STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
83RD STREET INVESTORS, L.P.	:	**DETERMINATION** DTA NO. 815232
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, 83rd Street Investors, L.P., c/o The Bromley Companies, 120 Fifth Avenue, 11th Floor, New York, New York 10011, 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 Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 24, 1997 at 10:15 A.M., with all briefs to be submitted by September 12, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Robert Friedson, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

ISSUE

Whether the Division properly denied 83rd Street Investors, L.P.'s request to include certain settlement payments in its original purchase price under Tax Law § 1440(5).

FINDINGS OF FACT

1. Petitioner, 83rd Street Investors, L.P. ("83rd Street"), was the sponsor of a condominium project known as "The Bromley Condominium". The property is located at 225 West 83rd Street in Manhattan. The condominium project consisted of 305 residential units in the offering plan and one unit not contained in the offering plan and retained as the superintendent's unit. The first sale pursuant to the offering plan occurred in February 1987. By December 27, 1989, all 305 residential units contained in the offering plan had been transferred. The final 11 units were transferred as a *pro rata* distribution in kind by petitioner to its individual partners.

2. Petitioner, among others, was a defendant in an action brought by the board of managers of the Bromley Condominium. The lawsuit involved allegations of breach of contract, breach of express warranties and negligence. In January 1995, petitioner and the condominium board of managers reached a settlement of the lawsuit. The terms of the settlement were incorporated into a settlement agreement executed by both parties, with petitioner paying over to the condominium association the sum of $1,209,375.00. The settlement agreement provided that the board and petitioner entered into the settlement solely for the purpose of avoiding further expense and litigation. The settlement agreement further provided that neither it, nor any of its terms, should be construed as an admission of liability, fault or wrongdoing of any nature by either of the parties, and any allegations of liability, fault or wrongdoing asserted in the various lawsuits were expressly denied by the parties.

3. Petitioner was audited by the Division of Taxation ("Division") in connection with the condominium project. As part of the audit, the total original purchase price of the project was computed to be $70,656,726.00, of which 3.61% was allocated to the 11 units distributed to the

individual partners. The Division treated the condominium project as a sell-out because title to all units had been transferred.

4. On February 7, 1995, petitioner filed a Claim for Refund of Real Property Transfer Gains Tax requesting a refund of $230,549.00. It is uncontested that this refund was timely filed under Tax Law former § 1445(1)(a) and (c). For purposes of clarity, the substance of the refund can be divided into two segments:

(a) petitioner claimed that the settlement agreement obligated it to pay to the board of managers of The Bromley Condominium the sum of $1,209,375.00 in settlement of all claims;

(b) petitioner claimed to have incurred additional costs for professional, architectural, engineering and construction services in the amount of $1,385,901.00.

5. On May 10, 1995, the Division issued its response to petitioner's refund claim. The Division denied the refund claim, based on the position that the cost of the capital improvements were fixed at the time of the transfer and could not be increased as a result of the taxpayer's incurring additional costs to settle litigation concerning the construction of the condominium units.

6. During the course of the hearing, petitioner introduced into the record of this matter various invoices in support of the claimed professional, architectural, engineering and construction costs:

(a) 13 invoices totaling $36,555.00 for engineering services for the period February 4, 1992 through April 4, 1994;

(b) 35 invoices totaling $114,258.25 for professional services for the period April 30, 1992 through September 30, 1995;

(c) 9 invoices totaling $13,089.91 for construction services for the period July 14, 1993 through November 9, 1994; and

(d) a statement that 6 invoices totaling $5,397.02 for construction services for the period March 9, 1992 through September 30, 1994 were missing.

CONCLUSIONS OF LAW

A. Tax Law former § 1445(1) provides, in part, as follows:

> "(a) General. A person claiming to have erroneously paid the tax imposed by this article may file an application for refund within two years from either the date of transfer or the date of payment, whichever is later.
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> * * *
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> "(c) Condominium or cooperative plan or aggregated transfer. Provided however, that in the case of a transfer pursuant to a condominium or cooperative plan, or aggregated transfer, an application for refund may be filed with respect to any such transfer within two years from the date of the last transfer made pursuant to such plan or aggregated transfer or from the date on which the tax was paid, whichever is later . . . ."

B. The gains tax was imposed on the "gains derived from the transfer of real property within the state" (Tax Law former § 1441). Gain is the difference between the consideration and the original purchase price for the real property (Tax Law former § 1440 [3]). Pursuant to section 1440(1)(a) of the Tax Law, consideration is generally the price paid or required to be paid for the real property. In turn, original purchase price is:

> "the consideration paid or required to be paid by the transferor (A) to acquire the interest in real property, and (B) for any capital improvements made or required to be made to such real property . . ." (Tax Law former § 1444[5][a][i]).

C. Tax Law former § 1440(1)(a) defines "consideration" as follows:

> "'Consideration' means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or

> contract to purchase or use real property. 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 incumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation."

D. The issue presented in this matter involves the question of whether petitioner may properly adjust its consideration or original purchase price to include a post-transfer settlement of litigation relating to the construction of the condominium units. The Tax Appeals Tribunal has addressed this issue in a case involving a very similar factual setting. In *Matter of Rhinebeck Farms Development Corporation* (Tax Appeals Tribunal, August 18, 1994), the taxpayer sought a refund of previously paid gains tax based on post-transfer litigation settlement payments. In determining whether the taxpayer was entitled to a refund[1], the Tribunal stated that:

> "[to] obtain a refund, petitioner would have to show that the settlement payments represented amounts of consideration petitioner paid or was required to pay for any capital improvements made or required to be made to the real property at the time of transfer. In other words, petitioner would have to show: 1) that it was required to make capital improvements in a manner other than made, and 2) what the costs of the required capital improvements would have been at the time of the transfer."

In the present matter, at the time of the transfer, it had not as yet been established whether petitioner was required to make capital improvements in a manner other than made and the costs of such capital improvements. There are absolutely no specifics presented by petitioner regarding the use of the funds for capital improvements or what the costs would have been at the

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[1] *Matter of Rhinebeck Farms Development Corporation* was remanded to the Administrative Law Judge for a determination of whether the taxpayer met the requirements for entitlement to the refund claim as outlined by the Tribunal.

time of transfer. In addition, the settlement agreement specifically stated that the sole purpose of the payment was to avoid further expense and litigation and that neither party admitted to any liability, fault or wrongdoing connected with the lawsuit. It is beyond dispute that the parties to the settlement agreement agreed that the payment made pursuant to the agreement was for the resolution of litigation and not a capital expense. The payments for the engineers, professionals and contractors were not paid or required to be paid on the date of transfer, as required by Tax Law former § 1440(5)(a). Nor was petitioner, on the date of transfer, obligated to pay for any capital improvements made or required to be made to the real property. Unlike the *Matter of V & V Properties* (Tax Appeals Tribunal, July 16, 1992), where the requirement to make the post-transfer payment was created by a written agreement existing at the date of transfer, there is nothing in the record which establishes that the settlement costs were required to be paid by petitioner at the time the transfer occurred.

Petitioner's attempt to distinguish the factual pattern of the present matter from that contained in the *Rhinebeck* decision is unpersuasive. Petitioner argues that the present matter does not involve a complete sell-out because the Division allocated 3.61% of the original purchase price to the apartment units that had been transferred to the partners. According to petitioner, if the Division considered this condominium project a sell-out, such allocation would have been unnecessary. However, the transfer of the final 11 units to the partners involved a change of title sufficient to bring the transfers within the meaning of the term "Transfer of real property" as that term is defined in Tax Law former § 1440(7). Petitioner no longer retained title to any of the 11 units. Moreover, the 3.61% of the basis was allocated to the 11 units to allow for their new owners to have a basis when the gains tax was calculated upon the units' future sales for consideration.

E. In *Matter of Cheltoncort Co.* (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).

The Appellate Division has also made it clear that consideration for the transfer must be determined at the time of transfer and is not reduced by subsequent events (*Matter of Brockman v. Tax Appeals Tribunal,* ___ AD2d ___, 656 NYS2d 429; *Matter of Fazkap Associates v. Commn. Of NYS Dept. Of Taxation and Finance,* 232 AD2d 747, 648 NYS2d 186; *Matter of South Suffolk Recreation Ventures v. Tax Appeals Tribunal,* 224 AD2d 874, 638 NYS2d 515, *lv denied* 88 NY2d 803, 645 NYS2d 446). Similarly, in *Matter of V & V Properties (supra),* the Tribunal held that original purchase price is also fixed at the time of the transfer and cannot be reduced because the transferor did not in fact pay all that he was required to pay to acquire the property.

Therefore, under *Rhinebeck*, *V & V Properties*, *Cheltoncort* and the progeny of cases that have followed, petitioner's taxable gain cannot be reduced by the amount of the settlement costs as the consideration and original purchase price were established at the time of transfer.

F. Even were it to be found that petitioner could reduce its taxable gain by the amount of the settlement costs, those costs would be limited to the amount paid pursuant to the settlement agreement ($1,209,375.00) plus the amount of the expenses established at the hearing to have been actually incurred ($163,903.16).

G. The petition of 83rd Street Investors, L.P. is denied, and the Division's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
February 12, 1998

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE