

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LAURENCE LOSCALZO	:	DECISION
	:	DTA No. 806863
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 Laurence LoScalzo, c/o Kenneth E. Boklan, Esq., 1400 Wantagh Avenue, Wantagh, New York 11793 filed an exception to the determination of the Administrative Law Judge issued on May 28, 1992 with respect to his 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. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation properly determined that, pursuant to 20 NYCRR 590.50(a)(3), petitioner should have a carryover original purchase price with respect to certain real property acquired in a "mere change of identity" transfer under Tax Law § 1443.5, or whether said regulation is beyond the scope of Article 31-B and is invalid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

At all times relevant herein, petitioner, Laurence LoScalzo, was the sole shareholder of Kim-Brooke Enterprises, Inc. ("Kim-Brooke").

Petitioner paid \$2,247,010.00 to acquire his interest in Kim-Brooke.

Kim-Brooke's principal asset was a parcel of real property known as "Vacant Land", Sound Avenue, Riverhead, New York, the subject property herein.

Kim-Brooke was dissolved pursuant to a corporate resolution adopted on June 30, 1988. This dissolution plan provided for the complete liquidation and distribution of all assets of the corporation in November 1988.

Petitioner subsequently acquired his interest in the subject property in a liquidating distribution of the assets of Kim-Brooke in exchange for his stock in Kim-Brooke.

At the time of such liquidating distribution, the fair market value of the subject property was \$6,000,000.00.

Petitioner subsequently sold the subject property to DiCanio Residential Communities, Inc. for \$6,000,000.00. The date of this transfer was January 12, 1989.

Petitioner paid \$375,299.00 in real property transfer gains tax at the time of the January 12, 1989 transfer. Said tax was determined by the Division of Taxation (hereinafter the "Division") as follows:

Consideration in respect of 1/12/89 transfer	\$6,000,000.00
Purchase price to acquire property, i.e., to acquire Kim-Brooke stock	<u>2,247,010.00</u>
Gain subject to tax at 10%	\$3,752,990.00

Petitioner later filed a claim for refund of gains tax paid. The Division denied petitioner's refund claim by letter dated April 5, 1989.

OPINION

The Administrative Law Judge rejected petitioner's argument that the Division's regulation at 20 NYCRR 590.50(a)(3) is inconsistent with Tax Law § 1440(5)(a) and, therefore, invalid. The Administrative Law Judge found that petitioner failed to meet his burden to prove that his interpretation of the law was a plausible one and the only reasonable one. The Administrative Law Judge determined that the Division's regulation is a rational interpretation of the statute and

that petitioner's interpretation of the statute is unreasonable and would invite and enable gains tax avoidance.

On exception, petitioner argues that the carry-over original purchase price rule of 20 NYCRR 590.50(a)(3) is invalid. Petitioner states that, since there is no exception in the definition of original purchase price found at Tax Law § 1440(5)(a) to cover a "mere change" acquisition, the Commissioner of Taxation and Finance is precluded from administratively amending the statute by adding the carry-over original purchase price rule to the regulation.

In response, the Division states that petitioner's exception should be denied as the Tax Appeals Tribunal's decision in Matter of Schrier (Tax Appeals Tribunal, July 16, 1992) found 20 NYCRR 590.50(a)(3) to be a valid interpretation of the Tax Law.

We affirm the determination of the Administrative Law Judge.

First, we note that the Tax Appeals Tribunal has "the authority to rule on the validity of the regulations of the commissioner of taxation and finance where such regulations are at issue" (Tax Law § 2006[7]).

We find 20 NYCRR 590.50(a)(3) to be a proper and practical method for implementing the gains tax. The regulation is not inconsistent with Tax Law § 1440(5)(a) and to hold otherwise would undermine the imposition of the gains tax. As we held in Matter of Schrier (supra):

"[w]ithout 20 NYCRR 590.50(a)(3), a taxpayer intending to sell real property could raise the original purchase price of the real property through an intermediate transaction to a dummy corporation wholly owned by the taxpayer. This transaction would be exempt from tax pursuant to Tax Law § 1443(5) as a mere change in form. The corporation could then make a transfer of the real property to a third party. Although this transfer would be subject to the imposition of the gains tax, the amount of tax due would be greatly diminished since the intermediate transaction inflated the original purchase price through a transfer that was not taxed. The carry-over original purchase price rule, applied to the mere change in form transfer, acts to preserve the gain for taxation at the time of a subsequent taxable transfer."

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Laurence LoScalzo is denied;

2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Laurence LoScalzo is denied; and
4. The Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
January 21, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner