Mr. Pilevsky reported a gain subject to tax of $3,915,000.00 after deducting original purchase price of $45,185,000.00 calculated as follows:
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> | | |
> |---|---|
> | Purchase price paid to acquire real property | $45,100,000.00 |
> | Legal expenses to acquire property | 45,000.00 |
> | Legal expenses to sell property | 40,000.00 |
> | Original purchase price | $45,185,000.00 |
>
> Consideration to be received by Mr. Pilevsky from 205-15 Lex Associates of $49,100,000.00 less original purchase price of $45,185,000.00 equals a gain subject to real property transfer gains

[3]We modified these findings of fact to more accurately reflect the record.

> tax of $3,915,000.00, with anticipated tax due of $391,500.00 (10% of $3,915,000.00).[4]

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> The Division also submitted for review a photocopy of a supplemental return dated April 26, 1988 filed by Mr. Pilevsky, in his individual capacity, as transferor of the property at issue to 205-15 Lex Associates (Division's Exhibit "P"). By this Supplemental Return, Mr. Pilevsky chose to defer his payment of the gains tax due. He elected to pay the tax in equal installments payable on the anniversary date of the transfer for the length of the term of a certain purchase money mortgage, which was apparently used to finance the transaction at issue. However, a copy of the purchase money mortgage was not made part of the record. Nowhere in this Supplemental Return filed by Mr. Pilevsky does it mention 31/32 Lexington Associates.[5]

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> The Division's Exhibit "D" is a claim for refund of gains tax paid of $313,200.00 dated May 24, 1993, which was filed by David Werner in his capacity as partner of an entity described as "31/32 Lex Associates, a New York partnership." It appears that "Lex" was used erroneously instead of "Lexington" in the description of the entity seeking the refund claim. This refund claim is the first document filed by petitioner, and placed in evidence, to make reference to 31/32 Lexington (or Lex) Associates. This refund claim noted the following minimal facts:
>
> > "Seller transferred an interest in [the Manhattan property] to Buyer on or about May 26, 1988.
> >
> > "No cash was received by Seller at the time of the transfer. Seller took back Buyer's second mortgage on the Property, as security for Buyer's obligation to pay the purchase price over a five-year period. Pursuant to the applicable provisions of the New York State real property gains tax, an election

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[4]We modified the first sentence of this finding of fact to properly reflect that the consideration was to be paid to Lexington Associates and not to petitioner. We modified the last sentence of this finding of fact to clarify that Mr. Pilevsky received the consideration from 205-15 Lex Associates.

[5]We modified this finding of fact to more accurately reflect the record.

> was made by Seller to pay the gains tax in installments. The scheduled payments of gains tax were made timely by Seller."
>
> We note that this refund claim contradicts the other evidence in the record (transferor questionnaire, Tentative Assessment and Return and Supplemental Return filed with the Division by Mr. Pilevsky), since it asserts: i) that petitioner, and not Philip Pilevsky, was the seller of the Manhattan property; and ii) that it, and not Mr. Pilevsky, paid the gains tax here. No contracts, cancelled checks or closing documents were offered in evidence to support petitioner's refund claim.[6]

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> This refund claim dated May 24, 1993 shows tax installments paid on May 17, 1989, May 2, 1990, May 20, 1991 and May 27, 1992, which totaled $313,200.00. Petitioner's second refund claim dated May 11, 1995 (Division's Exhibit "I") seeks a refund of a fifth installment payment made on May 26, 1993 of $78,300.00. The two refund claims total $391,500.00, which corresponds to the amount of gains tax reported due by Mr. Pilevsky on his transfer of the Manhattan property to 205-15 Lex Associates. There is nothing in the record to show that petitioner, rather than Mr. Pilevsky, paid the gains tax here. Neither Mr. Werner's affidavit nor the refund applications themselves show a business or other connection between Mr. Pilevsky and petitioner. There is no documentation in the record to show an acquisition or transfer of the Manhattan property by an entity known as 31/32 Lexington Associates.[7]

Pursuant to an order of the United States Bankruptcy Court dated June 22, 1993 (petitioner's Exhibit "3"), the reorganization of 205-15 Lex Associates under Chapter 11 of the Bankruptcy Code was confirmed. Under the reorganization plan (petitioner's Exhibit "2"), petitioner released and discharged a "Second Mortgagee Claim" against 205-15 Lex Associates in exchange for a payment of $200,000.00. In addition, the Manhattan property was reconveyed

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[6]We modified this finding of fact to more accurately reflect the record.

[7]We modified this finding of fact to more accurately reflect the record.

to an entity known as 205/215 Lexington Limited Partnership, which apparently was the first mortgagee on the Manhattan property.

In its refund claims, petitioner asserts that it "will realize no gain upon the sale of the Property to Buyer" because of the bankruptcy of 205-15 Lex Associates. However, the record does not, in fact, disclose the total payments made by 205-15 Lex Associates to Mr. Pilevsky or to petitioner.

By a letter dated July 30, 1993 (Division's Exhibit "E"), petitioner's refund claim dated May 25, 1993 in the amount of $313,200.00 was denied because "[t]he tax was properly calculated on the date of transfer" (emphasis in original). By a letter dated May 24, 1995 (Division's Exhibit "J"), petitioner's refund claim dated May 12, 1995 in the amount of $78,300.00 was also denied for the same reason.

We make the following additional finding of fact:

> The transferor questionnaire, the transferee questionnaire, the Tentative Assessment and Return and the Supplemental Return filed by Mr. Pilevsky regarding the transfer of the Manhattan property never make any reference to 31/32 Lexington Associates. The first time the name 31/32 Lexington Associates appears is in the refund applications. No deed, contract or contract assignments, closing documents or other source documentation were placed in evidence to show the parties and interests in the subject transaction. None of the documents Mr. Pilevsky filed with the Division purport to show that he is filing in a representative capacity on behalf of any entity.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioner's claim that gains tax may be imposed only in the case of an actual gain. Rather, the Administrative Law Judge noted that gains tax has been imposed in situations of speculative profit and in situations where real estate transactions have soured. The Administrative Law Judge noted that in Matter of Brockman (Tax Appeals Tribunal, April 4, 1996, confirmed Matter of Brockman v. Tax Appeals Tribunal, ___AD2d___, 656 NYS2d 429) the major portion of the sales price was financed by a purchase money note and mortgage from the buyer in the amount of $8,500,000.00. The buyer never made any payments

on this note. Like petitioner, the Brockmans argued that because they suffered a loss, the imposition of gains tax was not rational and violated their equal protection rights. The Administrative Law Judge noted that we denied the Brockmans' claims for refund of gains tax and held them liable for gains tax.

The Administrative Law Judge pointed out that in Brockman we emphasized that subsequent events do not alter the value that the consideration had at the time of the transfer, citing our decision in Matter of Starburst Dev. Co. (Tax Appeals Tribunal, May 5, 1994) where we stated:

> "the moment that the taxable event occurs, i.e., the transfer of the real property, is the temporal restriction underlying the entire gains tax. Consistent with this interpretation, we have held that the consideration for the transfer is fixed at this moment and is not reduced by subsequent events . . . . To deviate from this theory, as petitioner suggests, and exclude transactions from the definition of transfer of real property based on subsequent events would, in our view, be contrary to the entire scheme of the tax."

The Administrative Law Judge also recognized that in Brockman we noted that our conclusion that the amount of gains tax due is to be finally determined by the amount of consideration paid or required to be paid on the date of the transfer had been affirmed on appeal (see, Matter of Wanat v. Tax Appeals Tribunal, 224 AD2d 873, 638 NYS2d 251, lv denied 88 NY2d 803, 645 NYS2d 446, confirming Matter of Wanat, Tax Appeals Tribunal, September 15, 1994; Matter of South Suffolk Recreation Ventures v. Tax Appeals Tribunal, 224 AD2d 874, 638 NYS2d 515, lv denied 88 NY2d 803, 645 NYS2d 446, confirming Matter of South Suffolk Recreation Ventures, Tax Appeals Tribunal, November 3, 1994). In Wanat, which the Administrative Law Judge viewed as on point, we held that the amount of the consideration calculated at the time of the transfer is not affected by the transferee's later default on a note and mortgage.

The Administrative Law Judge rejected petitioner's contention that the amendment of the gains tax law in 1993 (L 1993, ch 57, § 60), which deemed "consideration" to be limited to the fair market value of the property transferred to a lender in foreclosure proceedings, means that

gains tax may be imposed only on an actual gain. The Administrative Law Judge also pointed out that this amendment only applies to transactions occurring on or after April 15, 1993 (L 1993, ch 57, § 418[8]).

The Administrative Law Judge further concluded that the Legislature has manifested no intent to ignore a transaction for purposes of gains tax due to events occurring subsequent to the time of transfer.

The Administrative Law Judge agreed with petitioner that the real property transfer gains tax is not viewed as a stamp tax, but rather as a tax on income in the context of bankruptcy litigation (see, In re 995 Fifth Ave. Assocs., L.P., 963 F2d 503, cert denied 506 US 947, 121 L Ed 2d 302). However, the Administrative Law Judge concluded that the fact that gains tax due is calculated at the time of transfer and may not be reduced by subsequent events does not mean that it is not a tax on or measured by income or gross receipts (see, Matter of Brockman, supra).

Finally, the Administrative Law Judge rejected petitioner's argument that its right to equal protection of the law is violated by holding it liable for gains tax on a transaction that later soured, citing our decision in Matter of Brockman (supra) where we stated:

> "Neither the Federal nor the State constitution require that all taxpayers be treated identically; they only require that those similarly situated be treated uniformly (see, Matter of Foss v. City of Rochester, 65 NY2d 247, 491 NYS2d 128; Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354). Requiring petitioners to pay the gains tax does not violate their constitutional rights because petitioners are being treated the same as all other similarly situated taxpayers -- they are required to calculate the tax based upon the value of the consideration at the time of the transfer (see, Matter of Rapoport, Tax Appeals Tribunal, August 31, 1995)."

ARGUMENTS ON EXCEPTION

Petitioner makes the same arguments as it did below.

Petitioner claims that denying its refund claims is contrary to the Tax Law and to basic principles of fairness and common sense. According to petitioner, the gains tax is imposed only on "actual economic gain." It supports this statement by citing to litigation in the bankruptcy

context where the gains tax has been viewed not as a stamp tax, but rather as an income tax or a tax imposed on economic gain. Petitioner states it had no gain because the purchaser went bankrupt.

Petitioner also argues that the amendment of the gains tax law in 1993 limits the calculation of "consideration" to the fair market value of the property transferred to a lender in foreclosure proceedings or a transfer in lieu of foreclosure. Further, petitioner maintains that to tax a real estate transaction even where gain is not derived would be defective under the Equal Protection Clause.

Petitioner argues that none of the cases relied upon by the Division address its central argument that when the correct class of similarly situated taxpayers is identified, i.e., taxpayers in petitioner's position, the gains tax statute as applied to petitioner violates the Equal Protection Clause (Petitioner's reply brief, p. 2).

The Division counters, citing to our earlier decisions, that in computing consideration the face amount of a mortgage at the time of transfer is properly used (Matter of Normandy Assocs., Tax Appeals Tribunal, March 23, 1989). Subsequent events, the Division argues, which may effect the transferor's actual gain are irrelevant. The Division also points out that we rejected an equal protection argument similar to petitioner's in Matter of Rapoport (supra).

OPINION

We affirm the determination of the Administrative Law Judge.

While we agree with the above conclusions of the Administrative Law Judge, we would dismiss the petition on jurisdictional grounds. Although not raised by either party before the Administrative Law Judge, a jurisdictional issue may be raised at any time and cannot be waived (United States v. Wright, 658 F Supp 1, 86-1 USTC ¶ 9457). As stated above, this record is very minimal. Tax Law former § 1445(1) provided, in pertinent part, that "[a] transferor claiming to have erroneously paid the [gains] tax . . . may file an application for a refund" (emphasis added). If 31/32 Lexington Associates was ever a party to the subject

transaction or had an ownership interest in the Manhattan property, or ever transferred the Manhattan property or ever paid gains tax on such transfer, petitioner has not demonstrated it. The evidence is, at best, contradictory. The bankruptcy papers suggest that petitioner held a second mortgage on the subject property and that such mortgage was forgiven in return for $200,000.00. That fact, by itself, does not tell us anything about the subject transaction. The note and mortgage is not part of the record. We cannot assume that because petitioner held a second mortgage on the subject property that that mortgage arose from the subject transaction. Further, there is nothing in this record to show that petitioner paid any gains tax. Without evidence of the actual parties to this transaction and who paid the gains tax that is the subject of the refund claim, it cannot be concluded that petitioner is even a proper party to this proceeding. Based on the record before us, it appears that a Mr. Philip Pilevsky paid the gains tax due, and it would be Mr. Pilevsky who would have standing to apply for a refund (Tax Law former § 1445[1]; cf., Matter of Kheel, Tax Appeals Tribunal, March 1, 1990 [where refund claim made by a corporate officer, on his own behalf, for a refund of penalties paid by corporation was denied]). These are all elements of petitioner's burden to establish it is entitled to a refund. Petitioner has failed to meet that burden (20 NYCRR 3000.15[d][5]; Matter of Classic Residences, Tax Appeals Tribunal, December 1, 1994; Matter of SOGL Assocs., Tax Appeals Tribunal, August 4, 1994). In the absence of any evidence to establish that Mr. Pilevsky was acting on behalf of petitioner, 31/32 Lexington Associates is not a proper party and the petition should have been dismissed.

If subject matter jurisdiction was the only issue before us, we would allow the parties additional time to present arguments to us on this issue (New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal, 151 Misc 2d 326, 573 NYS2d 140). However, that is not necessary in this case for even if we decided that we had jurisdiction to entertain the subject matter of petitioner's exception, we conclude that the Administrative Law Judge properly

addressed each of the issues and arguments raised by petitioner, all of which have been dealt with by this Tribunal in prior decisions.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 31/32 Lexington Associates is denied;

2. The determination of the Administrative Law Judge is modified; and

3. The petitions of 31/32 Lexington Associates are dismissed.

DATED: Troy, New York
August 21, 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