

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
	:	
of	:	
	:	
<b>GOLDOME CAPITAL INVESTMENTS, INC.</b>	:	DECISION
<b>F/K/A GOLDEN BUFFALO, INC.</b>	:	DTA NO. 802506
	:	
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.	:	

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 19, 1987 with respect to the petition of Goldome Capital Investments, Inc. f/k/a Golden Buffalo, Inc., Goldome Center, One Fountain Plaza, Buffalo, New York 14203 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 (File No. 802506). Petitioner appeared by Saperston & Day, P.C. (John P. Hains, Esq. and Charles C. Swanekamp, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq. and Paul A. Lefebvre, Esq., of counsel).

The Division filed a memorandum in support of their exception and the petitioner filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the consideration reported by petitioner for gains tax purposes with respect to its leasehold interest in a property located at 745 Fifth Avenue, New York, New York which consideration was equal to the fair market value of that interest on the date of the transfer, was proper.

***FINDINGS OF FACT***

We find the facts as stated in the Administrative Law Judge's determination which represent the substance of the facts stipulated to by the parties. These facts may be summarized as follows.

On May 13, 1983, petitioner, Goldome Capital Investments, Inc., formerly known as Golden Buffalo, Inc., acquired 100 percent of the voting stock of United National Corporation. Following this acquisition, United National Corporation changed its name to Goldome National Corporation ("GNC"). GNC was a real estate management firm, and it owned and operated shopping centers, office buildings and other properties in several states, including New York.

Among the assets of GNC when it was acquired by petitioner was a 50 percent partnership interest in 745 Associates, a general partnership. GNC remained a 50 percent partner in 745 Associates at all times relevant herein.

745 Associates was, at all times relevant herein, lessee of a long-term lease of a parcel of land and an office building thereon located at the southeast corner of Fifth Avenue and 58th Street in Manhattan designated 745 Fifth Avenue ("the leasehold").

On November 27, 1984, Golden Buffalo, Inc. and TransAmerican Partners ("TAP") executed a contract pursuant to which Golden Buffalo would sell and TAP would buy all of the issued and outstanding shares of Goldome National Corporation. Section 2 of the Contract, captioned "Purchase Price," provided, in relevant part, the following:

"The purchase price ("Purchase Price") for the Shares shall be the sum of \$144,710,834 less the aggregate amount of the unpaid principal balances as of the Closing of the mortgages or deeds of trust described in Exhibit B annexed hereto (collectively, the "Mortgages"), subject to the adjustments, increases and reductions provided for elsewhere in this Agreement and in Annex A attached hereto."

A mortgage encumbering the leasehold was not included among the mortgage obligations set forth in Exhibit B to the Contract.

Annex A to the Contract provided, in relevant part, as follows:

"[N]o adjustment shall be made in the Purchase Price payable pursuant to Section 2 of the Agreement [Contract] for the unpaid principal balance of any Mortgages encumbering the Partnership Property or the fee interest in the premises known as 745 Fifth Avenue, New York City, New York."

Section 26 of the Contract, captioned "New York State Gains Tax; Recapture", provided for amounts allocable to property interests located in New York State for gains tax purposes. Specifically, this section provided, in relevant part, as follows:

"Purchaser and Seller hereby agree that the amount allocable to the Properties located in the State of New York shall be as set forth in Exhibit N hereto."

Exhibit N provided that \$50,850,000.00 of the total consideration paid for the GNC shares was allocable to GNC's partnership interest.

On December 18, 1984, both Golden Buffalo and TAP submitted questionnaires (Forms TP-580 and TP-581) as required by Tax Law Article 31-B in respect of transfer of the stock of GNC. In their respective questionnaires, each party allocated \$50,850,000.00 to the 50 percent interest in the leasehold at 745 Fifth Avenue.

On January 30, 1985, closing of acquisition of the common stock of GNC by TAP took place.

On the date of the transfer, the principal balance of the mortgage encumbering the leasehold at 745 Fifth Avenue was \$13,054,945.00. GNC's liability in respect of its 50 percent partnership interest was thus \$6,527,473.00 on the transfer date.

The Division of Taxation subsequently determined that, for gains tax purposes, petitioner had understated the consideration allocable to the partnership interest by this \$6,527,473.00 because the purchaser in the transaction had assumed this liability and the Contract had not allowed for an adjustment in the consideration allocable to the partnership interest despite the purchaser's assumption of the mortgage. The Division issued a Notice of Determination assessing tax of \$652,747.00, plus penalty and interest. The petitioner paid the tax and then requested a refund. The Division denied the refund claim.

In early 1984, Landauer Associates, Inc. ("Landauer"), 335 Madison Avenue, New York, New York, prepared an appraisal (the "Appraisal") of 745 Fifth Avenue for a corporation which was the other 50 percent partner in 745 Associates. In the Appraisal, Landauer stated its opinion that, as of December 31, 1983, the "equity value" of a 50 percent leasehold interest in 745 Fifth Avenue was \$42,400,000.00.

Fair market value of the leasehold interest in 745 Fifth Avenue was determined by Landauer by adding together the appraised "equity value" of the leasehold plus the principal amount of debt encumbering said leasehold.

As of December 31, 1983, the fair market value of the leasehold interest in 745 Fifth Avenue was \$97,854,945.00, derived as follows:

(1) Landauer appraisal of 50% interest x 2	\$42,400,000 <u>x 2</u> \$84,800,000
(2) Mortgage balance	<u>+13,054,945</u> \$97,854,945

Thus, the fair market value of the partnership interest of each 50 percent partner as of December 31, 1983 was \$48,927,473.00.

Subsequently, Landauer issued an update to its December 31, 1983 appraisal of 745 Fifth Avenue, stating that the value of a 50 percent interest in the leasehold had increased by \$1,800,000.00.

As of July 6, 1984, the fair market value of a 50 percent partnership interest in 745 Associates was \$50,727,473.00, derived as follows:

FMV at 12/31/83	\$48,927,473
Increase at 7/6/84	<u>1,800,000</u>
	\$50,727,473

The \$50,850,000 allocated by the transferor and transferee of 745 Fifth Avenue represents the fair market value, at the time, of the interest in real property being transferred.

#### ***OPINION***

The Administrative Law Judge determined that the instant transaction was a transfer for gains tax purposes because it was an "acquisition of a controlling interest in an entity with an interest in real property" (Tax Law {1440.7}). In such a case, the Administrative Law Judge opined, the consideration

allocated to the real property interest is the fair market value of that interest and that since the fair market value involved here took into account the amount of the unpaid principal mortgage balance, the adjustment made by the Division of Taxation was improper. The Administrative Law Judge's determination was based, in part, on his conclusion that the fair market value attributed to the real property by the transferor and transferee adequately reflected the fair market value of the property. We affirm the Administrative Law Judge for the reasons stated below, but we do so without evaluating or ruling on the correctness of the fair market value attributed to the real property by the transferor and transferee. We are precluded from such an evaluation because the parties to this litigation, the Division and the petitioner, stipulated as stated above that "The \$50,800,000 allocated by the transferor and transferee of 745 Fifth Avenue represents the fair market value, at the time, of the interest in real property being transferred" (20 NYCRR 3000.7[e]).

Given this stipulated fair market value of the property, the only issue before us is whether the fair market value of the property is the appropriate measure of consideration for the instant transaction.

The transaction consisted of the acquisition by TAP of 100 percent of the voting stock of GNC, which was a 50 percent partner in 745 Associates which owned an interest in real property (a leasehold) in New York State. This transaction, through its corporate and partnership tiers, is according to the Division of Taxation's regulations (20 NYCRR 590.51), an acquisition of a controlling interest in an entity with an interest in real property ("an entity transaction") and thus a transfer within the meaning of section 1440.7 of the Tax Law.

Included in the definition of consideration, for gains tax purposes, is the provision that "In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of the controlling interest." (Tax Law {1440.1[c].}) This statutory statement resolves this controversy; the consideration for this transfer is the fair market value of the real property, apportioned to the controlling interest. Since the litigants

have agreed that this apportioned amount is \$50,800,000, we conclude that the Division improperly adjusted this amount upwards.

The Division argues that section 1440.1(c) should not be used exclusively to determine the consideration for this entity transaction. According to the Division, the provisions of section 1440.1(a) should also be used which would include "the amount of any mortgage, purchase money mortgage, lien or other encumbrance . . . ." This argument, which would increase the fair market value of the property by the amount of the encumbrance is not in accord with the provisions of section 1440.1(c) set forth above, nor with the Division's regulations interpreting this statute. The regulations (20 NYCRR 590.47) provide only that the fair market value of the property apportioned to the interest acquired determines the consideration in an entity transaction. No provision is made for increasing this amount by the amount of any encumbrance or any other element of consideration set forth in section 1440.1(a).

These regulations do provide that where a piece of real property is a corporation's only asset, the amount of a mortgage on the property plus the amount paid for 100% of the stock of the corporation could indicate the fair market value of the property (20 NYCRR 590.47[b]). This regulation illustrates how fair market value may be determined, it does not state that the consideration in an entity transaction can ever be more than the fair market value of the underlying real property.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Goldome Capital Investments, Inc. f/k/a Golden Buffalo, Inc. is granted and the Division of Taxation is directed to refund in full amounts paid under protest in respect of the

Notice of Determination issued July 22, 1985 together with such interest as may be lawfully due and owing.

Dated: Albany, New York  
September 1, 1988

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner