

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>YONKERS AND HEMPSTEAD REALTY, LLC</b>	:	DECISION
	:	DTA NO. 819336
for Revision of a Determination or for Refund of	:	
Real Estate Transfer Tax under Article 31 of the	:	
Tax Law for the Year 1999.	:	

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Petitioner Yonkers and Hempstead Realty, LLC, 7123 Ayrshire Lane, Boca Raton, Florida 33496, filed an exception to the determination of the Administrative Law Judge issued on March 18, 2004.<sup>1</sup> Petitioner appeared by Leon C. Baker, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

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<sup>1</sup>Petitioner's exception refers to an "initial determination," dated March 18, 2004, and a "final determination on May 6, 2004." In fact, there was only a single determination, dated March 18, 2004. The second issuance consisted of an "order," dated May 6, 2004, denying petitioner's motion for reargument.

***ISSUES***

I. Whether a conveyance of real property was properly excluded from the real estate transfer tax pursuant to Tax Law § 1405(b)(6) as a “mere change of identity or form of ownership or organization where there is no change in beneficial ownership.”

II. Whether penalty imposed under Tax Law § 1416(b) should be sustained.

***FINDINGS OF FACT***

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

On January 28, 2002, the Division of Taxation (“Division”) issued to petitioner, Yonkers and Hempstead Realty, LLC, a Notice of Determination which asserted \$21,800.00 in real estate transfer tax due, plus penalty pursuant to Tax Law § 1416(b) and interest.

Petitioner is a limited liability company owned by Leon C. Baker and Gloria Baker, husband and wife, with each having a 50-percent interest.

The assessment herein was issued in connection with the conveyance of certain commercial real property located at 2492 Central Park Avenue, Yonkers, New York, from Yonkers Realty Associates to petitioner on January 1, 1999. The consideration for the transfer was \$5,400,000.00 and consisted of the grantee’s taking title by either assuming a \$5,400,000.00 mortgage or by taking title subject to such mortgage.

A Real Estate Transfer Tax Return filed on February 16, 1999 in respect of the subject transfer claimed that the consideration for the conveyance was excluded, in full, from the real estate transfer tax as a mere change of identity or form of ownership or organization.<sup>2</sup>

Yonkers Realty Associates (“the partnership”) was a real estate partnership which had been in existence since 1968. The partnership consisted of one general partner, Leon C. Baker, and several limited partners.<sup>3</sup> The partnership owned a fee interest in and earned rental income from commercial real estate located at 2492 Central Park Avenue, Yonkers, New York. In 1998, the mortgage on the partnership real property became due. The partnership needed financing to make the required payment on the mortgage, but unfavorable interest rates made obtaining such financing unfeasible. The partnership therefore considered transferring its interest to the mortgagee in lieu of foreclosure, but the mortgagee, a qualified profit-sharing trust, did not look favorably upon the taxable rental income which would be accrued as a result of ownership and, thus, did not want title to the property. The problem was resolved by an extension of the mortgage at a higher interest rate. This resolution increased the cost of owning the property, however, and effectively offset all net rental income from the property. It was determined, therefore, that final distributions to the partners would be made, the interests of the limited partners would be retired, the property would be transferred to a limited liability company owned by Leon C. Baker, and the partnership would be dissolved.

The partnership’s 1999 New York partnership return, with an attached copy of its 1999 Federal partnership return, was received in evidence. These returns indicate that the partnership

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<sup>2</sup> The return also claimed a continuing lien deduction in the full amount of the consideration. Such a deduction is not available for commercial property, and petitioner no longer makes this claim.

<sup>3</sup> Gloria Baker was not a partner of Yonkers Realty Associates.

had 17 partners in 1999. Schedule K-1's for each partner were attached to the Federal return. In addition, New York schedule B's (Partner's Share of Modifications, Credits, Etc.) for each partner were attached to the New York return. The schedule K-1's listed distributive share items of income and loss to be reported on the respective partner's U.S. Individual Income Tax Return, Form 1040. The most significant of such items was identified as "unrecaptured section 1250 gain," which ranged from approximately \$68,000.00 to \$700,000.00 on the various K-1's. The K-1's also showed the partner's percentage of ownership of partnership capital "before change or termination," which ranged from about .5 percent to about 16 percent, and the percentage of such ownership at the end of the year. All partners had zero capital at the end of the year. The K-1's also reported distributions to partners during 1999 in amounts identical to those listed in a letter from Mr. Baker dated January 18, 1998 (*see*, below).

Leon C. Baker, as general partner of the partnership, sent a letter dated January 18, 1998 to the other partners of Yonkers Realty Associates which stated in relevant part:

The extension of the mortgage on the partnership's real estate to January 1, 1999 was consented to by more than two thirds of the limited partners.

In the past the partnership has made annual distributions in July, but there appeared to be no reason for delay now that operations have ceased. Accordingly, enclosed is a check for your final distribution . . . .

The letter lists distributions to the limited partners in accordance with their respective partnership interests. The total amount of such distributions is \$70,000.00.

Following a conciliation conference with the Division's Bureau of Conciliation and Mediation Services a conciliation order was issued on January 3, 2003 modifying the assessment to \$20,297.54 in tax due, plus penalty and interest. This modification was premised on a finding

that Leon C. Baker had a 6.892 percent ownership interest in the partnership property at the time of the subject transfer. The source of this 6.892 percent figure is not in the record.

Mr. Baker had an 8.5242 percent ownership interest in the partnership at the time of the subject transfer to petitioner. The Division concedes that petitioner is entitled to a mere change of identity exclusion to the extent of this 8.5242 percent interest.

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

The real estate transfer tax is “imposed on each conveyance of real property or interest therein” (Tax Law § 1402[a]), and all conveyances are presumed subject to the tax (Tax Law § 1404[b]). The Administrative Law Judge noted that while the grantor in a transaction is generally responsible for the payment of the transfer tax, where the grantor fails to pay, the grantee has the duty to pay the tax (Tax Law § 1404[a]).

“Conveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership,” are excluded from the real property transfer tax (Tax Law § 1405[b][6]).

Petitioner claimed that at the time of the conveyance the interests of all limited partners had been retired and Leon C. Baker, as the sole remaining partner, owned 100 percent of the partnership’s property. Since Mr. Baker also owned 50 percent of the grantee in the transaction (i.e., petitioner), petitioner asserted that the mere change exclusion of Tax Law § 1405(b)(6) should apply with respect to 50 percent of the consideration. Petitioner further asserted that the remaining 50 percent of the consideration should be excluded pursuant to Tax Law § 1405(b)(4) as a bona fide gift to his wife, Gloria Baker, the other 50 percent owner of petitioner. However, the Administrative Law Judge rejected this argument. The 1999 partnership return indicates that

there were 17 partners in 1999, all of whom had items of income and loss to be reported on their 1999 personal income tax returns. The partnership return also indicates that each partner had an interest in the partnership's capital at the beginning of the year and that each partner received a distribution during the year. Therefore, the Administrative Law Judge found that the 1999 partnership return is strong evidence that the partnership consisted of 17 members at the time of the subject transfer on January 1, 1999.

Furthermore, the Administrative Law Judge pointed out that even if, contrary to the 1999 return, the final distributions were made in January of 1998 as the date of the letter would suggest, the K-1's clearly show that the limited partners each had an interest in the partnership's capital at the beginning of 1999 and show items of income and loss for that year. The Administrative Law Judge pointed out that there is no explanation in the record as to why the 1999 partnership return would reflect such information if the limited partners' interests were retired in 1998.

Therefore, the Administrative Law Judge found that petitioner failed to establish that Mr. Baker's interest in the partnership at the time of the subject conveyance was greater than 8.5242 percent. Accordingly, the Administrative Law Judge concluded that petitioner failed to establish that it is entitled to a mere change of identity exclusion greater than such 8.5242 percent interest.

Since petitioner did not establish that Mr. Baker owned 100 percent of the partnership at the time of the subject conveyance, the Administrative Law Judge found that petitioner's contention that 50 percent of the transfer should be excluded from tax as a gift to Gloria Baker is moot. In any event, the Administrative Law Judge noted, the gift exclusion is restricted to

conveyances having no “consideration” (Tax Law § 1405[b][4]), and the instant conveyance had consideration of \$5,400,000.00.

Lastly, with respect to the imposition of penalties, the Administrative Law Judge noted that petitioner offered no evidence of reasonable cause and articulated no rationale for the cancellation of penalty. Accordingly, the Administrative Law Judge sustained the imposition of penalty.

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

Petitioner continues to argue that Yonkers Realty Associates was terminated as a partnership on or before January 1, 1999, and that the limited partners had no interest in the partnership in 1999. Further, petitioner continues to urge that no tax is due here, because the transfer did not involve a change in beneficial ownership (Tax Law § 1405[a][6]).

Petitioner also claims that the Administrative Law Judge, by his order dated May 6, 2004, erred in denying its motion to reargue the point that the limited partners had no interest in the partnership on January 1, 1999.

Finally, petitioner argues for the first time that no taxable transfer occurred in this matter since Tax Law § 1401(e) provides that a transfer in lieu of foreclosure is not subject to tax.

### ***OPINION***

After reviewing the evidence and arguments offered by petitioner, we can find no basis for modifying the determination of the Administrative Law Judge in any respect. Petitioner’s arguments are not supported by the record.

With respect to petitioner’s new argument made on exception, we note that Tax Law § 1401(e) defines those transactions that shall constitute a taxable “conveyance” for purposes of

the real property transfer tax. Contrary to petitioner's claim, a transfer in lieu of foreclosure is expressly provided for as a taxable conveyance (*see*, Tax Law §1401[e]).

We affirm the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Yonkers and Hempstead Realty, LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Yonkers and Hempstead Realty, LLC is denied; and
4. The Notice of Determination dated January 28, 2000, as modified by the conciliation order dated January 3, 2003 and as further modified pursuant to finding of fact "9" of the Administrative Law Judge's determination, is sustained.

DATED: Troy, New York  
December 9, 2004

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

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