

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>HILLCREST ESTATES DEVELOPMENT CO.</b>	:	DECISION
	:	DTA NO. 814357
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.	:	

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Petitioner Hillcrest Estates Development Co., c/o Rabco Development, Inc., 6610 Thornton Place, Rego Park, New York 11374, filed an exception to the determination of the Administrative Law Judge issued on December 11, 1997. Petitioner appeared by Howard M. Koff, P.C. (Howard M. Koff, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 10, 1998.

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

### ISSUE

Whether the Notice of Determination issued to petitioner upon its breach of an installment payment agreement must be canceled, because said notice was issued more than three years after the underlying property transfer date.

***FINDINGS OF FACT***<sup>1</sup>

We find the facts as determined by the Administrative Law Judge except for finding of fact “8” which has been modified. The Administrative Law Judge’s findings of fact and the modified finding of fact are set forth below.

On May 24, 1989 petitioner, Hillcrest Estates Development Co., transferred its interest in real property located at 71st Avenue and Parsons Boulevard, Queens, New York to P.H. Development Corp. Prior to this transfer, petitioner and P.H. Development Corp. filed transferor and transferee questionnaires as required under the pre-transfer audit procedures of Tax Law former Article 31-B (the "gains tax").<sup>2</sup> These filings reported a gross consideration of \$25,300,000.00 for the transfer, taxable gain thereon of \$12,768,609.00, and gains tax due of \$1,276,860.90.

In response to petitioner's filing, the Division of Taxation ("Division") issued a Tentative Assessment and Return, dated May 15, 1989, with a Schedule of Adjustments. Such tentative assessment increased petitioner's taxable gain on the transfer to \$13,992,599.00, and its resulting gains tax liability to \$1,399,259.90.

Petitioner agreed with the Division's revisions and, in conjunction with its May 24, 1989 transfer of the property, filed a supplemental return requesting deferral such that its entire \$1,399,259.90 gains tax liability could be paid in installments over a three-year period.

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<sup>1</sup>On February 28, 1997 and March 30, 1997, respectively, the parties by their representatives entered into a stipulation of relevant facts. These stipulated facts are included in the Findings of Fact herein.

<sup>2</sup>The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occurred on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

Petitioner's request to make installment payments was accepted by the Division on August 1, 1989, with each installment payment due on the May 24 anniversary date of the property transfer.

In May 1990, petitioner requested that the installment payment plan be expanded to 15 years. This request, resulting in annual payments of \$155,523.09 for each of the first three years, followed by annual payments of \$77,724.23 for the fourth through fifteenth years thereafter, was approved by the Division on May 9, 1990.

Petitioner paid the first two annual installments on May 24, 1990 and May 24, 1991, respectively, each in the amount of \$155,523.09. However, petitioner requested that the payment date for its May 24, 1992 installment be extended to August 15, 1992. By a letter dated July 2, 1992, the Division agreed to this request, noting however that such extension was not a permanent change in the due date for petitioner's installment payments and that if payment (including interest) was not made by August 15, 1992, the entire balance of tax would be declared immediately due and payable with applicable penalties and interest.

Petitioner failed to make its installment payment by the August 15, 1992 extended due date. By a letter dated August 20, 1992, the Division denied petitioner's request for a further extension and requested immediate payment of the installment amount then due including accrued interest. Petitioner did not make such installment payment and, on September 17, 1992, the Division issued a Statement of Proposed Audit Adjustment advising that since petitioner had failed to pay its installment as required, the entire balance of tax (plus penalty and interest) was due and owing.

On November 23, 1992, the Division issued to petitioner a Notice of Determination assessing the entire balance of tax due in the amount of \$1,088,213.72, plus penalty and interest. The parties did not execute an extension agreement with respect to the period of limitations on assessment pursuant to Tax Law § 1444(3)(c).

We modify finding of fact “8” of the Administrative Law Judge’s determination to read as follows:

The parties submitted a written stipulation for hearing. In this stipulation, petitioner waived all issues that were raised in its petition and agreed to proceed on the sole issue of whether the November 23, 1992 Notice of Determination issued against petitioner should be canceled as untimely because it was issued more than three years after the May 24, 1989 property transfer date. The parties agreed that if the notice is held to be barred by the statute of limitations, it must be canceled. On the other hand, the parties agreed, if it is determined that the notice is not barred by the statute of limitations, then the notice must be sustained (Exhibit R).

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

Former Article 31-B of the Tax Law imposed a gains tax at the rate of 10 percent upon gains derived from the transfer of real property within New York State (Tax Law former § 1441).

Tax Law former § 1442(a) provided that the gains tax shall be paid no later than the fifteenth day after the date of transfer. However, as the Administrative Law Judge noted, the statute permitted a transferor, in certain situations, to elect to pay the tax on an installment basis rather than at the time of transfer (Tax Law former § 1442[c]). There is no dispute that under the circumstances of petitioner's transfer, it was allowed to make such an election.

Tax Law former § 1442(e) stated that “[i]f the taxpayer shall fail to pay any such installment on the date on which it is due, the commissioner of taxation and finance may declare

the entire *unpaid balance* of the tax due and owing” (emphasis added). The Administrative Law Judge observed that upon petitioner’s failure to make the installment payment due May 24, 1992, as extended until August 15, 1992, it became subject to the provisions of Tax Law § 1442(e). Thereupon, the Division could and did declare the entire unpaid balance of tax due and owing, and issued the Notice of Determination at issue herein.

Petitioner urged, however, that the gains tax statute prohibited the assessment of additional tax after the expiration of three years from the date of the transfer of the real property (Tax Law former § 1444[3][a][1]). Since the Notice of Determination assessed additional tax, petitioner argued, but was issued more than three years after the May 24, 1989 property transfer date, the notice must be canceled.

Petitioner also claimed that the Division should have issued a Notice and Demand under Tax Law former § 1444-a(2) rather than a Notice of Determination under Tax Law former § 1444(1), since issuance of a Notice and Demand carries no period of limitation.

The Administrative Law Judge noted that the amount of tax shown on a tentative assessment, including a tentative assessment filed with a supplemental return (as here), is deemed assessed on the date of the property transfer (Tax Law former § 1444-a[1]). Further, Tax Law former § 1444-a(2) requires the Commissioner of Taxation to give notice to each person liable for any amount of tax, penalty, interest penalty or interest, *which has been assessed but remains unpaid* (Tax Law former § 1444-a[2]).

In this case, the Administrative Law Judge stated, there is no question as to the amount of tax due, as shown on the supplemental return filed by petitioner, and, the Administrative Law Judge concluded that such tax was assessed on the May 24, 1989 property transfer date (Tax Law

former § 1444-a[1]). The Administrative Law Judge determined further that, when petitioner failed to make its May 24, 1992 installment payment by the extended due date of August 15, 1992, the Division was entitled to declare the entire unpaid balance due and owing, i.e., it terminated petitioner's right to pay its assessed liability in installments over a period of years (Tax Law former § 1442[e]). Based on the dollar amount specified in the Notice of Determination issued to petitioner, and also based on the fact that it was *undisputed by petitioner*, the Administrative Law Judge determined that the Division was not asserting any *additional* tax due<sup>3</sup> when it issued the Notice of Determination, but rather, was simply declaring the entire unpaid balance of tax (plus penalty and interest) to be immediately due and owing. The Administrative Law Judge also rejected petitioner's argument that since the Division issued a Notice of Determination, rather than a Notice and Demand, such *notice* was subject to the three-year limitations period of Tax Law former § 1444(3)(a)(1). The Administrative Law Judge noted that petitioner's argument overlooks the fact that the notice in question did not assess *additional* tax, but only declared the right to immediate payment of an already assessed but unpaid amount of tax. The Administrative Law Judge pointed out that contrary to petitioner's argument, Tax Law former § 1444(3)(a)(1) only limited the period during which the Division could determine and notify a taxpayer that *additional* tax was due. In this case, since no *additional* tax was imposed by the Notice of Determination, the Administrative Law Judge determined that the statute of limitations was not applicable.

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<sup>3</sup>The Administrative Law Judge's footnote stated: "The term 'additional' tax obviously means the amount of tax determined by the Division in excess of that calculated and reported by the taxpayer (i.e., the amount in excess of zero in cases where no return or report is filed by the taxpayer, or the amount in excess of the tax reported by the taxpayer on a filed return or report)" (Determination, conclusion of law "E").

The Administrative Law Judge agreed with petitioner that the Division could have simply proceeded by issuing a Notice and Demand to petitioner. However, the Administrative Law Judge noted, there is no statutory bar to the Division's use of a Notice of Determination to notify a taxpayer that the entire unpaid balance of a previously assessed tax is due in the event of the taxpayer's failure to timely make an installment payment (*see, Matter of Posner*, Tax Appeals Tribunal, June 21, 1990). In any event, it remains, the Administrative Law Judge determined, that by issuing the Notice of Determination, the Division did not assert *additional* tax, and, thus, the statutory limitation period on assessment of *additional* tax did not come into play. Further, the Administrative Law Judge pointed out that petitioner demonstrated no harm or prejudice arising from the Division's issuance of a Notice of Determination, rather than a Notice and Demand. Inasmuch as the Division's Notice of Determination asserted no *additional* tax beyond that already self assessed and unpaid, the Administrative Law Judge determined that the statute of limitations on assessment of additional tax did not apply to require cancellation of the Notice of Determination in this case (Tax Law former § 1444[3][a][1]).

### ***ARGUMENTS ON EXCEPTION***

Petitioner takes exception to that part of the determination of the Administrative Law Judge which concluded that the Notice of Determination did not assert additional taxes and, therefore, was not barred by the statute of limitations.<sup>4</sup>

In this regard, petitioner argues that in addition to the amount of tax that was self-assessed, the statutory notice also assessed interest and penalties. Further, petitioner urges in its brief, that penalties are subject to abatement based upon reasonable cause. Since the notice

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<sup>4</sup>Conclusions of law “F” and “G” of the Administrative Law Judge’s determination.

asserted penalties and interest in addition to the amounts that were self-assessed, petitioner argues, for the first time on exception, that the notice is barred by the three-year period of limitations of Tax Law former § 1444(3)(a)(1).

In further support of this argument, petitioner asserts that, at the time it elected the installment payment method, the installment payments were interest free. Hence, petitioner urges, on a present value basis, petitioner's gains tax liability was actually much less than the self-assessed amount. This argument, as expanded upon at oral argument, is as follows. On the day the tax was self-assessed in 1989, petitioner owed roughly \$1.3 million. Petitioner paid approximately \$300,000.00 leaving a balance of about \$1 million to be paid under the deferred payment agreement over 15 years. Petitioner hypothesizes that, if it wanted to pay this tax obligation today, rather than make the State wait for 15 years, the present value of that \$1 million might be, for purposes of argument, \$600,000.00. Thus, petitioner urges, this hypothetical "spread" between \$600,000.00 and \$1 million constitutes an additional tax which is barred by the three-year period of limitations. At oral argument, petitioner's counsel was unable to state exactly how much of the tax asserted in the Notice of Determination he believed constituted the assessment of additional tax (*see*, Oral Argument Tr., p. 23). Furthermore, petitioner's counsel was also asked if, using this argument, petitioner could, under the statute existing in 1989, theoretically enter into the deferred payment agreement for \$1 million on Wednesday and pay it off on Thursday at the reduced rate using the "present value" argument. Petitioner's counsel replied in the affirmative (*see*, Oral Argument Tr., pp. 10-11).

### ***OPINION***

We affirm the determination of the Administrative Law Judge.



We do not address petitioner's claim that there was reasonable cause for the abatement of penalties, since petitioner never raised the issue below nor was it raised in petitioner's exception. In addition, petitioner offered no evidence at hearing to support its claim.

Further, we also reject petitioner's argument that the tax asserted in the Notice of Determination represented additional tax because it asserted penalties or interest or based on petitioner's "present value" argument. We note at the outset that the Administrative Law Judge specifically noted in his determination that petitioner *did not dispute* that the subject Notice of Determination did not assess additional tax (Determination, conclusion of law "F").

The deferred payment agreement entered into by petitioner never included the option for petitioner to pay its tax obligation at its "present value" or "today's dollars." Nor is there anything in the deferred payment agreement that provides that petitioner could breach the agreement, but still pay the tax obligation interest and penalty free. Nor is there any legal authority proffered in support of petitioner's argument. We also find it significant that petitioner failed to offer any evidence at hearing to show the "present value" of petitioner's claimed tax obligation. In fact, as late as oral argument, it was clear that petitioner's counsel had no idea himself what the "present value" of petitioner's tax obligation would be. We do not feel that petitioner's hypothetical regarding the "present value" of what it would have owed *if* it paid the tax today worthy of further discussion.

Petitioner next argues that tax and penalties cannot be imposed here, because (i) penalties and interest are the same thing as "additional tax" and (ii) the Notice of Determination was issued more than three years from the date the subject property was transferred and must be canceled. Petitioner has offered no legal authority for this argument.

Under Tax Law former § 1442(c), petitioner could, and did, enter into a deferred payment agreement which permitted it to pay the tax over a 15-year period, interest free. Tax Law former § 1442(e) provided that:

If the taxpayer shall fail to pay any such installment on the date . . . it is due, the commissioner of taxation and finance may declare the entire unpaid balance of the tax due and owing.

In this case, petitioner breached the deferred payment agreement thereby rendering its generous interest free payment provisions a nullity, and the Commissioner declared the entire unpaid balance of the tax, together with interest and penalties, due and owing. Petitioner was only entitled to pay this tax obligation interest free under the terms of the agreement. Once it breached that deferred payment agreement, petitioner became subject to interest and late payment penalties.

Tax Law former § 1444(3)(a) provided that an assessment of “additional tax” could not be made “after the expiration of three years from the date of transfer . . . .” Tax Law former § 1446(2)(a) authorized the imposition of penalties and interest for, *inter alia*, failure to timely pay the gains tax due. These statutory provisions authorizing the imposition of penalties are completely separate from the provisions imposing the tax. While penalties and interest under Tax Law former Article 31-B relate directly to the amount of tax owed, they are not the same as a tax. Furthermore, accepting petitioner’s argument would lead to a legal absurdity. Under petitioner’s argument, a taxpayer can wait for three years, then stop making payments on a previously assessed obligation. Under petitioner’s scenario, the taxpayer would then be rewarded for its failure by the State being unable to assert penalties or interest on the unpaid amount. We do not believe that the Legislature intended to reward taxpayers who fail to timely pay the gains

tax and we note that, again, the taxpayer has offered no legal authority for its argument. We conclude that the inclusion of penalties and interest on the Notice of Determination issued to petitioner did not thereby assess “additional tax.” The only gains tax that was asserted on the Notice of Determination was self-assessed by the supplemental return filed by petitioner and that was deemed assessed on May 24, 1989, the date upon which the property was transferred (Tax Law former § 1444-a[1]). Since no additional tax was determined due, we agree with the Administrative Law Judge that the statute of limitations is not applicable. In accordance with the stipulation entered into before the Administrative Law Judge, we find the statute of limitations was not a bar to the Notice of Determination and, thus, the notice must be sustained.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hillcrest Estates Development Co. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Hillcrest Estates Development Co. is denied; and

4. The tax asserted on the Notice of Determination dated November 23, 1992 is sustained, together with applicable penalties and interest.

DATED: Troy, New York  
December 3, 1998

/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