STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BEN HELLER	:	**DETERMINATION** DTA NO. 814229
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, Ben Heller, 14 Weber Road, Sharon, Connecticut 06069, 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 January 29, 1997 and February 6, 1997, petitioner by his representative, Jones, Day, Reavis & Pogue (Dan A. Kusnetz, Esq., of counsel) and the Division of Taxation by Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by June 3, 1997. Thereafter, petitioner's motion to reopen the hearing was granted and the Division of Taxation was given until September 1, 1997 to serve and file a response to petitioner's affidavit and the attached exhibits, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge renders the following determination.

*ISSUE*S

I. Whether it was proper for the Division of Taxation to assess interest on the real property gains tax due on a supplemental condemnation award.

II. Whether it was proper for the Division of Taxation to disallow certain expenses incurred by petitioner in the calculation of original purchase price.

FINDINGS OF FACT

1. In March 1982, petitioner, Ben Heller, purchased real property in East Hampton, New York. The property was known as Barcelona Point (the "real property").

2. On August 15, 1989, the State of New York, through the Department of Environmental Conservation, acquired the property from petitioner in an eminent domain proceeding. On the same date, as consideration for the transfer, petitioner received $15,000,000.00 for the real property pursuant to an Agreement of Advanced Payment with the New York State Department of Environmental Conservation. Under the Agreement for Advance Payment, petitioner reserved the right to file a claim against New York State to challenge the adequacy of the consideration he received for the transfer.

3. In connection with the transfer, transferor and transferee questionnaires were filed reporting that the consideration was $15,000,000.00 and that gains tax was due in the amount of $798,402.41. The Division of Taxation ("Division") issued a Tentative Assessment and Return, dated August 4, 1989, which showed a total gains tax due of $845,638.99. The additional gains tax arose from the Division's disallowance of construction period interest, certain selling expenses, and certain legal fees. Under protest, petitioner paid the tax assessed on the Tentative Assessment and Return.

4. On June 29, 1990, petitioner filed a claim against the State of New York in the Court of Claims in order to obtain additional consideration for the transfer. In support of his claim, petitioner's legal counsel, Bernard Fishman, Esq., of Shea & Gould, and William Esseks, Esq., of Esseks, Hefter & Angel, directed petitioner to engage several appraisers to perform sophisticated valuation studies on petitioner's property. Petitioner's attorneys also engaged appraisers to perform sophisticated valuation studies on the property. Petitioner's counsel believed that the appraisals were a critical aspect of their legal strategy and that, without the appraisals, petitioner would not have been able to prove the value of the property and establish that he is entitled to additional consideration. Petitioner incurred appraisal fees and related expenses of $350,485.77.

5. On October 21, 1992, petitioner and the New York State Department of Environmental Conservation entered into a Stipulation of Settlement and Discontinuance. Under the Stipulation New York State agreed to pay $40,000,000.00 for the property of which $15,000,000.00 had already been paid. The Stipulation further provided that, of the $25,000,000.00 remaining to be paid, $19,550,000.00 was principal and $5,450,000.00 was simple interest from the vesting date (August 15, 1989) to September 21, 1992, at the statutory rate of nine percent and the remaining unpaid balance would bear interest at a rate of three percent from September 22, 1992 until the date of payment, with payments to be made in installments during 1993, 1994 and 1995.

6. The three percent interest rate which petitioner received under the Stipulation of Settlement was presented to petitioner by representatives of the State Comptroller's Office and the Department of Environmental Conservation on a "take it or leave it" basis. Petitioner had the choice of either accepting the three percent interest rate or continuing to litigate his Court of Claims action at a trial.

7. The Division issued a Notice of Determination, dated February 16, 1993, which assessed tax in the amount of $1,955,000.00 plus interest in the amount of $801,131.26 for a balance due of $2,756,131.26. In a document titled Attachment to Statement of Proposed Audit Changes, the Division explained that "interest was assessed beginning on the sixteenth day after the vesting date of July 31, 1989 [i.e., August 15, 1989] and will continue to accrue on any balance of tax and interest remaining unpaid."

8. In conjunction with a letter dated March 26, 1993, petitioner submitted amended transferor and transferee questionnaires to the Division. The amended questionnaires stated that the date of the transfer was August 15, 1989 and listed the total consideration as $34,550,000.00.

9. Petitioner and the Division entered into a letter agreement, dated April 14, 1993, which provided, among other things, that the tax of $1,955,000.00, which is the amount asserted in the Notice of Determination, was to be paid at the time he received the proceeds of the first cash payment pursuant to the Stipulation of Settlement and Discontinuance. The parties also agreed that petitioner would request a conference with the Bureau of Conciliation and Mediation Services to address the legality of the Division's imposition of interest on the gains tax due and, if necessary, the amount of the refund that is due petitioner.

10. The Division issued a statement dated April 19, 1993 acknowledging receipt of petitioner's payment of $1,955,000.00 towards the asserted gains tax liability.

11. On May 14, 1993, the Division received a claim for refund of gains tax in the amount of $158,031.64. While the refund claim was under review, petitioner submitted additional documentation and amended the amount of the refund sought to $160,926.93. In a letter dated October 15, 1993, the Division granted the refund claim to the extent of $125,878.35 plus interest and disallowed the balance of $35,048.58 on the grounds that certain selling expenses,

primarily appraisal fees, could not be included in the property's original purchase price. The letter from the Division set forth the following explanation for its decision:

> "Our letters of May 27, 1993 and July 30, 1993, requested documentation such as invoices, cancelled checks (front & back) and/or affidavit from the attorney to verify the legal fees being claimed. The invoices and cancelled checks submitted documented the legal fees claimed and also verified additional legal fees now being claimed ($28,952.91).
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> "Pursuant to Section 590.17 of the Gains Tax Regulations, 'Original purchase price may be increased by the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred in selling real property.' Accordingly, the following selling expenses totaling $350,485.77 must be disallowed:
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> |---|---|---|
> | *"5)* | *Jerome Haims Realty Inc. - appraisal* | *$153,100.00* |
> | *6)* | *Roderick S. Green Jr/Morley - appraisal* | *$11,275.75* |
> | *7)* | *Gregory F. Price Agency - comparison study* | *$825.00* |
> | *8)* | *Suzanne L. Han - comparison study* | *$1,250.00* |
> | *9)* | *Dayton Appraisers - comparison study* | *$8,500.00* |
> | *10)* | *McKay Golf & Country Club Properties - appraisal* | *$25,450.37* |
> | *11)* | *Rooney & Associates - appraisal* | *$96,232.59* |
> | *12)* | *William Sherman Company - related appraisal work* | *$3,212.78* |
> | *13)* | *Deighan Appraisal Assn. - related appraisal work* | *$525.00* |
> | *15)* | *Rudy Tomasilli - video cassette filming, process & helicopter* | *$2,247.39* |
> | *16)* | *DeMatteis Flight Dept. - helicopter photo flight* | *$1,203.50* |
> | *17)* | *National Video Industries, Inc. - video cassette* | *$708,18*[sic] |
> | *18)* | *Deloitte & Touche - accounting services* | *$29,225.00* |
> | *19)* | *Ram Court Reporting Service - court reporting* | *$13,328.75* |
> | *20)* | *George H. Walbridge - Barcelona Survey* | *$10.50* |
> | *21)* | *South Fork Nat. Hist. Soc. - membership* | *$35.00* |
> | *22)* | *Beth Greenberg - court reporting* | *$572.30* |
> | *23)* | *Aquebogue Abstract Corp* | *$225.00* |
> | *24)* | *Alliance Reporting Service* | *$1,064.00* |
> | *25)* | *Federal Express* | *$44.50* |
> | *26)* | *Gotcha Legal Process Svc* | *$120.00* |
> | *27)* | *Echo Appellate Press Inc - reproductions* | *$225.23* |
> | *28)* | *American Express - Florida appraisal trip* | *$1,103.93"* |

12. Petitioner filed a request for a conciliation conference wherein he challenged the Division's imposition of interest on the gains tax due and the Division's denial of the $35,048.58 remainder of petitioner's refund claim. Following a conciliation conference, a Conciliation

Order, dated May 26, 1995, was issued sustaining the Notice of Determination and denying a refund of the balance of the refund request in issue. This proceeding ensued.

13. In support of his position that the foregoing expenses are deductible, petitioner submitted an affidavit which explained that the Barcelona property is a peninsula located in the Town of East Hampton on Long Island, New York. The parcel is undeveloped and in an area which contains a number of expensive first and second homes owned by people of substantial means. It had been petitioner's intention to develop the property into a group of private homes overlooking a championship golf course. The value of such a development was the main issue in the Court of Claims action.

14. The appraisal report contained three main levels of analysis. The first level of analysis was the collection of large amounts of data showing the growth of land values from the time petitioner purchased the property until it was taken by the State. To perform this study, data was collected for each of the time periods on the value of each sale of vacant residential zoned land in the Town of East Hampton and nearby Southampton. This data was used to develop a trend line analysis to show the changes in vacant land property values from the time of petitioner's acquisition of the Barcelona property until the time it was acquired by the State. This analysis was performed by Roderick S. Green Jr./Morley at a cost of $11,275.75 (*see,* Finding of Fact "9", item 6). After Mr. Green passed away, additional information for the report was acquired from the Gregory F. Price Agency (*see*, Finding of Fact "9", item 7).

The second aspect of the appraisal report involved an analysis of the relative wealth of home buyers in the vicinity of the Barcelona property. This was necessary because the appraised value of the property was based on the ability to sell homes, plots for homes, and golf club memberships for very high values. Petitioner hired Suzanne L. Hahn, for the "North Fork" areas,

for $1,250.00 (*see*, Finding of fact "9", item 8) and Dayton Appraisers, for the Hampton areas, for $8,500.00 (*see*, Finding of Fact "9", item 9). Jointly, these appraisers undertook an analysis of the value of the zoned land and if applicable, the homes in the area at the time of the conveyance. The analysis involved an examination of actual sales, asking prices of real estate which was being offered for sale and the likely offering price for land and homes that had not been offered for sale. In total, 499 high value properties were analyzed and evidence of the large number of people who could purchase luxury homes was acquired.

The third aspect of the appraisal report set forth an analysis of the impact on land and home values of the accessibility of a golf course and beachfront locations. To conduct this analysis, petitioner hired McKay Golf and Country Club Properties for $25,450.37 to determine the type of golf course that could be constructed on the Barcelona property (*see*, Finding of Fact "9", item 10). Petitioner then retained three firms, Rooney and Associates for $96,232.57 (*see*, Finding of Fact "9", item 11), William Sherman Company for $3,212.78 (*see*, Finding of Fact "9", item 12) and Deighan Appraisal Assn. (*see*, Finding of Fact "9", item 13) to study residential property developments that had a combination of luxury housing, golf and beachfront property. From the data they collected, these firms were able to indicate the marginal increase in value that occurs when the property is linked to a golf course and a beachfront. In the course of performing this study, site visits were made to comparable developments in Florida with experts from the Rooney firm and local Florida appraisers. Petitioner paid $1,103.93 for this trip (*see*, Finding of Fact "9", item 28).

The data and analysis from the three aspects of the appraisal report were analyzed by the Jerome Haims Realty, Inc. ("Haims Firm") at a cost of $153,100.00 (*see*, Finding of Fact "9",

item 5). The Haims Firm's analysis resulted in the appraisal report describing the value of the Barcelona property.

In addition to the foregoing, petitioner incurred related legal expenses in the Court of Claims action. For example, petitioner began separate litigation against the Town of East Hampton to show that he would have obtained approval for the density for the homes on the parcel and for the establishment of a golf course.

Petitioner wished to provide the Court of Claims with an appreciation for the property and the surrounding neighborhood. Therefore, petitioner hired a camera crew for $2,247.39 (*see*, Finding of Fact "9", item 15), a helicopter and pilot for $1,203.50 (*see*, Finding of Fact "9", item 16) and a video production lab for $709.18 (*see*, Finding of Fact "9", item 17) to create an aerial view of the property and the homes intended for the adjacent properties. The video cassette was prepared as evidence in the Court of Claims action.

The accounting services to support the submission of the evidence were provided by Deloitte and Touche at a cost of $29,225.00 (*see*, Finding of Fact "9", item 18). Petitioner also incurred costs for court reporting (Ram Court Reporting Service - $13,328.75; *see*, Finding of Fact "9", item 19; Beth Greenberg - court reporting - $527.30; *see*, Finding of Fact "9", item 22; Alliance Reporting Service - $1,064; *see*, Finding of Fact "9", item 24), process serving (Gotcha Legal Process Svc. - $120.00; *see*, Finding of Fact "9", item 26), and courier and copying fees which were incurred in the course of taking and defending depositions (Federal Express - $44.50; *see*, Finding of Fact "9", item 25; Echo Appellate Press, Inc. $225.23; *see,* Finding of Fact "9", item 27).

It was necessary for petitioner to gather evidence relating to the physical parcel of land. George H. Walbridge obtained evidence for preparation of a survey at a cost of $10.50 (*see*,

Finding of Fact "9", item 20). Petitioner was also required to pay the South Fork Natural Historic Society a membership fee of $35.00 in order to gather historic information regarding the Barcelona property (see, Finding of Fact "9", item 21). Lastly, petitioner paid $225.00 to the Aquebogue Abstract Corp. for an abstract of title to the property (see, Finding of Fact "9", item 23).

SUMMARY OF THE PARTIES' POSITIONS

15. It is petitioner's position that the imposition of interest starting with the date of the transfer was a taking of property without just compensation and due process of law. Petitioner submits that the difference in the underpayment interest rate which petitioner was charged and the rate of interest which he received resulted in his being deprived of constitutionally mandated just compensation. According to petitioner, he should not have been charged any interest in connection with New York's taking of his property. Petitioner posits that the Division's imposition of interest was an unjust and irrational reading of the gains tax statute. It is also argued that the Division's imposition of interest failed to follow the language of the statute with respect to the meaning of the term "underpayment". Petitioner submits that the Division's imposition of interest ignored related gains tax provisions and is inconsistent with the Tax Law's treatment of installment tax payments. It is also maintained that New York State's receipt of interest from petitioner constituted unjust enrichment. Lastly, petitioner argues that the Division improperly denied petitioner's refund claim for selling expenses incurred in his Court of Claims action.

16. In response to the foregoing, the Division argues that it properly assessed interest on petitioner's supplemental condemnation award pursuant to Tax Law § 1442(a) as in effect on August 15, 1989. With respect to petitioner's argument regarding interest rates, the Division

submits that the issue was decided by the Appellate Division in *Matter of Forty Second Street Co. v. Tax Appeals Tribunal* (219 AD2d 98, 101, 641 NYS2d 151, *lv denied* 88 NY2d 807, 647 NYS2d 164). The Division further contends that petitioner could have paid the tax due on the transfer within the appropriate time and not incurred any interest costs from an underpayment of gains tax. Therefore, it is the Division's position that petitioner's situation is a product of his own making. The Division also contends that the "interest rate differential" is an inaccurate portrayal because petitioner knew the total consideration as of the Stipulation of Settlement and Discontinuance, dated October 31, 1992, and therefore, he could have paid the gains tax in full at that time. Lastly, the Division notes that petitioner agreed to the lower three percent interest rate in the Stipulation of Settlement.

With respect to the constitutional argument, the Division contends that petitioner is attacking the Tax Law on its face and that the Division of Tax Appeals does not have the jurisdiction to consider this argument. In the alternative, the Division maintains that if the Constitutional argument were to be considered, it is without merit.

The Division next contends that the imposition of interest was proper because the property's value was immutably fixed at the time of transfer. In addition, the Division maintains that the imposition of interest is consistent with the Gains Tax Law. According to the Division, petitioner's argument that the Division was unjustly enriched is without merit. Lastly, the Division maintains that it was proper for the Division to disallow appraisal fees in the calculation of original purchase price.

17. In his reply brief, petitioner argues: that the issues raised in his petition were not resolved by *Matter of Forty Second Street Co. v. Tax Appeals Tribunal* (*supra*); that petitioner could not have estimated the total consideration he would receive for the property; that the

Division's interest rate differential calculation illustrates the unconstitutional application of the law; that petitioner is not challenging the constitutionality of the statute on its face; and that petitioner has furnished adequate support for the inclusion of the appraisal fees and related expenses he incurred in the calculation of original purchase price.

CONCLUSIONS OF LAW

A. Tax Law former § 1441(1)[1] imposed a tax at a rate of ten percent on gains derived from the transfer of real property within New York State. The taking of property by eminent domain, as was the case here, constituted the transfer of an interest in real property subject to gains tax (Tax Law former § 1440[7]).

B. Tax Law former § 1440(3) defined "gain" as the "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeded the original purchase price." Tax Law former § 1440(5) defined "original purchase price" to mean:

> "the consideration 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 . . . ."

"Consideration," in turn, was defined by Tax Law former § 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."

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[1] Article 31-B of the Tax Law was repealed by chapter 309 of the Laws of 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996.

C. According to Tax Law former § 1442(a), as in effect at the time of the transfer on August 15, 1989, the gains tax "shall be paid . . . no later than the first business day after the date of the transfer."[2]

D. Petitioner's first argument arises from the difference in the interest rates between (1) that which New York State was required to pay petitioner because of the delay between the time of the taking in the condemnation proceeding and the payment of the award and (2) the interest rate which the transferor of the property is required to pay New York State because of the delay between the time that the gains tax is due and the time that the tax is remitted to New York State. Petitioner notes that the interest rates paid on late payments of condemnation awards and the interest rate paid on deficiencies of gains tax were determined under different provisions of the law. Petitioner's brief then presents a chart illustrating the fact that the interest rate charged petitioner on the tax underpayments was, with the exception of a short period in 1992, always higher than the interest rate he received as a result of the transfer. It is further submitted that this result is exacerbated by the fact that the condemnation interest rate which New York paid petitioner was simple interest while the interest rate which petitioner was charged was compounded daily. It is petitioner's position that because the underpayment rate exceeded the rate paid on petitioner's condemnation award, he was left with a net amount which was less than the just compensation he was constitutionally required to receive.

E. Initially, it is noted that while the Division of Taxation is correct that the Division of Tax Appeals does not have the authority to rule on the facial constitutionality of a statute, it is

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[2] On April 19, 1989, which is approximately four months prior to the transfer, chapter 61 of the Laws of 1989 amended Tax Law § 1442(a) to provide that the tax was due no later than the first business day after the date of the transfer.

concluded that the issue raised by petitioner does not raise such a question. In determining whether an argument involves a question of facial constitutionality, the question is whether the decision depends on the application of a particular statutory provision to certain facts (*Matter of New Milford Tractor, Co., Inc*., Tax Appeals Tribunal, September 1, 1994). As pointed out by petitioner, in order to resolve the instant petition, one must examine the particular facts involved in New York's condemnation of the property. This inquiry constitutes a challenge to the statute as applied. Therefore, the issue raised by petitioner may be resolved by the Division of Tax Appeals.

F. The Division has correctly noted that a similar factual pattern was presented in *Matter of Forty Second Street Co. v. Tax Appeals Tribunal* (*supra)*. In *Forty Second Street* the New York State Urban Development Corporation ("UDC") condemned petitioner's property. Subsequently, petitioner submitted a gains tax transferor questionnaire stating that there had not been an advance payment and that the amount of the consideration had not been determined. Petitioner also made an election to pay its real property gains tax in installments. After several months, the Division issued a tentative assessment stating that no tax was due.

Approximately one year after the transfer of title, the UDC made an advance payment offer of $3,500,000.00. Petitioner accepted the offer as a partial payment and reported to the Division the compensation and tax due of $285,471.00. The Division then issued a tentative assessment and return stating that the total amount due was $318,240.82 which included the tax as determined by petitioner and interest accrued from the date of transfer. After paying the tax and interest, petitioner filed for a refund of the interest.

The Tax Appeals Tribunal denied the refund request which prompted petitioner to commence an Article 78 proceeding. In the course of the proceeding, petitioner argued that it

was irrational for the Tax Appeals Tribunal to determine that the tax was due within 15 days of the transfer since the amount of the consideration had not been determined and was not determinable at that time. In support of its position, petitioner relied upon the "open transaction rule" which states that, when the receipt of income or gain is contingent upon the occurrence of an event which is to take place in the future, tax may not be imposed on the same until the income or gain is actually received. In response to this argument, the Court agreed with the Tribunal that:

> "[T]he circumstances triggering the application of the rule are not present here, for the amount of consideration to be paid in a condemnation case is not dependent on any event which may occur after the transfer. While the fair market value of the property as of the transfer date - and thus the precise amount to be paid - may not be known by the parties until later, the property's value is immutably fixed on that date; significantly, that value is in no way contingent on indeterminate future events. Accordingly, it is not improper to impose a tax based on that value at the time of the taking.
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> "Nor is it as petitioner suggests, unfair or unreasonable for the Division to charge interest on the tax due, as it has here, from the date of the transfer. Though not actually in possession of the money to be paid for its property, the taxpayer becomes entitled to it as soon as title is acquired by the condemner, and, for that reason receives interest to compensate for any delay in actual payment. Inasmuch as the condemner is legally mandated to afford the taxpayer just compensation, including any gain the taxpayer may realize as a result of the transfer, upon the vesting of title (and, accordingly, must compensate the latter for its use of the money thereafter), it is not irrational or unfair to require payment of the transfer gains tax at that time and to assess interest if it is not paid." (*Matter of Forty Second Street Co. v. Tax Appeals Tribunal, supra,* 641 NYS2d at 152-153; citations omitted.)

In a footnote, the Court stated that the impact of its analysis on the discrepancy between the interest rate charged by the Division and that paid by the condemner of the property would not be addressed because it had not been properly preserved for review.

G. Although the Court in *Forty Second Street Company* did not directly rule on the issue presented in petitioner's brief, the analysis presented in the case is helpful. First, as noted above,

the tax was due on the first business day following the transfer (*see*, Conclusion of Law "C", *supra*). Petitioner did not remit the tax when due. Under these circumstances, it was not unreasonable for the Division to charge interest from the time that the tax became due and assess interest from that time forward (*Matter of Forty Second Street Co. v. Tax Appeals Tribunal*, *supra,* 641 NYS2d at 153). If petitioner did not wish to be assessed interest, the obvious solution would have been to remit the tax when due. In this regard, petitioner's position is far less sympathetic than that of the taxpayers in either *Matter of Forty Second Street Co. v. Tax Appeals Tribunal* (*supra*) or *Matter of E.L.C. Hotel Corp.*) (Tax Appeals Tribunal, April 6, 1995, *confirmed* 226 AD2d 852, 640 NYS2d 823, *lv denied* 88 NY2d 807, 647 NYS2d 164). In each of those cases, interest was imposed on the underpayment of gains tax prior to the taxpayers' receipt of any consideration. Here, New York State made a significant payment of compensation for the taking which presumably could have been applied to satisfy the gains tax obligation.

It is evident from the foregoing that, if the difference in interest rates resulted in a failure to receive the amount of compensation to which he was entitled, the loss was created by petitioner's failure to pay the taxes when due. Under these circumstances, there has not been an unconstitutional taking of property without just compensation.

In reaching the foregoing conclusion, it is noted that petitioner's attempt to limit the applicability of *Matter of Forty Second Street Co. v. Tax Appeals Tribunal* (*supra*) has been considered and rejected. Although the Court expressly declined to rule on the impact of the discrepancy between the interest rate charged by the Division on the underpayment of tax and that paid by the State following the condemnation, the reasoning employed by the Court may be followed to the extent that it is applicable.

The argument in petitioner's reply brief that the Division's interest rate differential calculation demonstrates the unconstitutional application of the gains tax statute is also without merit.[3] Regardless of whether the three percent interest rate in the Stipulation of Settlement was the result of balanced negotiations or dictated by the State, petitioner voluntarily chose not to pay the gains tax when due. It was this decision which caused a loss from the difference in interest rates.

H. Petitioner next argues that he should not have been charged any interest for the underpayment of tax in connection with New York State's taking of his property. Petitioner submits that his:

> "alleged delay in payment of the Gains Tax resulting from the Transfer — the basis for the DTF's imposition of underpayment interest — was solely the result of the State's decision to delay and contest payment of any additional consideration for the Property far beyond the expiration of the fifteen-day period for Petitioner's payment of Gains Tax. In a scenario reminiscent of a scene from Lewis Carroll's 'Alice in Wonderland,' the State caused Petitioner's alleged tax violation through its delay and intransigence and then sought to punish him for, and profit from, the State's own conduct.
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> "The State's provision of $634,545 of interest to Petitioner in satisfaction of its constitutional obligations, when coupled with its elimination of such interest and its reduction of the condemnation award itself by seeking underpayment interest of $990,602 from Petitioner for a payment delay solely within the State's control, left Petitioner with less than just compensation." (Petitioner's brief, pp. 15-16.)

Petitioner's brief also maintains that any assertion that he should have estimated the consideration he would receive for the property and the gains tax he would owe is untenable.

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[3] In its brief, the Division presented a chart showing the difference between the amount of interest which petitioner had to pay because of the underpayment of gains tax and the amount of interest which petitioner received because of the late payment by the State of the amount he was due because of the taking of his property.

Petitioner submits that there are two reasons why the amount of consideration was not determinable at the time the property was transferred. First, petitioner contends that the gains tax is based on the actual consideration that a property transferor receives for his property and not some theoretical market value. According to petitioner, since there is no legal basis for requiring a gains tax payment until the consideration has been received, he was not required to estimate the value of the property. Second, petitioner argues that he spent months and hundreds of thousands of dollars to establish the value of the property using several appraisal firms and extensive litigation before New York conceded that it should pay additional consideration. It is petitioner's position that he could not have performed this work and obtained an accurate estimate of the value of the property upon which to make a gains tax payment before interest for underpayment began to accrue. According to petitioner, the onus should be on the State to timely value the property it seeks to acquire.

I. The foregoing argument has already been resolved. In *Matter of E.L.C. Hotel Corporation* (*supra*) the petitioner similarly argued that when property is taken by eminent domain and payment is not made until well after the passing of title, interest should not be imposed. In response to this argument, the Tribunal stated:

> "We appreciate that petitioners could not precisely calculate the amount of tax due at the time of transfer. However, for the taking of their properties, petitioners were entitled to receive the market value of their properties at the time the properties were appropriated *(Matter of Town of Islip*, 49 NY2d 354, 426 NYS2d 220). Given this standard, petitioners could have estimated the tax due on the transfer and paid the tax within 15 days of the transfer. If petitioners overestimated the amount of tax due, they would receive interest under section 1446(1) on this overpayment of tax."

Similarly, in this instance, the fact that petitioner could not precisely calculate the amount of tax due does not excuse the failure to pay the tax at the time of the transfer on the basis of an

estimate of the market value of the property. As the Tribunal noted in *Matter of E.L.C. Hotel Corporation* (*supra*), if petitioner overestimated the amount of tax due, he would receive interest under Tax law § 1446(1).

J. Petitioner' next argument is that the Division's imposition of interest was an unjust and irrational reading of the gains tax statute. Petitioner states:

> "The DTF's imposition of underpayment interest starting sixteen days after the Transfer (August 15, 1989) on the Gains Tax attributable to the additional $19,550,000.00 payment that Petitioner first became entitled to on April 15, 1993 was incorrect given the absurd and manifestly unjust result derived from such a 'literal' application of the provision, Tax Law Section 1446(1), to the facts presented here. Any underpayment interest should have begun to accrue on May 1, 1993, sixteen days after Petitioner first became legally entitled to the additional proceeds. Because Petitioner paid the Gains Tax due on the additional sum of April 15, 1993, no underpayment interest was due." (Petitioner's brief p. 19.)

K. Petitioner's position is meritless. The Tribunal has defined the term "underpayment" to mean a payment of less than the amount due (*Matter of Forty Second Street Company*, Tax Appeals Tribunal, April 6, 1995). Here, where the payment was not made when due, there was obviously an underpayment of tax. Moreover, petitioner's argument that it was irrational to impose interest before he received a payment from New York, was rejected by the Court in *Matter of Forty Second Street Co. v. Tax Appeals Tribunal* (*supra*; *see*, Conclusion of Law "F", *supra*, [which quotes a pertinent part of the decision]; *see also, Matter of E.L.C. Hotel Corporation*, *supra)*.

L. Petitioner's next argument is that the Division's imposition of interest failed to follow a plain reading of the statute and overlooked related statutory provisions. Initially, petitioner states that the Division failed to adhere to a plain reading of the term "underpayment". According to petitioner:

> "Only after Petitioner's right to the additional consideration the State was required to pay became fixed and certain by stipulation, which did not occur until April 15, 1993, did the DTF's claim to additional Gains Tax arise. Petitioner timely paid the Gains Tax assessed on the additional sum he received. There was, therefore, never a payment of less than what the DTF claimed or deserved; there was never an 'underpayment.'"(Petitioner's brief, p.21.)

M. The foregoing argument was rejected by the Tax Appeals Tribunal in *Matter of E.L.C. Hotel Corporation* (*supra*). In this case, the Tax Appeals Tribunal stated:

> "Section 1446(1) of the Tax Law provides that interest is due on any underpayment of tax. Although underpayment is not defined, we think its obvious meaning is a payment that is less than the amount of tax due. Because tax was due on these transfers 15 days after the date of each transfer and no tax was paid at this time, we conclude that there was an underpayment of tax upon which interest accrued."

N. Petitioner next contends that the Division's imposition of interest on the underpayment of tax is inconsistent with the Tax Law's treatment of installment payments. Petitioner argues that, prior to 1989, when a taxpayer sold property on a installment basis and decided to pay the gains tax on an installment basis, the gains tax payments were due as the consideration was received. In this situation, property transferors were not required to pay interest on the deferral of their gains tax liabilities. In 1989, Tax Law § 1446 was amended to impose interest on a property transferor's deferred gains tax liability where the transferor elected to utilize the installment method. Petitioner posits that if the Division's position were correct, an amendment to the Tax Law would have been unnecessary. Petitioner maintains that:

> " the 1989 amendment did not address contingent payments such as the undetermined condemnation consideration due petitioner on the property transfer date. Accordingly, in the absence of a corresponding statutory amendment, the DTF clearly was not authorized to impose interest in the much more attenuated situation where the consideration and resulting tax are not ascertainable at the time the property is transferred." (Petitioner's brief, p.25.)

O. As the Division noted in its brief, petitioner's argument proceeds on a faulty premise.

Although the value of the property may not be known until a later date, the value of the property is immutably fixed on the date of transfer and therefore the value is not contingent on indeterminate future events (*Matter of Forty Second Street Co. v. Tax Appeals Tribunal*, *supra*). Since section 1446(1) of the Tax Law authorized the imposition of interest when there was an underpayment of tax, there was no need for an additional statutory amendment to assess interest on the underpayment at issue herein. Moreover, it has been recognized that the imposition of interest in the situation presented herein is neither irrational nor unfair (*Matter of Forty Second Street Co. v. Tax Appeals Tribunal*, *supra*).

P. Petitioner next argues that New York's receipt of interest from petitioner constituted unjust enrichment. Petitioner's brief states that:

> "[i]n seeking underpayment interest from Petitioner, the State failed to recognize that at all times it was in possession and control of the amount of funds in question, including the amounts used to pay the Gains Tax that it determined Petitioner ultimately owed. Therefore, the State had the use of such funds and the ability to earn a return thereon throughout the period for which it has imposed interest. Accordingly, the State is entitled to no additional compensation for the fact that the Gains Tax was paid after the Property was transferred." (Petitioner's brief, pp. 27-28.)

According to petitioner, the fiction inherent in the Division's actions is the idea that the New York State Department of Environmental Conservation and the Department of Taxation and Finance are completely unconnected. Petitioner submits that they are components of the same governmental body. Petitioner further maintains that charging interest for a period for which the amount of consideration was allegedly contingent and uncertain transgresses the rule that interest is not recoverable on claims that are unliquidated and not ascertainable.

Q. The foregoing arguments have already been addressed. As noted earlier, in *Matter of Forty Second Street Co. v. Tax Appeals Tribunal* (*supra*), the Court reasoned that since New

York must compensate petitioner from the time of the transfer, it is not unreasonable to require the payment of gains tax starting at the same time. The same decision also held that the fair market value of the property was immutably fixed as of the transfer date and therefore the value was "in no way contingent on indeterminate future events." (*Matter of Forty Second Street Co. v. Tax Appeals Tribunal*, 219 AD2d 98, 641 NYS2d 151, 153.)

R. Petitioner's last point is that the Division improperly denied petitioner's refund claim for the selling expenses which he incurred in his Court of Claims action. Petitioner notes that as part of his refund claim he included certain appraisal fees and related expenses in prosecuting his claim in the Court of Claims. Petitioner submits that the appraisal fees were required in the Court of Claims proceeding in order for petitioner to receive the proper amount of consideration for the sale of the property.

Petitioner notes that he was entitled to the fair market value of the property at the time of the transfer and that he bore the burden of proving the right to additional compensation. To meet this burden, he engaged and his counsel engaged, on petitioner's behalf, several appraisers to perform extensive and sophisticated valuation studies on the property. Petitioner submits that in determining that the appraisal fees and related costs in the Court of Claims action were not allowable selling expenses under 20 NYCRR 590.18, the Division ignored the fact that the Eminent Domain Procedure Law, Court of Claims Act and the Uniform Rules of the Court of Claims contemplate that appraisal evidence and testimony of appraisers will be used by the claimant to prove that he has not received just compensation. Petitioner submits that "[t]o claim that any expenses other than those reflecting the actual time and work of licensed attorneys cannot constitute 'customary, reasonable and necessary legal fees' ignores both the purpose underlying the allowable selling expenses regulation, and the nature of legal proceedings

connected with a transfer of real property by eminent domain." (Petitioner's brief, p. 34.) Petitioner contends that although he paid the appraisal fees and expenses directly to the appraisal and related service companies, the services were critical to petitioner's case and clearly qualified as "customary, reasonable and necessary legal fees" in a case where there is a challenge to the sufficiency of the consideration in an eminent domain proceeding.

In response to the foregoing, the Division states, among other things:

> "Petitioner has failed to show how any of the disputed accounts come within the statutory definition of original purchase price. Moreover, some of the costs do not even seem to be related to petitioner's Court of Claims matter. For example, petitioner has failed to show how his payment of $35.00 to the 'South Fork Nat. Hist. Soc.' would qualify as a legal fee. Or why $1,103.93 American Express charge for a 'Florida appraisal trip' should be included in original purchase price as a legal fee. Similarly, the various fees by the court reporters (i.e., the invoices from Beth Greenberg and RAM Court Reporting service and Alliance Reporting Service all reference depositions taken in another legal matter, **Heller v. Town of East Hampton**, not petitioner's Court of Claims matter against the State of New York [Exhibit C]). (Emphasis in original.) (Division's brief, p. 20.)

The Division further argues that the Tax Appeals Tribunal has concluded that accounting or appraisal fees are not allowed as selling expenses and that selling expenses do not include all fees that are legally necessary to effectuate a transfer. It is also argued that acceptance of petitioner's argument would place him in a better position than other transferors.

In response to the foregoing, petitioner reiterates his position that the appraisal fees and expenses were required in order for petitioner to meet his burden of proof that New York had failed to pay the required just compensation for his property. Petitioner's brief then reiterates many of the facts set forth in an affidavit regarding the preparation of the appraisal report and concludes that in the absence of the legal expenses which totaled $350,485.77, he would not have been able to introduce the required evidence in the Court of Claims or cause New York to settle

on the eve of trial and pay substantial additional consideration. Petitioner also argues that the cases relied upon by the Division are inapposite.

S. At the time that the transfer occurred, Tax Law former § 1440(5) provided, in part, that:

> "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 . . . ."

The Commissioner's regulations similarly provided that:

> "Original purchase price may be increased by any customary, reasonable and necessary legal . . . fees . . . paid by the transferor in selling real property." (20 NYCRR 590.18, formerly numbered 20 NYCRR 590.17.)

T. Here, the Division disallowed expenses totaling $350,485.77 which account for $35,048.58 of petitioner's refund claim. At the same time it allowed a partial refund of $125,878.45 plus interest. In doing so, the Division allowed a portion of the fees which were incurred. Thus, the Division does not dispute the principle that the legal fees incurred in the Court of Claims litigation could be included in original purchase price and the only issue remaining is whether the remaining disallowed expenses should also be regarded as legal fees which may be included in original purchase price.

U. The evidence in the record establishes that the appraisal fees and expenses in issue were legally required in order for petitioner to prove in the Court of Claims that New York had failed to pay him just compensation for his property. However, the evidence does not establish that petitioner is entitled to the refund in issue. In *Matter of 415 C.P.W. Co.* (Tax Appeals Tribunal, March 2, 1989) the Tax Appeals Tribunal concluded that the term "legal fees" did not include the New York State Transfer Tax or the New York City Conveyance Tax. In reaching this conclusion, the Tribunal initially rejected the argument "that the Legislature meant to include

as allowable selling expenses all fees that are legally necessary to effectuate a transfer." (*Matter of C.P.W. Co., supra*). The Tribunal next explained that:

> "[t]he Legislature chose a specific term, fees, in connection with specific professional services. In the absence of a statutory definition, we defer to the ordinary meaning accorded the term *(Building Contractors Association, Inc. v. Tully*, 87 AD2d 909, 910). The term 'fee' as used here is 'a charge for a professional service' (Webster's New Collegiate Dictionary 454 [9th ed 1987]). Compare this to the legislative use of the term 'costs' (the amount or equivalent paid or charged for something) (Webster's New Collegiate Dictionary 295, *supra)* with regard to additions to OPP for capital improvements, and 'expenses' (something to secure a benefit or bring about a result) Webster's New Collegiate Dictionary, 437, *supra*) with regard to additions to OPP with regard to creation of ownership interests in real property in cooperative or condominium form in the same section, i.e., 1440.5(a). Moreover to interpret the word 'legal' more expansively than the words 'engineering' and 'architectural' - which clearly connote professional fees - would be to completely ignore a general rule of statutory construction, referred to as the rule of *noscitur a sociis* (*Mc Kinney's Cons Laws of New York*, Book 1, Statutes § 239), by which the meaning of words employed in a statute is ascertained by reference to the words by which they are associated." (*Matter of C.P.W. Co., supra.*)

It follows from the foregoing that the Division properly declined to grant a refund on the expenses in issue because they are not professional legal fees (*see also*, *Matter of Albany Public Markets, Inc.*, Tax Appeals Tribunal, August 27, 1992).

V. The petition of Ben Heller is denied.

DATED: Troy, New York
February 19, 1998

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE