STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EMPIRE REALTY GROUP 62ND STREET CORP.	:	DETERMINATION DTA NO. 809947
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 Empire Realty Group 62nd Street Corp., 414 East 59th Street, New York, New York 10022 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.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 4, 1992 at 1:15 P.M., with all briefs to be submitted by June 29, 1992. Petitioner submitted its brief on April 6, 1992. The Division of Taxation submitted a letter brief in support of its position on May 5, 1992. The Division of Tax Appeals received petitioner's reply on June 29, 1992. Petitioner appeared by Dreyer & Traub (Jay I. Gordon, Esq., and Joseph Gulant, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth Schultz, Esq., of counsel).

ISSUE

Whether the original purchase price for the land allocable between residential units and a retained commercial unit should be based on the percentage of common interest charges allocable to such units pursuant to the condominium offering plan or whether original purchase price should beallocated between the units on the basis of proportionate fair market value pursuant to 20 NYCRR 590.19.

FINDINGS OF FACT

Petitioner, Empire Realty Group 62nd Street Corp. ("Empire"), acquired real property

located at 300 East 62nd Street in New York, New York on September 5, 1984. Thereafter, during 1984 and 1985, Empire constructed a new condominium building comprised of 110 residential units and one commercial unit. Empire was the sponsor of the condominium project and sold residential units to unrelated purchasers retaining the commercial unit.

In connection with its acquisition of the property and subsequent construction of the building, petitioner obtained an appraisal of the proposed condominium project. The appraisal estimated the total sell-out value for the condominium at $31,300,000.00. The units ultimately sold for $31,550,453.00. The estimated value of the commercial space in the building was $1,100,000.00 comprised of $750,000.00 for commercial space located at the street level and the basement, and $350,000.00 for the space located in the sub-basement. The sub-basement was described in the appraisal as tentative construction and was not included in the appraisal; however, it actually became part of the commercial space when the project was completed and the total appraised value including the sub-basement is $31,650.000.00.

The parties do not dispute that the cost to acquire the land on which the condominium was to be constructed was $5,450,000.00. The specific issue in this case centers around the proper allocation of the $5,450,000.00 original purchase price for the land to the commercial unit.

The parties, by consent, amended the petition and the answer. Petitioner's representative indicated that the petition should have stated that the Division of Taxation ("Division") wrongfully allocated $398,286.00 of the $5,450,000.00 acquisition cost of the property (or 7.308% of the total cost) to the retained commercial space. Petitioner submits that the properly allocated amount is $189,660.00 (or 3.48% of the total cost). The difference of $208,626.00 would result in an increase in original purchase price allocated to the sold portion of the property, i.e., the residential units, thus resulting in a refund claim in the amount of $20,862.60.

The Division's amended answer interposes a general denial and reasserts that its allocation of 7.308% of the purchase price to acquire the property is properly allocated to the commercial unit.

The condominium offering plan ("Plan") was submitted into evidence along with its amendments numbered "1" through "6". The parties agree that the common charges set forth in the Plan have not changed as of the date of the hearing and the commercial unit had not been sold. The Plan initially set forth the various percentages of common interest pertaining to the residential units and the commercial unit. The percentage of common interest attributable to the individual residential units ranged from .412% to .466%. The percentage of common interest set forth for the commercial unit was 7.308%. An explanation of the basis upon which such percentages were determined was presented in a footnote to Schedule A of the Plan as follows:

> "Pursuant to Section 339-i(1)(iii) of the Condominium Act, the percentage interest of each Unit in the Common Elements is based upon equal percentages within separate classifications of Units as of the date of filing of the Declaration. Units of similar size or type have been classified together. The Common Interest of each Unit reflects the overall dimensions of such Unit as well as the dimensions of any Common Elements (except roof terraces) for the exclusive use of such Unit. Units with roof terraces and those having balconies or terraces below the roof have been separately classified based on size, which has been determined by adding the full floor area of the balconies and terraces below the roof, and 20% of the floor area of the roof terraces, to the interior of such Units." (Condominium Offering Plan, Exhibit "E", p. 74.)

On November 29, 1989, petitioner submitted a refund claim in the amount of $130,553.00, relating partially to the matter in issue. The Division indicated, upon its introduction of the refund denial letter, that in light of the amendment to the pleadings such an amount does not retain its significance to the issue herein. However, in correspondence dated June 19, 1990, the Division denied the refund sought in connection with the allocation issue herein.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner maintains that the original purchase price for the land should be allocated to the commercial unit based on the percentage of appraised fair market value of the commercial unit ($1,100,000.00) to the total appraised fair market value of the property ($31,650,000.00), i.e., 3.48%. The result of this allocation would increase original purchase price with respect to the residential units sold by $208,626.00, the gain subject to tax on the residential units would thus be reduced, and petitioner would be entitled to a corresponding refund in the amount of

$20,862.60. Petitioner claims support for its position in gains tax regulation section 590.19, which specifically addresses the issue of apportionment of original purchase price where an owner transfers less than its entire interest in real property. Petitioner asserts the regulation is properly applied in this instance and, as a result, the amount of original purchase price retained by petitioner with respect to the commercial unit must be determined based on relative fair market value.

The Division takes the position that the portion of the $5,450,000.00 original purchase price for the land allocable to the commercial unit should be based on the same percentage of the common interest charges allocated to the commercial unit pursuant to Schedule A of the Plan, i.e., 7.308%. The Division maintains that since the condominium declaration assigns a 7.308% common interest to the commercial unit, such unit owns a 7.308% undivided interest in fee simple absolute in the land upon which the building was constructed. Thus, apportionment at the same percentage of the cost of the land to the commercial unit is rational. The Division rejects petitioner's appraisal argument on the basis that there is no need to resort to an appraisal methodology since there has been no showing that the amount of common interest that petitioner has allocated to the commercial unit is unreasonable.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10% of the gain of such transfer. Under section 1440.3, gain is defined as:

> "[T]he difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price."

Tax Law § 1440.5(a)(i) provides that "original purchase price" is the consideration paid or required to be paid by the transferor to acquire the interest in real property. In this case, the issue is how to allocate the original purchase price attributed to the acquisition of the land, i.e., the $5,450,000.00. Petitioner points to 20 NYCRR 590.19 for guidance with respect to the allocation of original purchase price. In pertinent part, it is reproduced below:

> "Apportionment of original purchase price for transfers involving less than the transferor's complete interest in real property.

"(a) Question: If a transfer of less than a transferor's entire interest in real property is made (i.e., an easement, transfer of development rights or a subdivision of a parcel of real property), with no reversion of the transferred interest to the transferor, what are the original purchase prices of the interest transferred and of the remaining interest?

"Answer: The transferor's original purchase price of the real property must be apportioned between the property interest being transferred and the property interest being retained, whether or not a tax is due on such transfer. The apportionment should be made by multiplying the original purchase price of the real property by a fraction, the numerator of which is the fair market value of the interest being transferred and the denominator of which is the fair market value of the real property, including such interest.

"Upon a subsequent sale of the remainder of the real property (the real property less the interest transferred) the original purchase price of the real property which has been apportioned to such remainder should be subtracted from the consideration paid upon such subsequent sale to arrive at the gain subject to the tax."

B. Petitioner asserts it acquired the land, constructed the building and subdivided it through condominium form of ownership into the various residential units and a commercial unit, and thereafter sold less than its entire interest with no reversion. Thus, petitioner maintains that the amount of original purchase price retained by petitioner with respect to the commercial unit should be determined in accordance with the above-referenced regulation by its fair market value. The appraisal submitted into evidence was one prepared to assist in the acquisition of the land. Its relative accuracy to the predicted sell-out value of the residential units certainly enhances its credibility as a measuring tool for determining the relative fair market values of the units. The Division has taken the position that petitioner's original purchase price should be based on the commercial unit's share of condominium interest charges as set forth in the Plan. Petitioner asserts that such allocation was calculated as required by section 339-i(1)(iii) of the New York State Condominium Act and that such allocation was based on the square footage of the commercial unit relative to the residential units. Petitioner argues that there is no basis in the gains tax law or its regulations suggesting that original purchase price of land should be allocated based on a relative floor area concept, or any basis other than fair market value. The Division's primary argument in opposition to the application of its own regulation is that there is no need to resort to an appraisal methodology since the 7.308% allocation has not been shown to be unreasonable, citing Matter of Shareholders of

Beekman Country Club (Tax Appeals Tribunal, April 16, 1992). In Beekman, unlike this matter, parties had entered into what was referred to as an "allocation agreement" stating that the reasonable value of the real property in issue, with improvements thereon as of a particular date, was a specific sum of money. The allocation agreement was drafted specifically "for the purpose of the New York State Real Property Transfer Gains Tax." Its sole purpose was to provide for an allocation of the consideration to be paid by the transferee for the shares of corporate stock relating to the real property for the purpose of gains tax. The petitioner in that matter attempted to thereafter revise the consideration apportioned to real property alleging it was inaccurate and unreasonable because it did not reflect the true fair market value of the real property, and did not properly account for the value of the corporation's operating business as a going concern. The Tax Appeals Tribunal, in Beekman, rejected the petitioner's appraisal in favor of the executed allocation agreement stating that the petitioner failed to prove that the apportionment of consideration as to the real property was unreasonable, emphasizing the essence of fair market value as "the price at which a willing seller and a willing buyer will trade." Thus, absent any evidence that the apportionment in the allocation agreement was unreasonable, the Tribunal was unwilling to consider the appraisal as the method which should be employed in that case. Unlike Beekman, petitioner herein did not present an allocation percentage attributable to the commercial unit on the basis of any "fair value", but rather did so pursuant to the Condominium Act in accordance with a floor area concept. Petitioner has shown the appraisal to be of relative accuracy on the basis of the price at which the condominium units ultimately sold. Since it is well established that the fair market value of property is the price at which a willing seller and a willing buyer will trade (Matter of Shareholders of Beekman Country Club, supra; Matter of Bridgehampton Investors Corp., Tax Appeals Tribunal, August 11, 1988, quoting Blacks Law Dictionary 717 [4th Ed 1957]), and petitioner indicated that such units appraised at $31,300,000.00 ultimately sold for $31,550,453.00, representing cash and additional consideration in the form of mortgage tax credits and transfer taxes reimbursed to petitioner, the appraisal is clearly the best indication of

fair market value, and petitioner's suggested reallocation of original purchase price should be allowed. The Division's reliance on Beekman is misplaced and it offers no alternate explanation of why its own regulation should not be applied as suggested by petitioner.

C. The petition and claim for refund of Empire Realty Group 62nd Street Corp. are hereby granted.

DATED: Troy, New York
February 18, 1993

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE