STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RHINEBECK FARMS DEVELOPMENT CORPORATION	:	DECISION DTA No. 809882
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 filed an exception to the determination of the Administrative Law Judge issued on October 7, 1993 with respect to the petition of Rhinebeck Farms Development Corporation, c/o Weingarten, 11 South Gleneida Avenue, Carmel, New York 10512. Petitioner appeared by Robbins, Greene, Horowitz, Lester & Co. (Jules Blackman, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

The Division of Taxation submitted a letter in support of its exception and petitioner filed a letter in response. The Division of Taxation received an extension until March 30, 1994 to file a reply brief, which date began the six-month period for the issuance of this decision. No reply was filed. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Administrative Law Judge erred in granting petitioner's request for a refund, but holding the calculation of the refund in abeyance until pending litigation was settled.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "2" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, Rhinebeck Farms Development Corporation ("Rhinebeck"), was the sponsor of a condominium project known as "The Woods at Rhinebeck". This project has been completed, all transfers of units have occurred and all gains tax was paid by 1989.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> Petitioner is, at present, the defendant in an action brought by The Woods at Rhinebeck Condominium I Unit Owners ("the unit owners"). The issues in the litigation involve the construction and installation of siding, roofing, and heating, ventilation and air conditioning ("HVAC") systems for the condominium units sold. The litigation is pending in the New York State courts, and there also exists an ongoing informal proceeding in the New York State Attorney General's office. If the unit owners are successful, substantial expenses will be incurred by petitioner. There is no allegation or evidence that the litigation and/or informal proceedings are frivolous. In fact, the Division of Taxation ("Division") does not dispute any of the facts concerning the litigation involving petitioner.[1]

Petitioner was audited by the Division in connection with the condominium project, and agreed to the tax calculated by the auditor based on costs actually expended as of the time of the audit. However, the auditor would not allow any deduction for additional costs related to the

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[1]The Administrative Law Judge's finding of fact "2" read as follows:

> "Petitioner is, at present, the defendant in an action brought by The Woods at Rhinebeck Condominium I Unit Owners ("the unit owners"). The issues in the litigation involve the construction and installation of siding, roofing, and heating, ventilation and air conditioning ("HVAC") systems for the condominium units sold. The litigation is pending in the New York State courts, and there also exists an ongoing informal proceeding in the New York State Attorney General's office. If the unit owners are successful, substantial construction expenses will be incurred by petitioner, which will, in turn, increase the cost basis (original purchase price) of the project, decrease petitioner's gain, and justify the filing of a supplemental return seeking a refund of a portion of the gains tax paid. There is no allegation or evidence that the litigation and/or informal proceedings are frivolous. In fact, the Division of Taxation ("Division") does not dispute any of the facts concerning the litigation involving petitioner or that, should the unit owners prevail, those expenses incurred by petitioner would be properly includible in original purchase price ("OPP") and would lead to a refund of gains tax paid."

We modified this fact to more accurately reflect the record.

construction of the condominiums that may be incurred by petitioner as a result of the litigation, as such expenses had not been finalized and expended as of the time of the audit.

On June 29, 1989, petitioner filed a Claim for Refund of Real Property Transfer Gains Tax requesting a refund of $106,946.00. It is uncontested that this refund claim was timely filed per Tax Law § 1445.1(a), (c). For purposes of clarity, the substance of the refund claim can be divided into two segments:

> (a) $71,946.00 of such refund claim was based upon the claim that the original estimate of project gain upon which gains tax was paid was higher than the final (actual) project gain;
>
> (b) $35,000.00 of the refund claim was based upon an estimate of the construction costs to be incurred if the unit owners are successful in the pending litigation.

On September 21, 1989, the Division issued its response to petitioner's refund claim. The Division stated that based upon the recent field audit conducted, a refund in the amount of $48,916.81 was approved as a result of the decrease in the final project gain. However, the $35,000.00 estimated refund amount was denied for the reason set forth by the auditor (i.e., the costs could not be documented as they have not been finalized or incurred). Petitioner is protesting only the denial of the estimated refund amount.

In response to the Division's denial letter, petitioner filed a Request for Conciliation Conference indicating that the costs of repairs and alterations relating to the litigation with the unit owners had not as yet been determined. Petitioner requested that this issue remain open until the litigation was resolved.

On April 9, 1990, the Bureau of Conciliation and Mediation Services scheduled a conference to be held on May 15, 1990. Petitioner, on May 1 and 2, 1990, telephoned and forwarded a letter to the conferee requesting that the conference be adjourned for the reason that the litigation had not been concluded. By a responding letter dated May 11, 1990, the conferee stated the following:

> "Please be advised that your request has been granted. The protective claim for refund will be held in abeyance until litigation is resolved."

However, a second Bureau of Conciliation and Mediation Services conference was scheduled and held on April 23, 1991. A Conciliation Order denying the protective refund claim was issued on May 31, 1991. Thereafter, a petition was filed with the Division of Tax Appeals. Throughout the administrative process, petitioner has requested that the refund claim be treated as a protective claim for refund to be held in abeyance until the litigation is resolved.

OPINION

The Administrative Law Judge found that if the units' owners were successful in the litigation, petitioner would incur costs that would reduce petitioner's gains tax liability on the project and that the Division did not dispute that a future refund would be due. The Administrative Law Judge stated that the only issue to be determined was the dollar amount of the future refund. The Administrative Law Judge also stated that if petitioner delayed filing the refund claim until after the litigation was concluded, the refund claim would be denied as untimely. Based on these circumstances, the Administrative Law Judge held that petitioner filed a timely refund claim and that the amount of this claim would be determined after the litigation was resolved by petitioner's presentation of documentation to the Division establishing petitioner's additional expenses. If the parties were unable to agree to the amount of the refund claim, the Administrative Law Judge stated that either of them could request that the record be reopened to allow the submission of evidence relating to the refund amount. Finally, the Administrative Law Judge observed that the matter proceeded to hearing prematurely and that a better procedure would have been for the parties to agree to leave the statute of limitations open until the litigation was resolved.

On exception, the Division challenges the Administrative Law Judge's conclusion that the Division does not dispute that the litigation expenses would be includible in original purchase price. Citing Matter of Cheltoncort Co. v. Tax Appeals Tribunal (185 AD2d 49, 592 NYS2d 121) and Matter of V & V Props. (Tax Appeals Tribunal, July 16, 1992), the Division argues that

the value of original purchase price must, like the value of consideration, be determined at the time of the transfer without regard to expenses which may be occurred after the taxable event. The Division also argues that the Administrative Law Judge did not have authority to order that this matter be held in abeyance because this order effectively extended the statute of limitations on the refund claim and was contrary to section 2010(4) of the Tax Law which the Division contends requires that the Administrative Law Judge either grant or deny the petition. The Division also asserts that the parties could not agree to extend the period of limitations on the refund claim.

In response, petitioner states that "[t]he purpose of the Transfer Gains Tax is to provide a tax on the actual gain on the transaction. The purpose of the Statute of Limitations to file for a refund is to allow for adjustments to originally calculated gain" (Petitioner's letter on exception, p. 1). Petitioner also contends that it incurred substantial costs in following the information received from the Conciliation Conferee and from the Law Bureau, i.e., to file a petition, and that it is unconscionable for the Division to now reverse its position. Petitioner also contends that the Division did not reverse its position until after the litigation was settled and petitioner submitted evidence of the actual expenditures it incurred. Finally, petitioner argues that the statute of limitations for refunds may be extended because the statute of limitations on assessments may be extended.

We reverse the determination of the Administrative Law Judge.

First, as indicated by our modifications to the Administrative Law Judge's finding of fact "2," we find no affirmative statement by the Division that it did not dispute that the settlement costs would be includible in original purchase price and would lead to a refund of gains tax when the litigation was settled.

Turning to the merits of this matter, the gains tax is imposed on the "gains derived from the transfer of real property within the state" (Tax Law § 1441). Gain is the difference between the consideration and the original purchase price for the real property (Tax Law § 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; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property . . ." (Tax Law § 1444[4]).

Because the transfer of the real property is the taxable event, we have held that the consideration for the transfer must be determined at this time and is not reduced by subsequent events (Matter of Cheltoncort Co., Tax Appeals Tribunal, December 5, 1991, affd Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121). In Matter of V & V Props. (supra), we 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. Similarly, here the original purchase price with respect to the capital improvements was fixed at the time of the transfer and cannot be increased simply because petitioner might incur, or did in fact incur, costs to settle litigation with respect to the construction of the condominium units. 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. Petitioner did not make such a showing and, therefore, has not established that it is entitled to a refund. Normally, such a failure would be fatal to petitioner's case; however, we are concerned that the information petitioner received from the Division may have contributed to petitioner's failure to pursue the correct legal theory. For example, the conciliation conferee's letter of May 11, 1990 informing petitioner that its protective claim for a refund would be held in abeyance until the litigation was resolved suggests that petitioner's legal theory, i.e., that it would be entitled to a refund if the litigation costs were paid, had merit. To avoid any possibility that petitioner may have been harmed by its reliance on information from the Division, we take the unusual step of remanding (see, Matter of

Wyman, Tax Appeals Tribunal, December 31, 1992) this matter to the Administrative Law Judge for a hearing to allow petitioner the opportunity to establish, and the Division to dispute, that the settlement payments were amounts of consideration petitioner was required, at the time of the transfer, to pay for capital improvements required to be made.

We believe that our decision resolves all but one of the issues raised by the parties in this proceeding. We decline to address this last issue -- whether the parties could agree to extend the statute of limitations for the refund claim -- because it is a hypothetical question, not presented on the facts before us.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded for a hearing in accordance with this decision.

DATED: Troy, New York
August 18, 1994

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

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