

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MALBA COVE PROPERTIES, INC. : DETERMINATION
for Revision of a Determination or for Refund of Tax on : DTA NO. 823671
Gains Derived from Certain Real Property Transfers under :
Article 31-B of the Tax Law. :

Petitioner, Malba Cove Properties, Inc., 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.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (David Gannon, Esq., of counsel), brought a motion dated December 29, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Petitioner, by Howard M. Koff, Esq., filed a cross motion for summary determination dated January 14, 2011 seeking summary determination in this matter pursuant to sections 3000.5 and 3000.9 of the Rules. The Division filed a memorandum in response to petitioner's cross motion dated February 28, 2011, having been granted an extension until that date to do so. Accordingly, the 90-day period for the issuance of this determination commenced on February 28, 2011. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings filed in connection with this matter, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether a transfer of real property from petitioner to the City of New York, made pursuant to a court order in a condemnation proceeding, occurred prior to the repeal of the real property transfer gains tax, thereby subjecting the gains derived from such transfer to the tax.

FINDINGS OF FACT

1. In December 1995, the City of New York (City) commenced a condemnation proceeding in New York State Supreme Court, Queens County, seeking to obtain title to certain real property located in the Borough of Queens, New York. The property consists of vacant waterfront land located on the northern side of Eleventh Avenue, between 135th and 138th Streets, Queens, New York. It is adjacent to Powell's Cove, a shallow body of water on the Long Island Sound. The City sought title for the purpose of creating Powell's Cove Environmental Waterfront Park. The City's petition in the condemnation proceeding named petitioner herein, Malba Cove Properties, Inc. (Malba), and the State of New York (State) as defendants.

2. The State responded by filing a cross-motion for the dismissal of the City's petition on the grounds that the State was the owner of the subject property; that the City lacked the authority to condemn State-owned property; and that the court therefore lacked jurisdiction over the State. Specifically, the State alleged in the motion that the real property that was the subject of the condemnation proceeding "lie[s] below the mean high water line and are therefore lands owned by the State."

3. By court order filed on February 29, 1996, the City was permitted to withdraw its condemnation application as it applied to the State, and its petition to condemn the subject property was granted, "subject to the interests of the State of New York, if any." The order

further authorized the filing of an acquisition map dated January 1, 1996 and provided that the City's title to the subject property would vest as of the date of filing of the order.

4. After the City took title pursuant to the February 29, 1996 order, it made significant physical changes to the property. The park (*see* Finding of Fact 1) was completed at least as of a September 5, 2001 court inspection made as part of the condemnation proceeding.

5. The vesting of title notwithstanding, the City initially refused to make an advance payment of the compensation due Malba for the subject real property, claiming that the City itself owned the property. By notice of motion dated April 10, 1997, Malba sought an order compelling the City to issue an advance payment. In opposition, the City argued that the property is land now or formerly under the waters of Powell's Cove, so that the City held title to the subject parcels pursuant to three Colonial Patents. In response, Malba argued that its title to the subject property could be traced back to a Colonial Patent and that the property "has been privately owned and controlled since that time." The State was not served with papers related to the April 10, 1997 motion.

6. Following lengthy litigation, the court, by decision and order dated October 30, 2001, held that Malba had established title to the disputed parcels and ordered the City to make an advance payment.

7. Despite the October 30, 2001 order, the City refused to make an advance payment and further litigation ensued. In an order and decision dated February 10, 2004, the court granted Malba's motion to compel the City to make an advance payment pursuant to the October 30, 2001 decision. The February 10, 2004 decision found that Malba had previously established its title to the subject property and that the City was collaterally estopped from further litigating the

issue of title. Thereafter, the City brought a motion to reargue the February 10, 2004 decision. That motion was denied by an order and decision dated August 6, 2004.

8. The City next moved for an order to interplead the State into the condemnation proceeding. Pursuant to an order and decision dated November 15, 2004, the City's motion was denied. In its decision the court found that when the City made the determination that it would take title to the property subject to the State's interest (*see* Finding of Fact 3), it elected to forego litigating the issue of the State's interest in the subject property in the condemnation proceeding. The court further noted that it had considered the issue of title to the property on three separate occasions and had rendered three decisions in which it found that Malba held title.

9. On May 17, 2005, Malba received an advance payment from the City in the amount of \$880,000.00, plus interest. On April 12, 2006, an additional \$10,000.00 was received.

10. Following a trial, by decision and order dated February 15, 2007, the value of the property as of the February 29, 1996 date of vesting was established as \$9,067,480.00. Pursuant to a Final Decree dated and filed June 7, 2007 the City was ordered to pay Malba \$9,067,480.00, plus interest from the title vesting date of February 29, 1996. The City appealed the Final Decree, but later withdrew its appeal.

11. Final payment to petitioner from the City was made in or about September 2008. In accordance with the Final Decree, total compensation for the subject real property was \$9,067,480.00, plus interest from February 29, 1996.

12. On September 4, 2008, petitioner filed a Real Property Transfer Gains Tax Questionnaire reporting taxable gain on the condemnation transfer of \$7,829,472.00 and tax due on such gain of \$782,947.00. On the questionnaire petitioner stated its position that the instant transfer was not subject to the gains tax given the repeal of Article 31-B many years prior to the

resolution of the condemnation proceeding and the City's payment of the condemnation award. Petitioner further indicted that if the Division proposed to tax the transfer, it would be paid under protest and challenged.

13. On October 6, 2008, the Division issued to petitioner a Notice of Determination asserting gains tax due in the amount as calculated by petitioner on its Gains Tax Questionnaire, and also asserting interest, calculated from March 15, 1996 (the due date for the filing of the Gains Tax Questionnaire and payment of tax) and penalty for a total amount due of \$2,424,389.06. By letter dated October 9, 2008, the Division cancelled the penalty as asserted in the Notice of Determination. In December 2008, petitioner paid, under protest, all tax and interest due pursuant to the Notice of Determination and now seeks a refund of that amount.

CONCLUSIONS OF LAW

A. This matter is properly resolved by summary determination because there are no material facts in dispute (*see* 20 NYCRR 3000.9[b][1]).

B. The former real property transfer gains tax imposed under Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180). The provisions of Article 31-B and regulations promulgated thereunder remain in effect with respect to transfers of real property that occurred before June 15, 1996 (L 1996, ch 309, § 180).

C. Former Article 31-B imposed a tax at the rate of 10 percent upon gains derived from the transfer of real property within the State of New York (Tax Law former § 1441). Tax was due within 15 days of the transfer (Tax Law former § 1442[a]) and interest is due on any late payment of tax (Tax Law former § 1446[1]).

D. A transfer of real property under former Article 31-B means “the transfer of any interest in real property by any method” and includes “taking by eminent domain” (Tax Law former § 1440[7][a]). This definition thus includes an acquisition by condemnation, such as the City’s acquisition of the subject real property (*see Matter of Forty Second Street Company v. Tax Appeals Tribunal*, 219 AD2d 98, 641 NYS2d 151 [3d Dept 1996], *lv denied* 88 NY2d 807 [1998]).

E. Here, the Supreme Court order authorizing the filing of an acquisition map and granting the City’s condemnation petition was filed, along with the acquisition map, on February 29, 1996 (*see* Finding of Fact 3). Pursuant to Eminent Domain Procedure Law (EDPL) § 402(B)(5),¹ and as noted in the order, the City’s acquisition of the subject property was complete and its title to the subject property became vested upon the filing of the order and the acquisition map. The transfer at issue thus occurred on February 29, 1996, before the June 15, 1996 gains tax repeal date. Accordingly, the provisions of Article 31-B remained in effect for the subject transfer and any gains derived therefrom were properly subject to the gains tax.

F. Petitioner contends that the gains tax does not apply to the Malba condemnation under the “open transaction rule” pursuant to which “no tax may be imposed on income or gain, the receipt of which is contingent on the occurrence of future events, until the sums are actually received” (*Matter of Forty Second Street Company v. Tax Appeals Tribunal*, 219 AD2d at 100 641 NYS2d at 152). Petitioner asserts that the subject transaction remained open until at least October 30, 2001, when the court issued a decision in favor of petitioner on the title issue (*see*

¹ Specifically, EDPL § 402(B)(5) states, in relevant part: “Upon the filing of the order and the acquisition map, the acquisition of the property in such map shall be complete and title to such property shall then be vested in the condemnor.”

Finding of Fact 6). According to petitioner, then, since the transaction was not closed until well after the 1996 repeal of Article 31-B, it was not subject to the gains tax.

In *Forty Second Street*, the Appellate Division found that the circumstances triggering the application of the open transaction rule were *not* present in a condemnation proceeding where the amount of consideration was undetermined at the time of the transfer, explaining:

[T]he amount of consideration to be paid in a condemnation case is not dependent on any event which may occur after the transfer (*see Matter of Cheltoncort Co. v. Tax Appeals Tribunal of State of N.Y.*, 185 AD2d 49, 53, 592 NYS2d 121 [3d Dept. 1992]). While the fair market value of the property as of the transfer date - and thus the precise amount to be paid (*see e.g. Town of Islip [Mascioli]*, 49 NY2d 354, 360, 426 NYS2d 220 [1980]) - may not actually 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. (642 NYS2d at 152, 153)

Petitioner contends that the City's claim of title to the subject property and the ensuing litigation distinguishes this matter from *Forty Second Street* and triggers the open transaction rule. Specifically, petitioner contends that the City's claim of title and claims regarding the State's interest in the property brought into question petitioner's right to receive *any* compensation in connection with the condemnation and that the resolution of the title question was wholly contingent upon an indeterminate future event, identified by petitioner as its successful litigation of the title dispute.

Petitioner thus seeks to draw a line between a dispute over the amount of compensation payable in a condemnation proceeding and a dispute over the title to the property in such a proceeding. For purposes of the open transaction rule, however, these differences are insignificant. Similar to the fair market value at issue in *Forty Second Street*, resolution of the title issue in petitioner's condemnation proceeding was in no way dependent on any event

occurring after the transfer. To the contrary, whatever rights petitioner, the City or the State had in the subject property, such rights were immutable as of the transfer date. Like the resolution of the fair market value issue in *Forty Second Street*, the litigation involving petitioner and the City looked back to resolve the competing claims to the property as of the transfer date. Accordingly, the litigation of the title issue in the condemnation proceeding was no more an indeterminate future event for open transaction rule purposes than the litigation of fair market value as occurred in *Forty Second Street*.

The instant circumstances are clearly unlike those of *Burnet v. Logan* (283 US 404 [1931]) cited in petitioner's brief as an example of an open transaction. In that case, a sale of stock in a mining company in exchange for cash plus a percentage of the company's future sales was ultimately determined to be an open transaction, taxable only after the sum of the payments to the seller exceeded her basis in the stock. The Court found that the seller's gain on the transaction and thus her income tax liability was contingent upon future events, i.e., the company's future sales. Here, in contrast, although claims were raised regarding petitioner's title subsequent to the transfer, those claims were resolved by the court's consideration of evidence of title as of the vesting date. Resolution of those claims was not contingent, therefore, on any future event. Indeed, consistent with a finding that the transaction was closed as of February 29, 1996, the award of just compensation includes interest payable from the vesting date (*see* Finding of Fact 9).

G. Petitioner also contends that the "disputed income" rule prevents the application of the gains tax in this case. As described by petitioner, this rule provides that when there is a dispute as to whether a taxpayer has the right to receive an item of income, and the item is not reduced to the taxpayer's possession, such income is not taxable unless and until the dispute is settled by the

parties or through a court judgment or court-approved settlement (*see e.g. Cory v. Commr.*, 23 TC 775 [1955] *affd* 230 F2d 941 [1956], *cert denied* 352 US 828 [1956]; Rev Rul 70-109).

Pursuant to this rule, petitioner contends that since full payment of compensation was not made until 2008 (*see* Finding of Fact 11), more than a decade after repeal of the gains tax, the tax cannot apply to the transaction.

The disputed income rule, as described by petitioner, is applicable to income tax, and is consistent with the general rule regarding the taxable year for inclusion of income; that is, income is reported in the year it is actually or constructively received (*see* IRC § 451[a]). The present matter, however, involves the gains tax, where the taxable event is the transfer of real property (*see Matter of Starburst Development Co., Inc.*, Tax Appeals Tribunal, May 5, 1994; Tax Law former § 1441) and tax is due within 15 days of such transfer (*see* Tax Law former § 1442[a]), As discussed previously, such tax is due notwithstanding that a condemnation proceeding may be ongoing and the terms of the transfer unresolved (*see Matter of Forty Second Street Company v. Tax Appeals Tribunal*). The disputed income rule as asserted by petitioner is thus inapplicable herein.

H. The Division of Taxation's motion for summary determination is granted; petitioner's cross motion for summary determination is denied; the petition of Malba Cove Properties, Inc. is denied; and the Notice of Determination, dated October 6, 2008, as modified (*see* Finding of Fact 13), is sustained.

DATED: Troy, New York
May 26, 2011

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE