

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>MALBA COVE PROPERTIES, INC.</b>	:	DECISION
		DTA NO. 823671
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, Malba Cove Properties, Inc., filed an exception to the determination of the Administrative Law Judge issued on May 26, 2011. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Mark Volk, Esq. (David Gannon, Esq., of counsel).

Petitioner did not file a brief in support. The Division of Taxation filed a letter brief in opposition. Oral argument, at petitioner's request, was held in Troy, New York, on November 30, 2011. The Tax Appeals Tribunal granted leave to file supplemental post-oral argument briefs by April 13, 2012. Petitioner and the Division of Taxation each filed a supplemental letter brief.

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

***ISSUE***

Whether a transfer of real property from petitioner to the City of New York, made pursuant to a court order in a condemnation proceeding, occurred prior to the repeal of the real property transfer gains tax, thereby subjecting the gains derived from such transfer to the tax.

***FINDINGS OF FACT***

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

In December 1995, the City of New York (City) commenced a condemnation proceeding in New York State Supreme Court, Queens County, seeking to obtain title to certain real property located in the Borough of Queens, New York. The property consisted of vacant waterfront land located on the northern side of Eleventh Avenue, between 135th and 138th Streets, Queens, New York. It was adjacent to Powell's Cove, a shallow body of water on the Long Island Sound. The City sought title for the purpose of creating Powell's Cove Environmental Waterfront Park. The City's petition in the condemnation proceeding named petitioner herein, Malba Cove Properties, Inc. (Malba), and the State of New York (State) as defendants.

The State responded by filing a cross-motion for the dismissal of the City's petition on the grounds that the State was the owner of the subject property; that the City lacked the authority to condemn State-owned property; and that the court therefore lacked jurisdiction over the State. Specifically, the State alleged in the motion that the real property that was the subject of the condemnation proceeding "lie[s] below the mean high water line and are therefore lands owned by the State."

By court order filed on February 29, 1996, the City was permitted to withdraw its condemnation application as it applied to the State, and its petition to condemn the subject property was granted, "subject to the interests of the State of New York, if any." The order further authorized the filing of an acquisition map dated January 1, 1996 and provided that the City's title to the subject property would vest as of the date of filing of the order.

After the City took title pursuant to the February 29, 1996 order, it made significant physical changes to the property. The park was completed at least as of a September 5, 2001 court inspection made as part of the condemnation proceeding.

The vesting of title notwithstanding, the City initially refused to make an advance payment of the compensation due Malba for the subject real property, claiming that the City itself owned the property. By notice of motion dated April 10, 1997, Malba sought an order compelling the City to issue an advance payment. In opposition, the City argued that the property is land now or formerly under the waters of Powell's Cove, so that the City held title to the subject parcels pursuant to three Colonial Patents. In response, Malba argued that its title to the subject property could be traced back to a Colonial Patent and that the property "has been privately owned and controlled since that time." The State was not served with papers related to the April 10, 1997 motion.

Following lengthy litigation, the court, by decision and order dated October 30, 2001, held that Malba had established title to the disputed parcels and ordered the City to make an advance payment.

Despite the October 30, 2001 order, the City refused to make an advance payment and further litigation ensued. In an order and decision dated February 10, 2004, the court granted Malba's motion to compel the City to make an advance payment pursuant to the October 30, 2001 decision. The February 10, 2004 decision found that Malba had previously established its title to the subject property and that the City was collaterally estopped from further litigating the issue of title. Thereafter, the City brought a motion to reargue the February 10, 2004 decision. That motion was denied by an order and decision dated August 6, 2004.

The City next moved for an order to interplead the State into the condemnation proceeding. Pursuant to an order and decision dated November 15, 2004, the City's motion was denied. In its decision, the court found that when the City made the determination that it would take title to the property subject to the State's interest, it elected to forego litigating the issue of the State's interest in the subject property in the condemnation proceeding. The court further noted that it had considered the issue of title to the property on three separate occasions and had rendered three decisions in which it found that Malba held title.

On May 17, 2005, Malba received an advance payment from the City in the amount of \$880,000.00, plus interest. On April 12, 2006, an additional \$10,000.00 was received.

Following a trial, by decision and order dated February 15, 2007, the value of the property as of the February 29, 1996 date of vesting was established as \$9,067,480.00. Pursuant to a Final Decree dated and filed June 7, 2007, the City was ordered to pay Malba \$9,067,480.00, plus interest from the title vesting date of February 29, 1996. The City appealed the Final Decree, but later withdrew its appeal.

Final payment to petitioner from the City was made in or about September 2008. In accordance with the Final Decree, total compensation for the subject real property was \$9,067,480.00, plus interest from February 29, 1996.

On September 4, 2008, petitioner filed a Real Property Transfer Gains Tax (otherwise referred to as gains tax) Questionnaire reporting taxable gain on the condemnation transfer of \$7,829,472.00 and tax due on such gain of \$782,947.00. On the questionnaire, petitioner stated its position that the instant transfer was not subject to the gains tax given the repeal of Article 31-B many years prior to the resolution of the condemnation proceeding and the City's payment

of the condemnation award. Petitioner further indicated that if the Division proposed to tax the transfer, it would be paid under protest and challenged.

On October 6, 2008, the Division issued to petitioner a Notice of Determination asserting gains tax due in the amount as calculated by petitioner on its Gains Tax Questionnaire, and also asserting interest, calculated from March 15, 1996 (the due date for the filing of the Gains Tax Questionnaire and payment of tax) and penalty for a total amount due of \$2,424,389.06. By letter dated October 9, 2008, the Division cancelled the penalty as asserted in the Notice of Determination. In December 2008, petitioner paid, under protest, all tax and interest due pursuant to the Notice of Determination and now seeks a refund of that amount.

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

The Administrative Law Judge found that no issues of fact were in dispute and that only issues of law remained. Accordingly, the Administrative Law Judge found it appropriate to consider the parties' motions for summary determination.

The Administrative Law Judge observed that on July 13, 1996, the gains tax was repealed and all transfers on or after June 15, 1996 were no longer subject to the real property transfer gains tax (gains tax) under former Article 31-B of the Tax Law (L 1996, ch 309, §§ 171-180). However, the provisions of this article and the regulations promulgated thereunder remain in effect for transfers of real property that occurred prior to June 15, 1996 (L 1996, ch 309, § 180).

The Administrative Law Judge found that on February 29, 1996, the Supreme Court, Queens County, authorized the filing of the acquisition map of the subject property, and that title vested with the City on that day. The Administrative Law Judge further noted that, after extensive litigation, the Supreme Court ruled that petitioner was entitled to compensation

because it had title to the property on February 29, 1996, the date of the transfer. Based upon these facts, the Administrative Law Judge concluded that the transfer was subject to gains tax because title was transferred to the City on February 29, 1996, prior to the expiration of the law.

The Administrative Law Judge rejected petitioner's arguments based upon the "open transaction rule,"<sup>1</sup> which declares that no tax may be imposed on income or gain, which is contingent upon future events, until such sums are received (*see e.g. Burnett v Logan*, 283 US 404 [1931]). The Administrative Law Judge cited to *Matter of Forty Second St. Co. v Tax Appeals Trib. of State of N.Y.* (219 AD2d 98 [1996], *lv denied* 88 NY2d 807 [1996]), which addressed the assessment of gains tax in a similar condemnation case (*see also E.L.C. Hotel Corp. v Tax Appeals Trib. of State of N.Y.*, 226 AD2d 852 [1996], *lv denied* 88 NY2d 807 [1996]). Therein, the court rejected the taxpayer's open transaction rule argument because the circumstances triggering the rule were not present, and that ultimately, liability for gains tax was fixed on the date of the taking.

Herein, the Administrative Law Judge similarly concluded that there was no material difference between a dispute over the amount of compensation and a dispute over entitlement to compensation for the purposes of the open transaction rule. In so doing, the Administrative Law Judge found that, in either circumstance, the court must look back to the date of the transfer. The Administrative Law Judge noted that the transfer date is the day the tax liability becomes fixed (*Matter of Forty Second St. Co.*). Therefore, the Administrative Law Judge rejected petitioner's open transaction rule argument.

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<sup>1</sup> The "open transaction rule" is also referred to as the "open transaction doctrine." We use the former for purposes of consistency.

The Administrative Law Judge also rejected petitioner's arguments based upon the "disputed income rule," which provides that, for income tax purposes, income is not reported until it is either actually or constructively received (*see e.g. Cory v C.I.R.*, 23 TC 775 [1955], *affd* 230 F2d 941 [1956], *cert denied* 352 US 828 [1956]; *see also Nitterhouse v U.S.*, 207 F2d 618 [1953], *cert denied* 347 US 943 [1954], *reh denied* 347 US 970 [1954]). The Administrative Law Judge distinguished the disputed income rule as irrelevant because this rule addresses income tax and the present matter concerns the real property transfer gains tax. As such, the Administrative Law Judge rejected these arguments.

Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and denied petitioner's cross motion for summary determination.

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

Petitioner submits the same arguments it presented before the Administrative Law Judge, and contends that they were erroneously rejected.

Petitioner contends that this case is factually distinguishable from *Matter of Forty Second St. Co.* Petitioner submits that the underlying controversy therein concerned the value of the taxpayer's compensation for the taking, while herein, the issue in the underlying controversy is whether petitioner was entitled to compensation. Petitioner argues that for gains tax purposes, the transfer of real property could not be considered complete prior to June 15, 1996, because the issue of whether it held title had not been resolved. It asserts that the earliest the assessment could have been made was October 30, 2001 (i.e., the date of the first Supreme Court decision on the underlying matter), five years after the repeal of the gains tax.

Petitioner argues that it cannot be liable for gains tax because under the open transaction

or disputed income rules, the real property transfer gains tax could not be assessed until after its repeal. Petitioner submits that, under the open transaction rule, the transaction remained “open” because the gains were contingent on the court’s resolution of the matter, which, at the earliest, was October 30, 2001. In the alternative, petitioner argues that the City disputed petitioner’s right to the income until well beyond the expiration of the statute. As such, petitioner concludes that it should not be liable for gains tax because the assessment and subject Notice could not have been issued until after the repeal of the tax. If tax was properly imposed, petitioner argues that under the disputed income rule, interest should be calculated from the October 30, 2001 decision, the date when petitioner was certain to receive the income.

The Division adopts the Administrative Law Judge’s analysis and argues that petitioner’s arguments were properly rejected. It submits that the date of the taking, February 29, 1996, is the critical point in time because liability for gains tax attached upon the transfer of real property. The Division notes that under Eminent Domain Procedure Law, title vests on the date the acquisition map is filed with the court. As such, the Division contends that the Administrative Law Judge properly concluded that the transfer did occur on February 29, 1996, prior to the repeal of the gains tax. It argues that petitioner’s arguments have been previously addressed in *Matter of Forty Second St. Co.*, and the Administrative Law Judge properly rejected these points. Regarding interest, the Division argues that the provisions of former Article 31-B of the Tax Law provide that interest is due on any underpayment of tax and begins to run 15 days after the date of the transfer.



**OPINION**

This matter involves the real property transfer gains tax imposed under former Article 31-B of the Tax Law, which 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). The provisions of Article 31-B and the regulations promulgated thereunder remain in effect with respect to transfers of real property that occurred before June 15, 1996 (L 1996, ch 309, § 180).

The gains tax imposed a tax rate of 10 percent upon gains derived from certain transfers of real property within the State of New York (Tax Law former § 1441). Petitioner has not meritoriously argued that the subject transfer meets any of the exemptions provided under Tax Law former § 1443. Accordingly, we must decide whether gains tax liability attaches on the date that litigation is resolved or on the date real property is transferred.

A transfer of real property under former Article 31-B of the Tax Law means “the transfer of any interest in real property by any method,” which includes “taking by eminent domain” (Tax Law former § 1440[7][a]; *see e.g. Matter of Forty Second St. Co.; Matter of Basciano v Tax Appeals Trib. of State of N.Y.*, 235 AD2d 680 [1997]). New York Eminent Domain Procedure Law (EDPL) provides the procedure for a government entity to take real property (*see generally* EDPL 402). Title vests with the taking entity upon the authorized filing of an acquisition map (EDPL 402[3]).

Herein, the City followed the prescribed procedure and acquired title to petitioner’s property. Title vested with the City on February 29, 1996. Initially, the City refused to pay petitioner for this taking, arguing that a transfer did not take place because the City owned the property. After years of litigation, the Court concluded that petitioner had clear title to the

subject parcels on February 29, 1996, and that the City was required to compensate petitioner for the taking of petitioner's property on that date.

Liability for real property transfer gains tax becomes fixed upon the date that real property is transferred (Tax Law former §§ 1442[a]; 1444-a[1]). This Tribunal has held that where a taking occurs, liability for gains tax runs from the vesting date, not from the date of compensation received or any other point (Tax Law former §§ 1442[a], 1444-a[1]; *Matter of Forty Second St. Co.*). Herein, the Court decided that the City did take petitioner's property on February 29, 1996, and that petitioner was entitled to just compensation (*see e.g. Adventurers Whitestone Corp. v City of New York*, 65 NY2d 83 [1985], *lv dismissed* 474 US 935 [1985]). Accordingly, we conclude that the Division properly assessed gains tax on the compensation because the transfer occurred prior to the repeal of the real property transfer gains tax.

Contrary to petitioner's assertions, the open transaction rule does not require a different conclusion. As currently construed, the open transaction rule is "confined in its application to those situations that present elements of value [are] so speculative in character as to prohibit any reasonably based projection of worth" (*Campbell v U.S.*, 661 F2d 209, 215 [1981]).

Petitioner utilizes this rule to argue that its dispute with the City left the transaction "open" until the conclusion of litigation. It contends that its rights to the subject property had indeterminate value until the Supreme Court determined that petitioner held clear title. Under these facts, petitioner contends that open nature of the transaction requires the cancellation of the Notice because the Division could not have issued it prior to the repeal of the gains tax. We do not agree.

Petitioner's reliance on the open transaction rule is misplaced. Initially, we note that in

*Matter of Forty Second St. Co.*, the Appellate Division addressed the calculation of the real property transfer gains tax in an involuntary taking. Therein, the taxpayers argued that under the open transaction rule, the assessment was not valid because the transaction remained “open” until the eminent domain proceeding concluded and the value of the compensation was certain. The Court rejected this argument as the circumstances triggering the open transaction rule were not present because the gain’s value was set to the value of the property on the date of the transfer (see e.g. *Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360 [1980]). Furthermore, the court specifically noted that the consideration paid in a condemnation case is not dependant on any event that may occur after the transfer (see *Matter of Cheltoncort Co. v Tax Appeals Trib. of State of N.Y.*, 185 AD2d 49, 53 [1992]).

We reject petitioner’s argument based on the open transaction rule on the same grounds. Contrary to petitioner’s assertions, the instant dispute does not materially differ from that in *Matter of Forty Second St. Co.* In the October 30, 2001 decision, the Court determined that the City took petitioner’s properties on February 29, 1996. The value of the transaction became fixed to the value of the parcels as of February 29, 1996. Similarly, petitioner’s liability for gains tax became fixed on February 29, 1996 (Tax Law former § 1442[a]).

Petitioner’s arguments are unpersuasive. It is immaterial that the date of the decision is beyond the repeal of the statute. It is also of no consequence that had the City prevailed, no tax would be due, because the reality is that to its benefit, petitioner prevailed, and the Court found that the City took petitioner’s property on February 29, 1996. The open transaction rule was not triggered because petitioner’s compensation was certain, as it was fixed to the value of the subject parcels on February 29, 1996. Former Article 31-B of the Tax Law does not provide any

authority or grounds for tolling this liability due to the dispute. As noted in *Matter of Forty Second St. Co.*, only the Legislature could provide relief for this situation. Therefore, we reject petitioner's arguments based on the open transaction rule.

We further reject petitioner's argument based on the disputed income rule because this rule addresses an income tax, not a real property gains tax (*see e.g. Cory v C.I.R.*, 23 TC 775 [1955], *affd* 230 F2d 941 [1956], *cert denied* 352 US 828 [1956]; *see also Nitterhouse v U.S.*, 207 F2d 618 [1953], *cert denied* 347 US 943 [1954], *reh denied* 347 US 970 [1954]). These taxes are structured differently and, absent compelling rationale, it is improper to apply a rule regarding one tax to an entirely different tax. Petitioner failed to present either argument or rationale as to why an income tax rule should apply to the gains tax. As such, petitioner's reliance on the disputed income rule is misplaced. Accordingly, we find that the Administrative Law Judge properly rejected petitioner's argument based on the disputed income rule as irrelevant.

We now turn to the issue of whether the Division properly calculated interest on this deficiency. The Court has previously considered interest calculations on gains tax on involuntary transfers in cases such as *Matter of Forty Second St. Co.* Therein, the Court held,

“Inasmuch as the condemnor is legally mandated to afford the taxpayer just compensation, including any gain the taxpayer may realize as a result of the transfer, upon the vesting of title (and, accordingly, must compensate the latter for its use of that money thereafter), it is not irrational or unfair to require payment of the transfer gains tax at that time and to assess interest if it is not paid” (*Matter of Forty Second St. Co.* at 100-101).

Herein, real property was transferred from petitioner to the City on February 29, 1996. Interest was calculated from March 15, 1996, which is 15 days after that date. We find that petitioner's arguments with regard to interest, which focused on the disputed income rule, remain

unpersuasive.<sup>2</sup>

Tax Law former § 1442(a) provides that payment shall be made no later than 15 days from the date of the transfer. Interest shall accrue upon the determination of underpayment (Tax Law former § 1446[1]). No provision of former Article 31-B permits modifying interest on the principal of a deficiency. As such, we lack the statutory authority to modify the interest component of the subject Notice (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom. Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [1991]).

We find petitioner's remaining arguments to be unpersuasive or properly addressed by the Administrative Law Judge.

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<sup>2</sup> We are sympathetic to petitioner's position because interest accrued, at least in part, due to the City's prolonging of the litigation. In particular, footnote 2 in the November 16, 2004 Supreme Court decision (*Matter of City of New York*, King County Index No 14010/00) indicated that, in a prior matter addressing the same properties, the City conceded petitioner's ownership of the subject parcels (i.e., the City's papers in *Matter of Malba Cove Realty v Jorling*, Queens County Index Nos 7781/88 and 9548/88). The record lacks further documentation on this proceeding. Yet, it would appear that the City advanced a questionable position in its litigation for almost a decade.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Malba Cove Properties, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Malba Cove properties is denied;
4. The Notice of Determination dated October 6, 2008, is sustained.

DATED: Albany, New York  
May 17, 2012

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner