STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LANDMARK DINING SYSTEMS, INC.	:	DETERMINATION DTA NO. 810920
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, Landmark Dining Systems, Inc., c/o Lewis Cohen, Esq., 162 West 34th Street, New York, New York 10001, 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 Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 2, 1993 at 1:15 P.M., with all briefs to be filed by July 2, 1993 which commenced the six-month period to issue this determination. Petitioner filed its briefs on May 3, 1993 and May 24, 1993. The Division of Taxation filed its brief on May 6, 1993. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUE

Whether certain payments made by petitioner pursuant to a consulting agreement constituted "consideration" paid to acquire an interest in real property and were therefore includible in petitioner's "original purchase price".

FINDINGS OF FACT

Petitioner, Landmark Dining Systems, Inc. ("Landmark"), is a subsidiary of National Restaurant Management, Inc. ("National Restaurant").

National Restaurant is a privately-held firm which has been in business for over 50 years. Over the years, National Restaurant has acquired numerous chains of restaurants. It

holds leases on approximately 200 restaurants and rents to approximately 500 tenants. National Restaurant is also a tenant in hundreds of places.

At the hearing, the head of National Restaurant's real estate department, Lawrence Abrams, explained that the employees of National Restaurant are considered experts in real estate in New York City. National Restaurant has the expertise to build its own restaurants as well as the ability to negotiate from the perspective of a tenant or a landlord.

An example of National Restaurant's practices is shown by its activity following its acquisition of the leases of Schraffts Restaurants, Childs Restaurants and Chock Full O' Nuts restaurants. According to Mr. Abrams, these restaurants became obsolete in the 1960's and 1970's. However, the restaurants had two valuable assets: superb locations and long-term leases. National Restaurant divided each space which had been used by these restaurants and built new restaurants which it considered more contemporary. The balance of each space was sublet to third parties which reduced National Restaurant's overhead.

It is National Restaurant's practice to conduct its affairs with its own staff. It feels it knows the value of the space and does not seek outside expertise.

Petitioner entered into a Lease, dated April 3, 1985, with Empire Hotel - Lincoln Center Associates for the lease of 21,000 square feet in the premises at 1889-1895 Broadway in the building known as the Empire Hotel in the City of New York. Article 37 of the lease was entitled "Brokerage" and provided:

> "SECTION 37.01. The parties acknowledge and represent to each other that they had no dealings or negotiations with any broker, agent or finder in connection with the consummation of this Lease. Each party covenants and agrees to pay, hold harmless and indemnify the other from and against any and all cost, expense (including reasonable attorney's fees and court costs), loss and liability for any compensation, commissions or charges claimed by any broker, agent or finder with respect to this Lease or the negotiation thereof if such claim or claims by any such broker, agent or finder are based in whole or in part on dealing with such party or its representatives."

Section 41.07 of the Lease stated:

> "SECTION 41.07. It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this lease, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or

> representative, not embodied in this lease, made by the other. The Tenant has inspected the Premises and is thoroughly acquainted with their condition and accepts the Premises 'AS IS'."

Petitioner entered into a Consulting Agreement dated April 3, 1985 with a Mr. Sheldon Blittner. At this time, Mr. Blittner was a general partner of the Empire Hotel and negotiated the Lease on behalf of the hotel. The second whereas clause on the first page of the agreement stated:

> "WHEREAS, Landmark entered into a lese [sic] for certain portions of the ground floor and basement of said real property, dated April 3, 1985 between EMPIRE HOTEL - LINCOLN CENTER ASSOCIATES, as Landlord and LANDMARK DINING SYSTEMS, INC., as Tenant (hereinafter 'Lease') and desires to retain Consultant to advise, counsel and make recommendations to it regarding the leasing and subleasing of Landmark's demised premises at said real property . . . ."

The first paragraph of the Consulting Agreement provided that the consultant would act in a consulting capacity to Landmark with respect to the leasing and subleasing of commercial space at the Empire Hotel and that the consultant would "advise, counsel and make such recommendations" to petitioner with respect to petitioner's leasing and subleasing of commercial space at the Empire Hotel. The second paragraph of the Consulting Agreement stated that petitioner agreed to pay the consultant $1,150,000.00 in consideration for the consultant's services. Paragraph 4.01 of the Consulting Agreement contained a provision that the Lease would be held in escrow and that, under certain circumstances, petitioner's failure to perform as required by the Consulting Agreement would result in the forfeiture of the Lease to the consultant.

Petitioner paid $1,150,000.00 to Mr. Blittner as prescribed by the Consulting Agreement. It was petitioner's understanding that if it did not accept the Consulting Agreement, it would not have been awarded the Lease.

Mr. Blittner was never consulted by Landmark concerning the leasing or subleasing of space.

In the over 30 years that Mr. Abrams has been employed by National Restaurant, he has never known National Restaurant to pay for the services of an outside consultant in the real

estate area.

At the time petitioner signed the Lease for space in the Empire Hotel, there were four tenants in the premises: a coffee shop, a bank, a restaurant called O'Neal's Saloon and a small store that sold items that had to do with the arts such as ballet and opera.

After petitioner signed the Lease, it had to wait for the existing leases to expire. When the lease for the store which sold items pertaining to the arts expired, petitioner renewed the lease with an increase in the annual rent from $27,000.00 to $65,000.00. The new rent amounted to about $162.00 a square foot. Since petitioner was paying approximately $100.00 a square foot for its tenancy, all it had to do to make a profit was renew with the existing tenant.

The lease for O'Neal's Saloon expired in April 1986. Thereafter, petitioner renewed the lease with an increase in the rent from $106,000.00 to $400,000.00 per year. At the new rent, petitioner received $166.00 a square foot.

In April 1986, the lease for the coffee shop also expired. In this space petitioner built a food court which contained a Roy Rogers, a Pizza Hut and a Del Taco Restaurant.

Petitioner leased 1,600 square feet of space for use as an exclusive sit-down restaurant. The rent for this space was approximately $182.00 a square foot. Petitioner also leased 1,200 square feet for $169,000.00 which amounted to approximately $140.00 a square foot.

Each of the uses of the foregoing space was part of a plan which petitioner had devised. Petitioner knew what it wanted to build, what it wanted to sublet and what rents it could obtain. It was not necessary for petitioner to confer with outside consultants to know what to do with the property.

In his experience with National Restaurant, Mr. Abrams has never seen another agreement where a consulting agreement ties in with a lease and the lessor could lose the rented premises.

On February 25, 1991, the Division received Questionnaires which were filed by petitioner, as transferor, and MET Dining, Inc., as transferee. The transferor form reported that on March 10, 1991 petitioner anticipated a leasehold assignment or surrender of property at

1889 Broadway, New York, New York. The form also reported that the gross consideration was $4,500,000.00 and that the original purchase price was $3,651,708.00. The original purchase price was made up of four items as follows:

Purchase price paid to acquire real property	$1,400,000.00
Other acquisition costs	13,500.00
Cost of capital improvements to real property	2,212,208.00
Allowable selling expenses	26,000.00

The gain subject to tax was listed as $848,292.00 and the anticipated tax due was reported as $84,829.00.

The Division prepared a Tentative Assessment and Return, dated March 8, 1991, which increased the gain subject to tax by $1,638,481.12. As adjusted, the Division determined that the gain subject to tax was $2,486,773.12 and the amount of the tentative assessment of tax due was $248,677.31. To the extent at issue herein, the Schedule of Adjustments, which was attached to the Tentative Assessment and Return, explained that the purchase price paid to acquire the interest in real property was adjusted by $1,150,000.00 because the amount paid for services relating to the subleasing of commercial space for the period April 3, 1985 through April 1, 1990 was viewed as operating expenses incurred in the normal conduct of business. Accordingly, the Division disallowed the fees paid pursuant to the Consulting Agreement.

The transfer between petitioner and MET Dining, Inc. was consummated on or about March 15, 1991 and petitioner paid the full amount of the real property transfer gains tax sought by the Division. On or about May 30, 1991, petitioner applied for a refund of a portion of the gains tax paid. In the refund claim, petitioner maintained that the $1,150,000.00 paid to the consultant was key money for execution of the Lease rather than for consulting services.

In a letter dated June 18, 1991, the Division responded that, on the basis of the Consulting Agreement dated April 3, 1985, the $1,150,000.00 paid to the consultant must be considered a consulting fee. The Division also reiterated its position that the money paid for consulting services rendered in connection with the subleasing of commercial space is considered an operating expense. Therefore, the Division denied petitioner's refund claim.

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. The term "gain" is defined by Tax Law § 1440.3 as the difference between the consideration for the transfer of real property and the purchase price. The term "original purchase price" is defined as:

> "the consideration paid or required to be paid by the transferor; (1) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property . . ." (Tax Law § 1440.5[a]; emphasis added).

B. In this case, petitioner argues that the substance of the transaction should be controlling and that it was necessary to execute the Consulting Agreement as a condition to acquiring the Lease. Therefore, the amounts spent on the Consulting Agreement should reduce the amount of the gain subject to tax. Petitioner further maintains that the documents do not reveal the true substance of the transaction.

It is the Division's position that the language of the documents is controlling and that the documents presented herein show that the Consulting Agreement was not consideration for the Lease. Therefore, the Division concludes that it properly decided that the cost of the Consulting Agreement was not part of the consideration for the transfer of the real property.

C. The language of the Lease supports the Division's position. The Lease expressly states at paragraph 37.01 that the parties had no dealings or negotiations with any broker or agent and further unambiguously states at paragraph 41.07 that all understandings and agreements are merged into the Lease which fully and completely expresses their agreement. There is no provision in the Lease which requires the execution of the Consulting Agreement. On the basis of these provisions, it is concluded that the documents executed by petitioner contradict its position that it was necessary to enter into the Consulting Agreement in order to have the Lease.

D. It is noted that the provision in the Consulting Agreement which requires a forfeiture

of the Lease for failure to pay the consultant does not warrant a different conclusion. If one accepted petitioner's argument that this shows the execution of the Lease was dependent upon the Consulting Agreement, then the remaining referenced provisions of the Lease would be rendered meaningless. Thus, petitioner's argument violates the principle that, where possible, every provision of a contract should be given meaning (see, 22 NY Jur 2d, Contracts, § 221).

E. The question which remains is whether the testimony presented by petitioner may be employed to contradict the terms of the Lease. On the record presented, this question must be resolved against petitioner. The Tax Appeals Tribunal has recognized on repeated occasions that absent "fraud, accident or mistake, the parol evidence rule prohibits resort to extrinsic evidence to vary the meaning of a contract when the language of a contract is unambiguous" (Matter of Capital District Better TV, Tax Appeals Tribunal, July 30, 1992; Matter of Emery Air Freight Corp., Tax Appeals Tribunal, October 17, 1991, confirmed 188 AD2d 772, 591 NYS2d 264). Since the terms of the Lease are unambiguous, the foregoing cases prohibit the consideration of petitioner's testimony to show that it was necessary to agree to the Consultant Agreement as a condition for obtaining the Lease.

F. Petitioner's argument that the economic reality of the transaction is controlling has been considered and rejected. Although this principle is well established (see, e.g., Matter of Bredero Vast Goed, N.V. v. Tax Commn. of the State of New York, 138 Misc 2d 27, 523 NYS2d 754, affd 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105), it does not allow petitioner to rely on testimony to contradict the unambiguous terms of a contract.

G. The petition of Landmark Dining Systems, Inc. is denied.

DATED: Troy, New York
December 23, 1993

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE