

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RHINEBECK FARMS DEVELOPMENT CORPORATION:		
	:	DETERMINATION
	:	DTA NO. 809882
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, Rhinebeck Farms Development Corporation, c/o Weingarten, 11 South Gleneida Avenue, Carmel, New York 10512, 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 December 2 and 9, 1992, respectively, petitioner, by its representative, Robbins, Greene, Horowitz, Lester & Co. (Jules Blackman, CPA), and the Division of Taxation by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel) consented to have the instant controversy determined on submission without hearing, with all briefs submitted by April 15, 1993. Petitioner submitted documentary evidence and a letter on January 11, 1993. The Division of Taxation submitted documentary evidence on January 15, 1993 and a one-page letter on March 18, 1993. Petitioner submitted a one-page letter on April 15, 1993. After review of the entire record, Thomas C. Saccia, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund as prematurely filed.

FINDINGS OF FACT

1. Petitioner, Rhinebeck Farms Development Corporation ("Rhinebeck"), was the sponsor of a condominium project known as "The Woods at Rhinebeck". This project has been completed, all transfers of units have occurred and all gains tax was paid by 1989.

2. Petitioner is, at present, the defendant in an action brought by The Woods at Rhinebeck Condominium I Unit Owners ("the unit owners"). The issues in the litigation involve the construction and installation of siding, roofing, and heating, ventilation and air conditioning ("HVAC") systems for the condominium units sold. The litigation is pending in the New York State courts, and there also exists an ongoing informal proceeding in the New York State Attorney General's office. If the unit owners are successful, substantial construction expenses will be incurred by petitioner, which will, in turn, increase the cost basis (original purchase price) of the project, decrease petitioner's gain, and justify the filing of a supplemental return seeking a refund of a portion of the gains tax paid. There is no allegation or evidence that the litigation and/or informal proceedings are frivolous. In fact, the Division of Taxation ("Division") does not dispute any of the facts concerning the litigation involving petitioner or that, should the unit owners prevail, those expenses incurred by petitioner would be properly includable in original purchase price ("OPP") and would lead to a refund of gains tax paid.

3. Petitioner was audited by the Division in connection with the condominium project, and agreed to the tax calculated by the auditor based on costs actually expended as of the time of the audit. However, the auditor would not allow any deduction for additional costs related to the construction of the condominiums that may be incurred by petitioner as a result of the litigation, as such expenses had not been finalized and expended as of the time of the audit.

4. On June 29, 1989, petitioner filed a Claim for Refund of Real Property Transfer Gains Tax requesting a refund of \$106,946.00. It is uncontested that this refund claim was timely filed per Tax Law § 1445.1(a), (c). For purposes of clarity, the substance of the refund claim can be divided into two segments:

- (a) \$71,946.00 of such refund claim was based upon the claim that the original estimate of project gain upon which gains tax was paid was higher than the final (actual) project gain;
- (b) \$35,000.00 of the refund claim was based upon an estimate of the construction costs to be incurred if the unit owners are successful in the pending litigation.

4. On September 21, 1989, the Division issued its response to petitioner's refund claim. The Division stated that based upon the recent field audit conducted, a refund in the amount of \$48,916.81 was approved as a result of the decrease in the final project gain. However, the \$35,000.00 estimated refund amount was denied for the reason set forth by the auditor (i.e., the costs could not be documented as they have not been finalized or incurred). Petitioner is protesting only the denial of the estimated refund amount.

5. In response to the Division's denial letter, petitioner filed a Request for Conciliation Conference indicating that the costs of repairs and alterations relating to the litigation with the unit owners had not as yet been determined. Petitioner requested that this issue remain open until the litigation was resolved.

6. On April 9, 1990, the Bureau of Conciliation and Mediation Services scheduled a conference to be held on May 15, 1990. Petitioner, on May 1 and 2, 1990, telephoned and forwarded a letter to the conferee requesting that the conference be adjourned for the reason that the litigation had not been concluded. By a responding letter dated May 11, 1990, the conferee stated the following:

"Please be advised that your request has been granted. The protective claim for refund will be held in abeyance until litigation is resolved."

However, a second Bureau of Conciliation and Mediation Services conference was scheduled and held on April 23, 1991. A Conciliation Order denying the protective refund claim was issued on May 31, 1991. Thereafter, a petition was filed with the Division of Tax Appeals. Throughout the administrative process, petitioner has requested that the refund claim be treated as a protective claim for refund to be held in abeyance until the litigation is resolved.

CONCLUSIONS OF LAW

A. Tax Law § 1445.1 provides, in part, as follows:

"(a) General. A person claiming to have erroneously paid the tax imposed by this article may file an application for refund within two years from either the date of transfer or the date of payment, whichever is later.

* * *

"(c) Condominium or cooperative plan or aggregated transfer. Provided however, that in the case of a transfer pursuant to a condominium or cooperative plan, or aggregated transfer, an application for refund may be filed with respect to any such transfer within two years from the date of the last transfer made pursuant to such plan or aggregated transfer or from the date on which the tax was paid, whichever is later . . ."

B. Petitioner has established, and the Division does not dispute, the following:

- (1) All gains tax due on the condominium project of which petitioner was the sponsor, has been paid.
- (2) Petitioner is involved in litigation (and informal Attorney General proceedings) with certain unit owners of the condominium project involving the construction of the condominiums.
- (3) If the unit owners are successful in the litigation (and/or informal proceedings) against petitioner, petitioner will incur costs that will reduce the gain on the condominium project and therefore reduce petitioner's gains tax liability. The Division does not dispute that a refund would be due.
- (4) A timely Claim for Refund of Real Property Transfer Gains Tax was filed relating to the potential refund due petitioner as a result of the litigation (and/or informal proceedings) between the unit owners and petitioner.

C. Based upon the facts and circumstances of this matter, petitioner's request that its refund claim be treated as a "protective" refund claim to be held in abeyance until the litigation is resolved is granted. It is uncontested that petitioner has timely protested the Division's denial of the refund claim, that if the unit owners are successful in the litigation petitioner would be entitled to a refund based on expenditures required to be made, and that petitioner cannot file a timely refund claim after the litigation is resolved. On this latter item, if petitioner

had delayed filing its refund claim until after the litigation was concluded, such claim would be denied as untimely, i.e., filed more than two years from the later of either the date of the last transfer made pursuant to the condominium plan or the date on which the tax was paid (Tax Law § 1445[1][a], [c]; *Matter of Camuto*, Tax Appeals Tribunal, July 29, 1993). Thus, petitioner's only apparent option was to file a claim within the time parameters of Tax Law § 1445.1(a), (c), notwithstanding that the litigation had not been finalized, in order to preserve its rights. (*See generally*, 24 Fed Tax Coordinator [RIA] ¶ T-6742.)

D. The only issue to be determined, if the unit owners prevail against petitioner, is the dollar amount of the refund.¹ However, such dollar amount cannot be determined until the litigation is resolved. As petitioner has no other recourse to obtain a refund to which it may be entitled, it is determined that petitioner timely filed a refund claim which, pending the outcome of the litigation between petitioner and the unit owners, awaits determination of the amount of such claim.

Upon the resolution of the litigation (and/or informal proceedings) petitioner will be required to present documentation to the Division of Taxation concerning its additional expenses. Should the Division and petitioner be unable to reach a mutually agreeable resolution of the refund claim, either party may request that the record be reopened to allow the submission of appropriate evidence relating to the refund amount.²

E. The result herein avoids potential due process problems and enables petitioner to preserve its rights to a hearing on the merits of its refund claim, an option not otherwise available under the facts of this case. In this regard, if the Division's denial were to be sustained on the grounds of being premature, petitioner is forever precluded from obtaining relief. That

¹If petitioner is successful in the litigation and therefore is not required to expend funds on construction the claim for refund would, obviously, be rendered moot.

²It is apparent that this matter was scheduled for and proceeded to hearing prematurely. A more appropriate procedure might have been for the parties to consent to leave the statute of limitations open until such time as petitioner could present, and the Division could consider, the results of the litigation and/or informal proceedings (see, Tax Law § 1444[3][c] [which allows the Division and the taxpayer to consent in writing to an extension of the time limits upon assessment]).

is, petitioner's "timely" filed refund claim, per Tax Law § 1445.1(a), (c), has been denied as premature (i.e., since no expenses have yet been incurred). At the same time, had petitioner delayed in filing until resolution of the litigation such claim would be denied as untimely under the same section of the Tax Law. Therefore, sustaining the Division's denial would leave petitioner no period within which it could file.

Furthermore, under the result herein the Division is not required to grant and pay over any refund based on allowable expenses not yet incurred by petitioner. Instead it will have the opportunity to completely review the documentation presented by petitioner regarding such expenses after the same are incurred and prior to making its determination as to the appropriateness of the refund claim amount, if any. In addition, petitioner receives an opportunity to fully litigate both the lawsuit and, thereafter, its refund claim linked thereto .

F. The petition of Rhinebeck Farms Development Corporation is granted, and this matter is to be held in abeyance pending the resolution of the litigation and/or informal proceedings and the determination thereafter of the amount of refund due petitioner, if any. Should the parties be unable to resolve the issues of petitioner's entitlement to a refund and/or the amount, if any, of such refund, either party may petition the Division of Tax Appeals to reopen this matter for the purpose of presenting argument and evidence on the unresolved matters.

DATED: Troy, New York
October 7, 1993

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE