

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
NET REALTY HOLDING TRUST	:	DETERMINATION
	:	DTA NO. 808466
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, Net Realty Holding Trust, 535 Boylston Street, Boston, Massachusetts 02116, moves for a summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the ground that there there are no material and triable issues of fact and petitioner is entitled to a determination in its favor as a matter of law.

Based upon the affirmation of Stephan B. Gleich, Esq., in support of the motion, and the affidavit of Andrew J. Zalewski, Esq., in opposition to the motion, and upon all pleadings and documents submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the preemption provisions of the Federal Employee Retirement Income Security Act of 1974 preclude the Division of Taxation from imposing tax on petitioner's gains derived from the transfer of certain real property.

II. Whether the real property transfer gains tax runs afoul of the equal protection clause of the United States Constitution and of the New York State Constitution.

III. Whether petitioner is entitled to a total exemption from the tax on gains from the transfer of real property on the ground that the gains tax is an income tax and petitioner is exempt from income taxes imposed by New York State.

FINDINGS OF FACT

The New England Teamsters and Trucking Industry and Pension Fund (the "Pension

Fund") was organized pursuant to section 302(c) of the Labor Management Relations Act of 1947, as amended (29 USC 186[c]). The Pension Fund was, at all relevant times, a qualified employee benefit plan under the Federal Employee Retirement Income Security Act of 1974 ("ERISA").

Petitioner, Net Realty Holding Trust ("NET"), is the nominee of, and is wholly-owned by its beneficiary, the Pension Fund. It was organized to hold title to and manage properties on behalf of its beneficiary.

Letters of determination issued by the Internal Revenue Service establish that, as of 1970, NET was determined to be a qualified trust under section 401(a) of the Internal Revenue Code<sup>1</sup> and thus exempt from Federal income taxes under section 501(a) of the Internal Revenue Code.

On or about March 22, 1989, the Division of Taxation ("Division") provided NET with a statement of tentative assessment of tax in the amount of \$502,400.00 relating to the sale by NET of property located at 25 Deshon Drive, Melville, New York. A schedule of adjustments attached to the statement explained that NET's request for exemption from tax was denied on the ground that NET was not an organization qualifying for exemption under

section 1443 of the gains tax law. Several adjustments, not material to this proceeding, were made to NET's calculation of gain received on the transfer.

NET paid the full amount of the tax on the date of the transfer and timely applied for a refund of the tax paid on the grounds that, at the time of the transfer, it was exempt from the imposition of Federal income tax because it is a qualified trust under section 401(a) of the

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<sup>1</sup>IRC § 401(a) provides:

"A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section."

Internal Revenue Code which exempts it from Federal tax under section 501(a) of the Internal Revenue Code and that the ERISA preemption clause precluded the application of the transfer gains tax to the sale of real property by petitioner.

By letter dated May 29, 1990, the Division denied NET's request for a refund of tax, stating in material part:

Section 1443.3(a) of the Tax Law and Section 590.7(3)(iii) of the Gains Tax Regulations provides that a transaction will be exempt from Real Property Transfer Gains Tax if the transferor is any religious, charitable, education, or other organization which is or would be exempt under Section 1116(a)(4) of the New York State Sales and Use Tax Law, which is the same as an exempt organization under Section 501(c)(3) of the Internal Revenue Code.

In reference to your statement regarding the doctrine of pre-emption under 29 U.S.C. Section 1144, we have enclosed a recent Tax Appeals Tribunal Decision regarding the issue of the pre-emption doctrine. On page 9 of the decision it states that "the (Supreme) Court has recognized that the pre-emptive scope of ERISA is not all encompassing and that it does not extend to invalidate state statutes which affect employee benefit plans in 'too tenuous, remote or peripheral a manner'.... only those state laws which purport to regulate, directly or indirectly, the terms and conditions of employee benefit plans' will be found to be pre-empted."

Accordingly, since the gains tax has no regulating effect on any employee benefit plan, and such plan is not exempt under Section 1116(a)(4) of the New York State Sales and Use Tax Law or Section 501(c)(3) of the Internal Revenue Code, the refund claim of Net Realty Holding Trust is hereby denied in its entirety.

Petitioner now brings a motion for summary determination on the grounds that there are no material and triable issues of fact and petitioner is entitled to a determination in its favor as a matter of law.

In opposition to petitioner's motion, the Division alleges that there are material and triable issues of fact, stating, as pertinent to this issue:

"A question of fact exists as to whether the petitioner was a nominee of an ERISA qualified employee benefit plan at the time of the conveyance of the subject real property." (Affidavit in Opposition to Petitioner's Motion, Paragraph 9.)

"... A question of fact similarly exists as to whether the petitioner was a qualified trust exempt from tax within the meaning of Internal Revenue Code Section 501(a)." (Affidavit in Opposition to Petitioner's Motion, Paragraph 10.)

#### CONCLUSIONS OF LAW

A. Section 3000.5(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that any party may move for summary determination after issue has been joined. It

further states:

"The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor or any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion."

In Zuckerman v. City of New York (49 NY2d 557, 427 NYS 2d 595), the Court of Appeals enunciated the basic rules which are to be followed in determining whether a triable issue of fact exists, requiring denial of a motion for summary judgment. To obtain summary judgment, the moving party must offer admissible evidentiary proof which establishes a cause of action or defense sufficient to warrant judgment in his or her favor, as a matter of law. To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact. Ordinarily, the party in opposition must also produce evidentiary proof in admissible form or demonstrate an acceptable excuse for failure to do so (*id.* at 597-598). The mere assertion that questions of fact exist is insufficient to raise issues of fact requiring a trial (see, Gomez v. Superior Fleet Maintenance, \_\_ AD2d \_\_, 569 NYS2d 260 [4th Dept 1991]; Forray v. New York Hospital, 101 AD2d 740, 475 NYS2d 57).

To establish that, at the time of the conveyance of the subject real property, it was the nominee of an ERISA qualified employee benefit plan and exempt from Federal income tax under sections 401(a) and 501(a) of the Internal Revenue Code, petitioner submitted the following documentary evidence: a copy of the Pension Fund 1985 Summary Plan Description; a copy of the Nominee Agreement, made effective July 1, 1970, between the Pension Fund and NET; copies of determination letters of the Internal Revenue Service; and a copy of an order of the New York State Supreme Court, Nassau County, holding that NET was organized to hold title to and manage properties on behalf of the Pension Fund. In the absence of evidence to the contrary, the documentary proof offered by petitioner is sufficient to establish that NET is, and was during all periods relevant to this determination, a qualified trust pursuant to section 401(a) of the Internal Revenue Code and the nominee of a qualified employee benefit plan under

ERISA and that NET is, and was, exempt from Federal income tax under sections 401(a) and 501(a) of the Internal Revenue Code.

The Division's affidavit in opposition asserts only that there are questions of fact concerning whether petitioner was a nominee of a qualified benefit plan at the time of the conveyance of the real property and whether petitioner was a qualified trust exempt from tax under the Internal Revenue Code. It is true that none of the documents offered in evidence specifically references the year in which the conveyance was made; however, there is no evidence of any change of circumstance that would call into question the facts contained in those documents. Absent any evidence which would call petitioner's proof into question, the Division's assertions are insufficient as a matter of law to raise an issue of fact requiring a hearing.

B. Section 1443(3) provides for an exemption from the real property transfer gains tax if the transferor is "[a]n organization described in paragraph (4) of subsection (a) of section one thousand one hundred sixteen of this chapter" (Tax Law § 1443[3][c]). The organizations described in section 1116(a)(4) are these:

"Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purpose, or to foster national or international amateur sports competition..., or for the prevention of cruelty to children or animals."

Petitioner is not such an organization and does not claim that it is; accordingly, its claim for exemption from the gains tax is not based on the provisions of section 1443(3)(c) or any other exemption provision of the Tax Law.

Petitioner's argument for exemption from the tax rests on three premises. Petitioner begins its argument with the proposition that the real property transfer gains tax is an income tax. It then states, as a general principle, that "[t]he State cannot levy a tax on income that they [sic] could not tax under federal law". Since the gain realized on NET's sale of the subject real property was exempted from Federal tax under sections 401(a) and 501(a) of the Internal Revenue Code, petitioner concludes that the gain cannot be subjected to the real property

transfer gains tax because that would constitute a prohibited tax on income. This determination need not address petitioner's proposition that the real property transfer gains tax is properly categorized as an income tax because petitioner has not cited any authority that supports the proposition that the state may never levy a tax on income which the Federal government has chosen not to tax. The two cases cited by petitioner merely held that the states cannot impose a tax on income derived from securities and bonds of the Federal government, since such a tax would interfere with the power of the national government to borrow money (see, Macallen v. Commonwealth of Massachusetts, 279 US 620, 49 S Ct 432 [1929]); Northwestern Mutual Life Insurance Co. v. State of Wisconsin, 275 US 136, 48 S Ct 55 [1927]). Inasmuch as there is no support for petitioner's basic premise, its argument for granting it a total exemption from the real property transfer gains tax on the basis of its exemption from Federal income tax under sections 401(a) and 501(a) of the Internal Revenue Code must fail.

C. Petitioner's equal protection arguments constitute a constitutional challenge to the statute as written and not merely a challenge to the Division's interpretation or application of the statute. The Division of Tax Appeals does not have jurisdiction to consider such constitutional challenges (Matter of Fourth Day Enterprises (Tax Appeals Tribunal, October 27, 1988).

D. In Matter of Morgan Guaranty Trust Co. v. Tax Appeals Tribunal (166 AD2d 96, 569 NYS2d 502), the Appellate Division, Third Department, held that the real property transfer gains tax may not be applied to a transaction completed by a qualified employee benefit plan under ERISA. There, as here, the petitioner was the trustee of such a plan. The court found that the tax imposed by article 31-B of the Tax Law was preempted by the preemption provisions of ERISA.

In its brief, the Division essentially argues that the decision of the court in Morgan Guaranty is incorrect. Nonetheless, it is binding precedent and dictates a determination in petitioner's favor.

E. Petitioner's motion for summary determination is granted to the extent indicated in Conclusions of Law "A" and "D", and its claim for refund of real property transfer gains tax is

granted.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE