

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALLAN V. ROSE	:	DETERMINATION
D/B/A LAKELAND ASSOCIATES	:	
DTA NO. 804103	:	
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, Allan V. Rose d/b/a Lakeland Associates, 733 Yonkers Avenue, Yonkers, New York 10704, filed a petition 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.

On May 14, 1991 and April 30, 1992, respectively, petitioner by his representative, Vicki G. Cheikes, Esq., and the Division of Taxation by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel), waived a hearing and agreed to submit this case for determination. All documents and briefs to be submitted by the parties were due by September 14, 1992. A stipulation with exhibits was submitted on May 27, 1992. The Division of Taxation filed its initial brief on July 17, 1992. Petitioner submitted his answering brief on August 14, 1992. The Division of Taxation then submitted a reply brief on August 31, 1992. Petitioner responded by filing a final brief on September 14, 1992. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the subsequent claim for additional tax plus penalty and interest made by the Division of Taxation in July 1990 was barred by the statute of limitations.

II. Whether, if the subsequent claim for additional tax plus penalty and interest was not barred by the statute of limitations, the retrospective application of Tax Law § 1444(2) (chapter 61 of the Laws of 1989) is unconstitutional.

III. Whether the subsequent claim for additional tax plus penalty and interest was improperly made by a letter of counsel rather than by the amendment of the Division of Taxation's answer.

IV. Whether petitioner's calculation of allowable original purchase price for purposes of determining his gains tax liability was incorrect.

V. Whether, if petitioner's calculation of allowable original purchase price was incorrect, petitioner established reasonable cause for waiver of penalty for failure to pay the additional gains tax on time.

FINDINGS OF FACT

On October 24, 1969, petitioner, Allan V. Rose, purchased a 56.509-acre parcel in Hauppauge, Suffolk County, New York for \$850,376.00 (approximately \$15,000.00 per acre).

Mr. Rose and Bohemia Operating Co. (hereinafter "Bohemia") formed a limited partnership known as Lakeland Associates pursuant to an agreement executed on June 10, 1970 by Mr. Rose, who was described therein as "general partner", and by David J. Bell on behalf of Bohemia, which was described in the agreement as "limited partner". Mr. Bell signed as general partner of Bohemia.

Mr. Rose contributed the property,¹ referred to in Finding of Fact "1", to Lakeland Associates in exchange for a 75% general partnership interest.

On October 1, 1971, Lakeland Associates sold 12 acres of the original 56.509 acres for \$312,000.00.

Effective January 1, 1982, Bohemia assigned its 25% limited partnership interest in Lakeland Associates to Mr. Rose in consideration for Mr. Rose's assumption of all partnership liabilities, which totalled \$1,322,867.00 at that time. Lakeland Associates, with Mr. Rose as its one remaining partner, was then liquidated as a partnership, although the record title to the remaining 44.509 acres (hereinafter, "the property") remained in the name of Lakeland

¹Although the location of the property was designated by the parties as Hauppauge, Suffolk County, in their stipulation, the partnership agreement described the property as "unimproved land of approximately 56 acres situated at Bohemia, Town of Islip, in the County of Suffolk." The record does not include an explanation for this variance.

Associates.

On June 6, 1984, Mr. Rose contracted to sell the property to Robert A. Bernhard and Ben Rabiner for \$2,200,000.00.

Forms TP-580 and TP-581 (transferor and transferee real property transfer gains tax questionnaires) were duly filed with the Division of Taxation ("Division"), reporting the proposed transfer. Mr. Rose d/b/a Lakeland Associates reported a "gain" of \$877,133.00 and a gains tax due of \$87,713.00. This calculation was based upon the consideration of \$2,200,000.00, less an original purchase price for the property of \$1,322,867.00. This original purchase price was calculated based upon the liabilities of Lakeland Associates assumed by Mr. Rose on his acquisition of

the limited partner's interest in the partnership and the resultant liquidation of Lakeland Associates. Mr. Rose's affidavit, which was submitted with the questionnaires, disclosed this computation. The Division issued a Form TP-582 (Tentative Assessment) dated July 5, 1984 for the gains tax of \$87,713.00 reported by Mr. Rose d/b/a Lakeland Associates.

Mr. Rose elected to pay a portion of the gains tax due by installment and filed a Form TP-583 (Supplemental Return) dated August 2, 1984, which deferred gains tax in the amount of \$43,856.50 (50% of the gains tax of \$87,713.00 reported by Mr. Rose).²

The Division issued a Notice of Determination of Tax Due Under Gains Tax Law dated September 23, 1986 to Lakeland Associates at 733 Yonkers Avenue, Yonkers, New York, accelerating the deferred gains tax of \$43,856.50, plus penalties and interest. The following explanation was provided:

"Our records indicate that on May 7, 1985 and Sept. 2, 1986 you were requested to provide documentation of your claim for a [sic] installment payout of the tax due under the above assessment number. In as much as you have failed to respond to our requests and provide the requested documentation, the installment plan request is denied and the entire tax is due and owing."

²Mr. Rose reported cash received of \$50,000.00 on the sale of the property on the supplemental return.

Mr. Rose timely filed a petition with the former Tax Appeals Bureau contesting the asserted determination, penalties and interest. The petition was determined to be a perfected petition by a letter dated November 26, 1986, and was forwarded to the Law Bureau for answer. The Law Bureau's answer was filed on or about August 21, 1987.

The entire deferred portion of the gains tax of \$43,856.60 was paid by July 19, 1988. Accordingly, as of July 19, 1988, the only issue remaining with respect to Mr. Rose's petition pertained to penalties and interest due on account of the Division's acceleration of the deferred portion of the gains tax.

This matter was scheduled for a formal hearing to be held on July 26, 1990 by a Notice of Hearing dated June 18, 1990 issued by the Division of Tax Appeals. After the issuance date of the Notice of Hearing, but prior to the scheduled hearing date, attorney Paul A. Lefebvre, by a letter dated July 5, 1990, advised Vicki G. Cheikes, Mr. Rose's representative, that the Division was asserting additional gains tax due of \$49,142.00 on account of the 1984 transfer. Mr. Lefebvre wrote as follows:

"As I advised you on the telephone, the Division of Taxation hereby asserts that there is a greater amount of tax due on the Lakeland Associates transfer, Section 1444(3)(a)(2). The original purchase price claimed by the petitioner on line 4 of its Transferor Questionnaire is not allowable as a matter of law. Original purchase price is defined in Section 1440(5) of Article 31-B. This definition is not in accordance with the method Mr. Rose used to compute the original purchase price of this property (see Mr. Rose's affidavit of May 10, 1984). I shall also assert this deficiency at the up-coming hearing."

Mr. Lefebvre's letter also noted that the penalties and interest assessed on the gains tax of \$43,856.50, as noted in Finding of Fact "9", had been recomputed and reduced in accordance with Matter of Posner (Tax Appeals Tribunal, June 21, 1990 [where the Tribunal decided that interest and penalty on the "accelerated" amount of gains tax due "could be imposed from the date the Notice of Determination was issued", not from the date of transfer of the real property]). By a letter dated October 30, 1990, petitioner submitted full payment of the recalculated penalty and interest.

The Division claims that Mr. Rose's allowable "original purchase price" is \$831,443.00,

calculated as follows:

44.509 acres at \$15,000 per acre	\$ 667,635
	<u>75%</u>
Mr. Rose's interest in the property	\$ 500,726
1982 Buyout of Limited Partner:	
Liabilities of partnership	\$1,322,867
25% interest of Bohemia	<u>25%</u>
	\$ 300,717
Allowable original purchase price	831,443
Original purchase price claimed	1,322,867
Original purchase price disallowed	491,424

According to the Division, Mr. Rose's additional gains tax due is \$49,142.00, calculated as follows:

Original purchase price disallowed	\$491,424
Tax Rate	<u>10%</u>
Additional Tax	\$ 49,142

The Division also asserts that penalty and interest is due on the \$49,142.00 gains tax for failure to timely pay the tax due.

The parties entered into a stipulation, which was submitted by a letter dated May 26, 1992. This stipulation has been incorporated into the Findings of Fact.

SUMMARY OF THE PARTIES' POSITIONS

The Division asserts that petitioner incorrectly computed the original purchase price used to determine his gain subject to tax. Tax Law § 1440(5) and the regulations at 20 NYCRR 590.14 through 590.19 and 590.49 provide "a clear method for determining the petitioner's original purchase price" Furthermore, the deficiency at issue was timely asserted pursuant to Tax Law § 1444, as amended by chapter 61 of the Laws of 1989. According to the Division, penalty should not be abated because petitioner deliberately chose to make his computation of original purchase price without reference to the law and regulations.

Petitioner counters that the assertion of the additional deficiency was untimely. Chapter 61 of the Laws of 1989, which amended Tax Law § 1444 to add a new provision allowing the Division to assert a greater deficiency of gains tax after the filing of a petition and before a hearing has been held, was enacted after "the statute of limitations for the transfer in question

had already expired" (emphasis in original). According to petitioner, Tax Law § 1444(3)(a)(2) (added by chapter 61 of the Laws of 1989) applies to petitions filed after the date of enactment only. In addition, petitioner contends he correctly computed original purchase price of \$1,322,867.00 based upon his assumption of all partnership liabilities upon the dissolution of Lakeland Associates in 1982. Alternatively, petitioner contends that:

"If we must look back prior to Petitioner's 1982 acquisition of the Property, there are several transactions to look at, namely, Petitioner's purchase of the Property, his contribution of the Property to Lakeland, the buy-out of the limited partner, as well as the dissolution of Lakeland [W]hen all of these transactions are taken into account, Petitioner's original purchase price would be \$1,223,775."

Furthermore, in any event, petitioner maintains that his position was reasonable, and therefore penalties should not be imposed.

CONCLUSIONS OF LAW

A. Tax Law § 1444(3)(a)(2) provides as follows:

"Assertion of deficiency after filing a petition. If a taxpayer files with the division of tax appeals a petition for a review of taxes determined or claimed to be due under this article, the division of tax appeals shall have the power to determine a greater amount of tax to be due and to determine if there should be assessed any penalty or interest penalty provided in section fourteen hundred forty six of this article, if a claim therefor is asserted at or before the hearing under rules of the division of tax appeals."

B. Tax Law § 1444(3)(a)(2) was added by bill section 189 of chapter 61 of the Laws of 1989. A review of the legislative history contained in the Governor's Bill Jacket (L 1989, ch 61) discloses that Tax Law § 1444(3)(a)(2) was added "to provide the Department with the ability to assert a greater deficiency of tax than originally sent to the taxpayer . . ."

(Memorandum in support of Attachment H, "Real Property Gains and Real Estate Transfer Tax Revisions"). This memorandum in support also elaborated on the purpose for the provision at issue as follows:

"The provision regarding a deficiency assessment is similar to provisions found in many other taxes administered by the Commissioner. Essentially, if an asserted amount due is petitioned by the taxpayer, re-examination of the file may reveal additional amounts of tax due. This provision will allow the correction of office error if the additional amount due can be asserted at or before the hearing."

C. The effective date of bill section 189 of chapter 61 of the Laws of 1989, which added

the provision at issue, was described as "immediately". A review of the legislative history shows that the Governor signed the legislation into law on April 19, 1989, and it gives no indication that this provision was meant to apply retroactively.

D. As of April 19, 1989, the three-year Statute of Limitations under Tax Law § 1444(3) for assessing gains tax had expired with regard to the 1984 property transfer at issue herein. In order to conclude that the assertion of additional gains tax of \$49,142.00 by the letter of Mr. Lefebvre dated July 5, 1990 was timely, Tax Law § 1444(3)(a)(2) would have to be given retroactive effect. Tax Law § 1444(3)(a)(2) does not say "[i]f a taxpayer has filed or files . . . a petition", rather it provides for the determination of a greater amount of tax to be due "[i]f a taxpayer files a petition" (Emphasis added.) Petitioner's argument that Tax Law § 1444(3)(a)(2) applies to petitions filed on or after the effective date of this provision (April 19, 1989) only is persuasive (see, Hopkins v. Lincoln Trust Co., 233 NY 213; Char-Mo Investors v. Market Insurance Co., 58 AD2d 589, 395 NYS2d 250). In Hopkins, a newly legislated provision that the six-year period of limitations for commencing a cause of action for fraud would not begin to accrue until discovery of the facts constituting the fraud was not given retroactive effect to revive rights already barred.

In Char-Mo Investors v. Market Insurance Co. (supra, at 251) the court observed:

"Ordinarily, statutes of limitations are given a prospective construction unless the contrary is clearly indicated [citations omitted]. The amendment to section 168 gives no indication that it was meant to apply retroactively. Accordingly . . . plaintiff's action is barred."

E. In light of the conclusion that the claim for additional gains tax of \$49,142.00 plus penalty and interest made by the Division in July 1990 was untimely, the remaining issues are moot and will not be addressed herein.

F. The petition of Allan V. Rose d/b/a Lakeland Associates is granted to the extent that the claim for additional gains tax of \$49,142.00, plus penalty and interest, is cancelled.

DATED: Troy, New York
March 4, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE