STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of JOSEPH WANAT 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.	:	DETERMINATION DTA NO. 811055

Petitioner, Joseph Wanat, c/o Leonard I. Ackerman, Esq., 34 Pantigo Road, East Hampton, New York 11937, 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 June 28, 1993 and July 8, 1993, respectively, petitioner by its duly authorized representative, Howard M. Koff, P.C. (Howard M. Koff, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by January 15, 1994. The Division of Taxation submitted its documentary evidence on July 27, 1993. Petitioner submitted its brief on October 1, 1993. On October 12, 1993 the parties, by their respective representatives, submitted a stipulation agreeing to certain facts. The Division of Taxation submitted its responding brief on December 7, 1993. Petitioner did not submit a reply brief. After review of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a refund of gains tax previously paid based upon a change in circumstances subsequent to its transfer of real property.

FINDINGS OF FACT

The facts in this matter are not in dispute and are relatively straightforward.[1] On or about November 30, 1989 petitioner, Joseph Wanat, entered into an agreement to sell to Heather Hills Omni Sound Limited Partnership certain real property located in the town of Southhold, New York ("the premises") for the sum of $3,304,644.50. Pursuant to this agreement, petitioner was to receive payment of the contract amount as follows:

- $200,000.00 on account of a prior contract of sale;[2]
- $500,000.00 in cash;
- $1,351,950.00 via a promisory note secured by a certificate of deposit in like amount; and
- $1,252,694.50 via a 10-year note secured by a purchase money subordinate mortgage on the premises.

The pending transfer was reported to the Division of Taxation ("Division") via transferor and transferee questionnaires (forms TP-580 and TP-581). These forms reported consideration of $3,304,644.50, less brokerage fees of $100,000.00 and claimed allowable selling expenses of

$40,000.00, thereby resulting in $3,164,644.50 of gain subject to tax and gains tax due (at 10%) in the amount of $316,464.45. In turn, the transfer occurred on or about December 15, 1989 and petitioner timely remitted the noted amount of tax due.

On or about October 1, 1990, petitioner submitted a Claim for Refund of gains tax paid in the amount of $33,684.78. This refund claim was premised upon additional claimed allowable expenses increasing petitioner's original purchase price for the property. The

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[1] The parties have agreed to certain of the facts in this case as set forth in a stipulation signed by the Division of Taxation's representative on September 24, 1993 and by petitioner's representative on September 29, 1993. The content of this stipulation is incorporated as part of the Findings of Fact herein.

[2] The subject contract of sale superseded a prior contract of sale dated October 20, 1987 between petitioner and one Richard T. Carr. The contract vendee herein, Heather Hills Omni Sound Limited Partnership, as successor in interest to Richard T. Carr, received credit for the $200,000.00 amount previously paid to petitioner under the prior contract of sale.

Division, in turn, approved a partial refund in the amount of $27,569.10. The basis for this refund claim and the difference between the claimed refund amount and the approved amount are not at issue in this proceeding.

On September 6, 1991, petitioner submitted a second Claim for Refund of gains tax paid in the amount of $125,269.45. The basis for this claim is that the purchaser/mortgagor has defaulted with respect to the subordinated purchase money mortgage given to petitioner on the subject premises, and that such subordinated purchase money mortgage has been eliminated as a result of a foreclosure action instituted by a senior mortgagee. As a result of the foreclosure (and the purchaser/mortgagor's bankruptcy), petitioner has not, and will not, receive cash or any other thing of value in respect of his purchase money mortgage (and note). Petitioner therefore claims entitlement to a refund based upon changed circumstances, to wit, a failure to receive the aforementioned portion of the original consideration.

On or about September 10, 1991, the Division denied petitioner's claim for refund, leaving for determination herein the issue of whether the subsequent (post-transfer) elimination of a purchase money mortgage affects the amount of gains tax due. The parties agree that if such elimination affects the amount of gains tax, then petitioner is entitled to the amount of refund claimed (plus interest) and that, conversely, if such elimination has no affect on the amount of gains tax, then the refund denial was proper.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State. There is no dispute that the transfer of property herein constituted a transfer subject to this tax.

B. Tax Law § 1440.3 defines "gain" as the "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 defines "original purchase price" to mean:

"the consideration paid or required to be paid by the transferor;

"(i) to acquire the interest in the property, and (ii) for any capital improvements made or required to be made to such real property . . ." (emphasis added).

"Consideration", in turn, is defined by Tax Law §1440.1(a) to mean:

"the price paid or required to be paid for real property or any interest therein . . . . Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to" (emphasis added).

As the statute recites, consideration includes the amount of a mortgage, meaning its face amount and not its present value or other value (Matter of Normandy Associates, Tax Appeals Tribunal, March 23, 1989; see also, Matter of Old Farm Lake Co., Tax Appeals Tribunal, April 2, 1992; Matter of Union Carbide Plastics and Chemicals Co., Tax Appeals Tribunal, September 2, 1993).

C. In Matter of Cheltoncort (Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121), the Tribunal stated that:

"In calculating the amount of tax due upon a taxable transaction, the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (emphasis added).

Here, it is clear that the transfer in question was subject to gains tax and that the amount of consideration paid or required to be paid included the $1,252,694.50 note secured by the subordinated purchase money mortgage. In Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), the Tribunal considered an analogous (though converse) situation. There, the petitioner sought to include in consideration (for purposes of calculating its original purchase price) certain liabilities it had assumed from its seller upon its acquisition of real estate. Though it appeared the petitioner in V & V may not in fact have ultimately paid such liabilities, the Tribunal nonetheless allowed the same as part of the consideration, holding that original purchase price includes "any consideration paid or required to be paid by the transferor." The Tribunal noted that:

"[W]hether petitioner has paid this amount is not determinative, but rather, the determinative factor is whether petitioner was required to pay this amount at the time the transfer occurred. Subsequent events do not effect the amount of liability assumed by the petitioner at the time it acquired the property" (emphasis added). A footnote included in the Tribunal's decision in V & V specifically affirmed this holding as being consistent with prior Tribunal decisions holding that the amount of consideration must be determined at the time of transfer and cannot be reduced based on subsequent events (citing, Matter of Cheltoncort, supra; Matter of Perry Thompson Third Co., Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121). In sum, "gain" subject to gains tax is computed as the difference between the original purchase price and the consideration (including the face amount of any mortgage) determined as of the date of the transfer.[3]

D. Petitioner claims that he is unable to recover the principal amount due under his note and mortgage because of (a) foreclosure by a senior mortgagee which has terminated petitioner's security interest in the premises and (b) petitioner's mortgagor's bankruptcy apparently leaving the note worthless. Therefore, petitioner argues that only "illusory gain", at best, resulted from the transfer. However, notwithstanding these circumstances, the amount of transfer gains tax due as a result of the transfer remains unchanged.

First, this case does not present the situation of "contingent" consideration, where the actual dollar amount of consideration (and hence the ultimate dollar amount of tax) is dependent upon future events and, while includable, is unknown at the time of transfer (see, e.g., Matter of V & V Properties, supra). Rather, this is a clear instance where consideration required to be paid, and petitioner's resulting gains tax liability, were set and known at the time of transfer.[4]

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[3]Any argument that the termination of petitioner's mortgage security interest leaves petitioner holding only an unsecured debt (not encumbering real estate) which should be includable in consideration at its value (here allegedly zero) rather than its face amount (see, Matter of Old Farm Lake Co., supra; see also, Matter of Union Carbide Chemical and Plastics Co., supra) is rejected. Such an argument would be premised upon revaluing consideration based upon subsequent events, and would directly contravene the holdings of those cases discussed hereinabove.

[4]Tax Law § 1442, at all times relevant hereto, provided that:

> "The tax imposed by [Article 31-B] shall be paid by the transferor to the [commissioner of taxation] or to any agent of such commission[er] . . . on the date

As outlined

above, there is no authority to reduce the consideration received on the transfer due to subsequent conditions, including the fact that the transferor did not and may not in fact receive all of the consideration which it had a right to receive at the time of the transfer. In this regard, the Tribunal has held that "[income tax] concepts of losses and depreciation deductions are not recognized in the gains tax statutes because neither has any relevance in that context" (Matter of SKS Associates, Tax Appeals Tribunal, January 12, 1991). Furthermore, the cases cited by petitioner in his brief[5] hold, inter alia, that the gains tax is imposed on the profit or gain from the transfer. However, these cases do not lend support, either in dicta or in holding, for the proposition that such gain on a transfer, calculated on the date of transfer, may be reduced by subsequent events (e.g., a transferor's failure to ultimately receive all of the consideration, whether due to changed market conditions, inordinate risk undertaken in a particular transaction, or unperceived risks), nor do they indicate that the amount of gain is to be measured and tax liability established at any time other than the date of transfer. Accordingly, petitioner's request for refund is denied.

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of transfer" (emphasis added).

Said section goes on to allow, under specified circumstances, for payment of gains tax liability on a transfer to be made in annual installments. The specific language of the installment payment provisions, however, leaves clear the fact that the amount of tax due on the transfer is established as of the date of transfer, with the installment provisions affording only a deferral of the payment of such liability over time.

[5] Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915); 995 Fifth Avenue Associates L.P. v. New York State Dept. of Taxation & Fin. (963 F2d 503, cert denied ___ US ___, 121 L Ed 2d 302).

E. The petition of Joseph Wanat is hereby denied and the Division's denial of petitioner's Claim for Refund is sustained.

DATED: Troy, New York
February 3, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE