STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THE FORTY SECOND STREET COMPANY	:	DETERMINATION DTA NO. 811834
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, The Forty Second Street Company, c/o Dr. Allan A. Brandt, 85 Viscount Drive, A-51, Milford, Connecticut 06460, 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 September 7, 1993 and September 15, 1993, respectively, petitioner, appearing by Weisman, Celler, Spett & Modlin, Esqs. (Kenneth A. Hicks, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) consented to have the matter determined on submission without a hearing. Documentary evidence was submitted by the Division of Taxation on October 19, 1993. Petitioner's documents and brief were submitted on November 16, 1993. The Division of Taxation submitted its brief on December 14, 1993. Petitioner submitted its reply brief on January 13, 1994. After review of the entire record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly imposed interest on petitioner's payments of gains tax, made approximately one year and three years after passage of title, where the subject property was taken by eminent domain and payments to petitioner by the New York State UrbanDevelopment Corporation also did not occur until approximately one year and three years after passage of title.

FINDINGS OF FACT

The Forty Second Street Company ("petitioner") was the owner of certain real property ("the property") located at 225-227 West 42nd Street (Block 1014, Lot 18) in the City and State of New York.

By the order of the Honorable Stanley Parness, Supreme Court Justice, County of New York, dated April 18, 1990, the New York State Urban Development Corporation ("UDC") was authorized to file an acquisition map in the office of the Clerk of the County of New York or the office of the City Register upon which filing title to certain property (including petitioner's property) vested in the UDC.

The aforesaid order directed the UDC to promptly complete vesting date appraisals and make advance payments thereon with nine percent interest from the date of vesting and ordered that the compensation to the owners of the various parcels would be determined by the court without a jury. Therefore, on April 18, 1990, an offer of payment in full or advance payment of the purchase price had not been made by the UDC (the condemnor).

An affidavit of William F. Treanor, an attorney with the firm of Wesiman, Celler, Spett & Modlin (the law firm which represents petitioner), states that, on November 1, 1991, he went to the office of the Clerk of New York County to review the file on the condemnation proceeding at issue herein. Other than the petition and order, there were no copies of the acquisition map or other acquisition papers in the file. He thereupon went to the Hall of Records where he located the acquisition map. In that file was an affidavit of printing and publishing and an affidavit of posting. Upon returning to the County Clerk's office, he consulted the minute book in connection with the condemnation proceeding which contained the following entry: "4/18/90 Condemnation Order, Affidavit and Map (sent to Hall of Records)." Mr. Treanor's affidavit stated that in neither of the two files did he find a gains tax Tentative Assessment and Return or an affidavit that the condemned parcels had a value of less than $500,000.00 as required by Tax Law § 1447(f).

On April 27, 1990, the Division of Taxation ("Division") received a Transferor

Questionnaire from petitioner which indicated thereon that the gross consideration to be paid for this transfer was "to be determined." The original purchase price was listed as $645,282.00. Also on April 27, 1990, the Division received a Supplemental Return from petitioner on which it elected to pay the tax due in installments.

Attached to the Transferor Questionnaire was an affidavit of Allan A. Brandt, president of Forty Second Street Resources Corporation, the court-appointed manager of petitioner. This affidavit, sworn to on April 26, 1990, stated, in part, as follows:

(a) As of the date of condemnation, petitioner had a contract to sell the property to a third party for a selling price of $3,500,000.00 (the date of the contract was March 31, 1990). A copy of the contract along with a Transferor Questionnaire (dated March 28, 1990) and a Transferee Questionnaire (dated March 31, 1990) were previously filed with the Division; and

(b) As of the date of transfer pursuant to the condemnation, no advance payment or final award had been received nor had the same been determined.

On June 1, 1990, petitioner executed a Notice of Extension of Period of Limitation for Assessment of Tax on Gains Derived from Certain Real Property Transfers (the extension was received by the Division on June 12, 1990 and was signed by the Division's authorized representative on July 6, 1990) which provided as follows:

"1. The transferor intends to transfer any interest in the real property listed above on or about the date stated above.

"2. The transfer is or may be subject to the gains tax.

"3. The total consideration, as defined in §1440 of the Tax Law, for the transfer is not yet determinable.

"4. The Tax Department agrees to issue a Tentative Assessment and Return, Form TP-582, based upon the consideration determinable at this time.

"5. The transferor agrees to file a supplemental questionnaire, hereinafter referred to as the 'questionnaire', pursuant to §1447.1(b) of the Tax Law, to report any additional consideration received for the transfer and pay any additional tax due, no later than 10 days after the date such additional consideration was received, until the total consideration for the transfer is finally determinable.

"6. The transferor agrees that the Tax Department may assess additional

gains tax, pursuant to §1444 of the Tax Law, by issuing a Notice of Determination for the transfer within 90 days after the date the Tax Department receives the questionnaire or, if the transferor fails to file the required questionnaire, at any time.

"7. The transferor agrees that, if the Tax Department assesses additional gains tax on the transfer in accordance with paragraph six above, the transferor shall not raise and is prohibited from raising any claim that the assessment is barred by the period of limitation provided by §1444.3 of the Tax Law."

A Tentative Assessment and Return, dated July 6, 1990, was issued by the Division showing no tax due as of the date of its issuance.

On March 19, 1991, the UDC made an advance fee offer of $3,500,000.00 which was accepted by petitioner as advance payment but not as payment in full.

A revised Transferor Questionnaire, dated March 27, 1991 and received by the Division on April 4, 1991, was submitted by petitioner showing anticipated tax due of $285,471.80 (gross consideration was listed as $3,500,000.00 and original purchase price as $645,282.00).

On April 11, 1991, the Division issued a Tentative Assessment and Return showing a total amount due of $318,240.82 which represented tax due of $285,471.80, plus interest in the amount of $32,769.02.

On April 25, 1991, the UDC paid the advance fee payment to petitioner less the amount of gains tax and interest shown on the Tentative Assessment and Return which amounts were paid, on the same date, by the UDC directly to the Division.

On August 2, 1991, the Division received a Claim for Refund of Real Property Transfer Gains Tax from petitioner seeking a refund in the amount of $32,769.02, the amount of interest assessed by the Division.

By letter dated October 16, 1991, the Division denied petitioner's refund claim in its entirety.

On January 7, 1994 and January 10, 1994, respectively, petitioner and the Division, by their duly appointed representatives, entered into a written stipulation whereby it was agreed that the present matter would be amended to include an additional claim by petitioner with respect to additional interest in the amount of $7,255.22. As explained in letters attached to the

written stipulation, this additional interest resulted from a second and final payment to petitioner by the UDC. The record does not disclose the actual amount of additional consideration received by petitioner or the date on which the UDC made such payment. Once again, interest was assessed on petitioner's additional gains tax liability and such interest was paid, under protest, on July 19, 1993.

SUMMARY OF THE PARTIES' POSITIONS

The position of petitioner may be summarized as follows:

(a) Tax Law § 1446(1) provides that interest may be imposed only if there has been an underpayment of tax. No tax was assessed by the Division until April 11, 1991. A Tentative Assessment and Return issued by the Division in 1990 indicated that no tax was due. There was no underpayment since there could be no determination of tax due until the advance fee offer by the UDC on March 19, 1991;

(b) The Division's pre-transfer audit procedure (Tax Law § 1447[2]) results in a determination and payment of gains tax before a County Clerk may accept any conveyance for recording because Tax Law § 1447(1)(f)(1) prohibits recording unless accompanied by a tentative assessment of the amount of tax or an affidavit that no tax is due. In the present matter, the County Clerk accepted the UDC's filing of the acquisition map on April 18, 1990 without a tentative assessment; and

(c) Annexed to the Transferor Questionnaire (filed after being notified by UDC's attorneys of the filing of the acquisition map on April 18, 1990) was an affidavit of Dr. Allan A. Brandt (see, Finding of Fact "4") which indicated that, as of the condemnation date, petitioner had a contract to sell the property to a third party for $3,500,000.00. A Transferor Questionnaire had been filed with the Division with respect to that transaction. Therefore, the Division could have determined tax due on its own initiative by issuing a Notice of Determination. Instead, it issued a Tentative Assessment and Return indicating no tax due. Also, the Division and petitioner executed a consent (see, Finding of Fact "5") wherein petitioner agreed to file a supplemental questionnaire

to report any consideration received in the future. Petitioner complied with this agreement. Despite its compliance and the timely filing of every form and questionnaire and the timely payment of tax, the Division asserted interest.

The Division contends as follows:

(a) The fact that the amount of consideration was not determined as of the date of transfer or could not be determined at that time does not relieve the transferor (petitioner) of its responsibility to pay the tax due within 15 days of the date of transfer pursuant to the requirements of Tax Law § 1442(a);

(b) It is not necessary, in order for interest to be imposed, to have first determined that the taxpayer had underpaid its tax liability;

(c) The Division, citing the provisions of Tax Law § 1442(c) relating to installment payments, analogizes the present matter to an installment payment election and states that interest is still due on the amount of unpaid tax from the date of transfer, computed pursuant to Tax Law § 1446(3). Moreover, there is no provision for the abatement of interest imposed pursuant to this section. Petitioner made an election to pay its tax in installments on the Supplemental Return filed on April 26, 1990. Imposing interest accords this taxpayer the same treatment as others who apply for and are permitted to defer payment of tax by electing to make installment payments; and

(d) The imposition of interest is not inequitable because petitioner was entitled to interest on the amount of its advance award at the rate of nine percent from the date of vesting of title in the UDC.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10 percent on gains derived from the transfer of real property within the State. The term "transfer of real property" is defined in Tax Law § 1440(7) and includes, among other things, "taking by eminent domain."

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)(a) defines "original purchase price" to mean:

> "the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property . . . ."

"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).

C. Tax Law § 1442(a), at all times relevant hereto, provided that the gains tax imposed was to be paid by the transferor no later than the fifteenth day after the date of transfer.[1]

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 consideration for the property taken by eminent domain was subject to tax but that the amount of consideration paid or required to be paid was not determinable at the date of transfer. In Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), the Tribunal considered an analogous (though converse) situation to that found in the Cheltoncort matter. There, the petitioner sought to include in consideration (for purposes of calculating its original purchase price) certain liabilities it had assumed from the 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 consideration, holding that original purchase price includes "any consideration paid or required to be paid by the

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[1]Chapter 46 of the Laws of 1990, effective March 31, 1990, amended Tax Law § 1442(a) to provide that the tax was to be paid no later than the fifteenth day after the date of transfer. Prior to this amendment, the tax was due no later than the first business day after the date of transfer.

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 affect the amount of liability assumed by 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 stating that the amount of consideration must be determined at the time of transfer and cannot be reduced based on subsequent events (citing Matter of Cheltencort Co., supra; Matter of Perry Thompson Third Co., Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121). While "gain" subject to gains tax is computed as the difference between the original purchase price and the consideration as determined as of the date of the transfer, in the present matter, since the consideration could not be determined as of the date of transfer, the gain and the resulting gains tax could not, therefore, be determined on such date.

D. On the date of the transfer, the actual dollar amount of consideration (and, accordingly, the amount of gains tax due) was dependent upon future events and, while includible, was unknown at that time (see, Matter of V & V Properties, supra). The actual consideration was not determined until approximately one year and three years after the date of transfer (see, Findings of Fact "7" and "13"). This lapse of time was not caused by petitioner, but by other parties and events. The present matter may be likened to an "unvalued benefit" or "contingent payment" situation. In that circumstance, the tax is due and determinable at the time the contingent consideration is received and interest begins to accrue as of this date.

On May 28, 1986, the Division issued a memorandum (TSB-M-86[4]-R) containing summaries of various letter opinions not specifically addressed in Publication 588 (November 1984) or in the regulations (effective September 24, 1985). With respect to contingent payments, the memorandum stated as follows:

> "Where a contract contains an unvalued benefit or provides for a contingent payment, the Department will issue either a statement of tentative assessment or statement of no tax due based on the known consideration. An agreement extending the statute of limitation of time for assessment will be required to be filed. If there is additional consideration received for the transfer at a later date, the

> transferor and transferee, [sic] are required to file updated questionnaires disclosing the actual consideration for the transfer of real property."

In the matter at issue herein, while there was no contract containing an "unvalued benefit" or a "contingent payment", the consideration to be received was contingent and unknown at the time of the transfer of title. Petitioner did, however, comply with the procedures outlined in the aforesaid memorandum since an agreement to extend the period of limitation for assessment was executed by the parties and a revised Transferor Questionnaire was submitted by petitioner eight days after the UDC made an advance fee offer which was accepted by petitioner (see, Findings of Fact "5" and "8").

Since, at the time of transfer, the consideration was unknown and contingent, the gain could not be computed and the amount of gains tax due was, therefore, indeterminable. Accordingly, no interest could accrue between the date of the taking of the property by eminent domain and the date on which the UDC made the advance payment to petitioner.

Tax Law § 1446(1) imposes interest "on the amount of any tax not paid." Here, "the amount of any tax not paid" was indeterminable until the consideration was paid by the UDC. At the time of the passage of title to the UDC, the amount of tax due could not be computed and, therefore, there could be no amount of tax not paid and no imposition of interest. As the Tribunal, in Matter of V & V Properties (supra), stated:

> "With respect to the time at which interest began to accrue for petitioner's failure to timely pay its gains tax liability, the Administrative Law Judge reasoned that since the 'kicker' consideration represented contingent consideration, unknown in amount until actually received by petitioner, interest on tax due for such amount properly runs only from such dates of receipt."

In its decision, the Tribunal did not disturb this conclusion of law.

E. The Division contends that this matter is analogous to installment payment election, i.e., where the transferor elects to defer payment of all or a portion of the tax due and pay the tax in annual installments pursuant to the provisions of Tax Law § 1442(c). Upon such election, the transferor may be allowed up to three years to pay the tax due or, when the consideration is in the form of a purchase money mortgage, the time to pay may be extended up to 15 years. In all cases, however, interest is due on the amount of the unpaid tax from the date of transfer (Tax

Law § 1446).

It must be noted that the installment payment provisions afford the taxpayer only the opportunity to defer payment of the tax liability over a period of time. They do not alter the fact that the amount of tax due is established by the consideration received on or before the date of transfer. In the present matter, petitioner could not elect to pay the total tax due in installments because, at the time of the transfer, the amount of consideration and the resulting gains tax due could not be determined. Therefore, the Division's analogy is misplaced.

F. The Division further contends that imposition of interest is not inequitable because petitioner was entitled to receive interest from the date of vesting of title in the UDC.

Petitioner was entitled to interest on the condemnation judgment to compensate for the delay in payment of the award and the interest was payable at such rate as was fixed by statute. Interest on the value of the property taken was required by the just compensation clauses of the Federal and State constitutions as a substitute for the beneficial use of the property during the period between the date of the taking and the date of final judgment (Adventurers Whitestone Corp. v. City of New York, 65 NY2d 83, 489 NYS2d 896). Interest was payable from the date that title was transferred to the date of the advance payment (LaPorte v. State of New York, 6 NY2d 1, 187 NYS2d 737; Amsterdam Urban Renewal Agency v. McGrattan, 91 AD2d 792, 458 NYS2d 67, affd 59 NY2d 624, 463 NYS2d 195; Marine Midland Bank, N.A. v. State of New York, 118 Misc 2d 472, 460 NYS2d 902; EDPL 514[A]). Therefore, petitioner was entitled to receive interest on the payments from the UDC from April 18, 1990 to date of payment.

The Division's argument that it is entitled to assess interest because petitioner received interest on the payments from the UDC is, apparently, an equity assertion for which there is no authority, in law or in fact. It is properly not contending that additional tax should be imposed on the interest received by petitioner; however, it is maintaining that it is entitled to interest because petitioner received interest. While, as the Division states, it may not be inequitable for it to receive interest because petitioner was paid interest, absent some authority therefor, it is an

argument without merit.

G. The petition of The Forty Second Street Company is granted and the Division is hereby directed to refund the sum of $32,769.02 paid on April 25, 1991 (see, Finding of Fact "10") and the sum of $7,255.22 paid on July 19, 1993 (see, Finding of Fact "13"), together with such interest as may properly be due and owing.

DATED: Troy, New York
June 9, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE