STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EDWARD H. EMERSON, III	:	DECISION DTA No. 809596
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 Edward H. Emerson, III, RD 8, Horsepound Road, Carmel, New York 10512, filed an exception to the determination of the Administrative Law Judge issued on March 31, 1994. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on July 6, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioner, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of gains tax.

FINDINGS OF FACT

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

Pursuant to a contract of sale dated December 12, 1986 between Edward H. Emerson, III ("petitioner"), as seller, and Melvin Weintraub, as purchaser, real property known as Hanover

Street, Yorktown, New York was contracted to be sold for a purchase price of $1,800,000.00.

The contract provided that $1,340,000.00 was to be paid at various times prior to the closing. The balance ($460,000.00) was to be paid pursuant to paragraph 28(b)(iv) of the contract which provided as follows:

> "$460,000.00 by the Purchaser executing a Purchase Money Note and Mortgage which shall be drawn on the standard form and shall provide for payment to be made within NINETY (90) days of the date Seller gives Purchaser written notice in accordance with Paragraph 33 hereof stating that the Seller has obtained a resolution of final approval of the subdivision of the premises into residential building lots serviced by municipal water and sewer systems and that all conditions set forth in such resolution have been complied with except for the payment of fees and the posting of bonds, which obligation shall be the Purchaser's. The Purchase Money Note and Mortgage shall provide that if payment is not made within such NINETY (90) day period through no fault of the Seller, Purchaser shall pay to Seller $500.00 a day as additional consideration for each day, or part thereof, from the date payment is due until the date payment is made. The costs and expenses incurred in connection with the recording of the $460,000.00 Purchase Money Mortgage shall be borne by the Purchaser and shall provide for attorneys fees in the amount of $5,000.00 and interest after default at the rate of TWO (2%) per cent per month. No interest shall be payable prior to a default."

By an Assignment dated August 7, 1987, the interest of Melvin Weintraub in the aforesaid contract of sale was assigned to Hanover East Estates, Inc. ("Hanover").

Prior to closing, the parties agreed to reduce the $460,000.00 deferred amount to $360,000.00 to reflect the purchaser's payment of $100,000.00 of petitioner's closing expenses.

On September 18, 1987, the date of closing (see, Exhibit "G"), a mortgage in the amount of $360,000.00 was executed between Hanover, as mortgagor and petitioner, as mortgagee.

A rider to the mortgage provided that if, on the date payment was due, the mortgagee had not complied with the terms and conditions of a letter agreement dated September 17, 1987 (attached to the mortgage), the mortgagor's debt would be reduced by $60,000.00.[1]

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[1]The letter agreement referred to the removal of a certain shed from the property. If not removed on or before the date on which payment was due, Hanover's payment would be $60,000.00 less.

Petitioner did not comply with the terms and conditions (the shed was not removed) so the total mortgage debt was reduced to $300,000.00.

By resolution dated January 11, 1988, the Town of Yorktown Planning Board approved the Hanover east subdivision subject to certain additional conditions being met.

The Town Board of Yorktown, by resolution dated April 5, 1988, permitted the Hanover East subdivision to utilize water from the Yorktown Consolidated Water District as an out-of-district user. However, the resolution stated in relevant part:

> "The use permitted herein shall be subject to a rate charge of two times that charged for other district users in addition to a surcharge to be hereinafter prescribed by this Town Board in accordance with such rules and regulations as may then be in effect and the Planning Board resolution of January 11, 1988."

The surcharge imposed by the Town Board of Yorktown was $282,000.00 ($6,000.00 per lot x 47 lots).

Hanover, in a verified complaint dated February 17, 1989, the service of which commenced a lawsuit against petitioner, stated that petitioner had represented that this project was within the boundaries of the Yorktown Water District and would, therefore, be serviced by the Town Municipal Water and Sewer system. This was not the case, however. As a result, in order to be serviced by this water and sewer system, payment of the $282,000.00 surcharge was required and Hanover contended this surcharge was the obligation of petitioner. On or about March 7, 1989, petitioner served a verified answer and counterclaim (for the amount of principal and interest due on the bond and mortgage) on Hanover.

By service of a summons and verified complaint dated March 7, 1989, petitioner commenced an action to foreclose the mortgage. In the verified complaint, petitioner alleged that all of the conditions of the mortgage had been complied with, and that notice of final approval (from the town of Yorktown) and compliance and demand had been served upon Hanover; however, Hanover failed to pay the principal and interest due on the mortgage.

On or about April 19, 1989, petitioner filed two claims for refund of gains tax totalling

$39,965.61 (one claim was for $3,965.61 due to certain expenses not having been included in the original filing; the other claim sought a refund of $36,000.00 due to Hanover's default on the mortgage).[2]

Petitioner had filed a Transferor Questionnaire (see, Exhibit "I"), dated August 21, 1987 on which anticipated tax due was indicated to be $47,213.95. However, based upon petitioner's claims for refund (see, Exhibit "B"), actual tax paid on September 18, 1987 (the date of transfer) was $92,213.95.[3]

By letter dated May 2, 1989, the Division of Taxation ("Division") granted a refund in the amount of $3,965.61 plus interest, based upon the additional costs of acquisition and capital improvements claimed subsequent to the initial gains tax filing. However, with respect to the balance of the claim, the letter stated that the $360,000.00 reduction in consideration was being denied "at this time" since a final settlement between the transferor and transferee had not been determined.

Both petitioner's brief and a Conciliation Order (CMS No. 099160) indicate that a third refund claim was made, i.e., a claim for refund in the amount of $6,000.00 based upon the $60,000.00 purchase price reduction (see, above). The Conciliation Order granted the refund of $6,000.00 plus interest.

The two legal matters (see, above) were settled in the latter part of 1991 by Hanover agreeing to pay the full deferred amount owed on the transfer and by petitioner agreeing to pay $150,000.00 of the total water surcharge. To effectuate the settlement, Hanover and Melvin Weintraub paid petitioner the sum of $150,000.00 and petitioner thereupon executed a general

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[2]The Division of Taxation's response to these claims for refund (Exhibit "C" dated May 2, 1989) indicates that petitioner originally filed a claim for refund on December 30, 1987 in the amount of $2,011.98, which amount was revised to $39,365.61 by virtue of these subsequent refund claims. Neither the original claim for refund nor the Division of Taxation's response thereto is contained in the record herein.

[3]An examination of the Transferor Questionnaire reveals a mathematical error on line 3 thereof which results in gain subject to tax being $929,139.50 rather than $427,139.50. Tax due thereon is $92,213.95 which was the amount paid by petitioner.

release (Exhibit "5") and a satisfaction of mortgage (Exhibit "9").

At the hearing and in his brief, petitioner amended his refund claim as follows:

a. Based upon the settlement between petitioner and Hanover, the $36,000.00 claim (see, above) is reduced to $15,000.00 on account of petitioner's payment of $150,000.00 of the water surcharge;

b. Petitioner seeks a refund of $2,959.00 which is 10% of the $29,591.00 in legal fees incurred in defense of Hanover's lawsuit, prosecution of the counterclaim, instituting the foreclosure action and settlement of these actions (see, Exhibit "13"). Petitioner actually paid legal fees of $28,000.00 and disbursements of $1,591.50.

OPINION

In the determination below, the Administrative Law Judge, after reviewing Article 31-B of the Tax Law ("gains tax") and more specifically Tax Law § 1440(3) which defines "gain" and Tax Law § 1440(5)(a) which defines "original purchase price" (OPP), rejected petitioner's contention

> "that his OPP should be increased by the portion of the water surcharge which he paid ($150,000.00) and by the $29,591.00 in legal expenses incurred or, in the alternative, that these expenditures were allowable capital improvement costs" (Determination, conclusion of law "C").

The Administrative Law Judge held that while petitioner was entitled to receive $300,000.00, the balance due him from the sale, he subsequently agreed to accept the sum of $150,000.00 in full satisfaction of the balance due on the mortgage as a settlement of both his foreclosure action and the lawsuit commenced by Hanover to recover the full amount of the water utilization surcharge imposed by the Town Board of Yorktown. The Administrative Law Judge further held that

> "[t]his surcharge was certainly not an acquisition cost of petitioner nor, based upon the sequence of events and the wording of the contract of sale, was it a fee incurred to sell the property" (Determination, conclusion of law "C").

The Administrative Law Judge further held that: 1) petitioner was not obligated by the

terms of the contract of sale to pay the fees to obtain municipal water and sewer system services; 2) since all capital improvements were to be made by Hanover after the transfer, the costs for same were not allowable capital improvement costs for petitioner; and 3) legal fees in the amount of $29,591.00 were incurred as a result of events which took place after the realty transfer and, therefore, were not incurred in the selling of the property.

The Administrative Law Judge also found that because petitioner was not required to pay the $150,000.00 surcharge, this payment was not a reduction of consideration. Finally, the Administrative Law Judge concluded that petitioner did not prove that $150,000.00 of consideration should be allocated to petitioner's obligation to obtain the approval for the subdivision.

On exception, petitioner requests the Tax Appeals Tribunal find that as a matter of fact the $150,000.00 payment was based on a reasonable compromise as to where contractual responsibility for the $282,000.00 water surcharge should lie and since said payment was based on the contract, there is no legal question as to his right to a refund of $15,000.00.

Petitioner argues, on exception, that since he expended $29,591.00 in legal fees in connection with clarifying responsibilities under the contract, the $2,959.00 refund should also be allowed.

The Division argues that: 1) petitioner raises the same arguments on exception and brief which he raised below; 2) the Administrative Law Judge correctly analyzed and decided those issues; 3) petitioner is not entitled to a reduction in consideration or to an increase in original purchase price and is not entitled to the refund claimed; and 4) the determination of the Administrative Law Judge should be sustained.

Petitioner has not raised any issues on exception that were not raised before the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Edward H. Emerson, III is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Edward H. Emerson, III is denied; and

4. The denial of refund is sustained.

DATED: Troy, New York
December 29, 1994

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

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