

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CAMPAC ASSOCIATES, INC.	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 810730
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 May 5, 1994 with respect to the petition of Campac Associates, Inc., 17911 Mitchell Avenue, Irvine, California 92714. Petitioner appeared by Olshan, Grundman, Frome & Rosenzweig (Thomas D. Kearns, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Herbert M. Friedman, Jr., Esq. and Paul A. Lefebvre, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition as well as a supplemental letter. The Division of Taxation filed a letter in reply as well as a supplemental letter answering petitioner's brief. The letter in reply was received on July 26, 1994, which date began the six-month period for the issuance of this decision. Neither party requested oral argument.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation, pursuant to Tax Law former § 1446(1), properly assessed interest against petitioner due to petitioner's failure to pay gains tax arising out of a transaction in which petitioner purchased a controlling interest in Campac Associates from Campeau Corporation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

The parties entered into a stipulation of facts which has been incorporated into Findings of Fact "1" through "19." The only modifications made to said stipulated facts were clarifications added to reflect additional information in the record. Following the stipulated facts are additional findings of fact.

1. On or about September 1, 1983, Campeau Corporation (U.S.) Inc. (now known as Federated Stores, Inc., hereinafter "Federated") sold a certain 60% partnership interest in Campac Associates to petitioner, Campac Associates, Inc. (the "Prudent transaction"). Campac Associates owned 99.9% of Prudent Fleetwood Properties ("Prudent"), a New York limited partnership. On October 5, 1990, the Division of Taxation ("Division") gave the Prudent transaction the Audit Registration Number of 101039E80024.

2. Federated and petitioner failed to file the appropriate returns under Article 31-B of the Tax Law ("gains tax") prior to the closing of the Prudent transaction.

3. Federated and petitioner failed to pay the New York real property transfer gains tax on the Prudent transaction.

4. Prudent was the sponsor of a cooperative offering plan for property known as Fleetwood Park Yonkers, New York.

5. The cooperative property is located at 754-800 Bronx River Road, Yonkers, New York.

6. Commencing in July 1983, petitioner, as a general partner of Prudent, began correspondence with the Division concerning the gains tax due on the sale of cooperative units. Petitioner paid gains tax on the sale of the units commencing in May 1985, using the

consideration paid to Federated as part of the original purchase price to calculate the gains tax payable on the sale of the units.

7. By letter dated May 23, 1985 to Marsha Sorin, an employee of the Division, petitioner's accountants outlined the Prudent transaction.

8. On March 11, 1987, James P. Thomas, a tax technician employed by the Division, wrote to Prudent advising it of its possible gains tax liability for the Prudent transaction.

9. Following petitioner's receipt of the letter described in paragraph "8" above, through January 24, 1992, the date of the issuance of the Notice of Determination in issue, petitioner, through its representatives, met with the Division on several occasions to review and discuss the Prudent transaction.

10. Petitioner's representatives provided the Division's auditors with the name, address and telephone number of Federated.

11. In January 1990, Federated filed for protection from creditors under the Federal bankruptcy laws.

On January 10, 1992, the United States Bankruptcy Court for the Southern District of Ohio issued an order confirming a plan of reorganization and fixing deadlines for filing certain claims.

12. On June 7, 1991, counsel to petitioner wrote to the Division's auditor urging the State to file a claim in the bankruptcy, even though the deadline for such claims expired in August of 1990.

13. The Division never filed a gains tax claim for the Prudent transaction in the Federated bankruptcy.

14. On June 3, 1993, the Division issued a Notice of Determination to Federated for the gains tax due on the Prudent transaction.

15. At the time of the Prudent transaction, the gains tax law did not permit the imposition of penalty or interest penalty against transferees.

16. On January 24, 1992, the Division issued a Notice of Determination to petitioner for the gains tax due on the Prudent transaction (Notice Number L-005223942-4) in the sum of \$243,250.00, plus penalty and interest, for a total of \$653,589.62.

17. On April 22, 1992, petitioner filed a petition to Notice Number L-005223942-4.

18. The petition was acknowledged by the Division of Tax Appeals on April 29, 1992.

19. The Division filed an answer to the petition on May 11, 1992.

20. On June 16, 1983, the Division received transferor and transferee questionnaires with regard to a transfer of title between Prudent Fleetwood Properties ("transferor") and Fleetwood Tenants Corp. ("transferee") which occurred on July 14, 1983. The transferor questionnaire stated transferor's attorney as Ronald Klempner, Esq., of the firm of Kassel, Hoffman, Neuwirth & Geiger, New York City. An exemption was claimed on the ground that the transfer was pursuant to a contract of sale entered into prior to the enactment of the gains tax law.

21. On November 15, 1983, Mr. Klempner wrote to the Division requesting a second extension of time to "make the computations and elections" required by the Division with respect to computation of consideration and original purchase price for condominium/cooperative plans sponsored by Prudent Netherland Properties and Prudent Fleetwood Properties.

By letter dated December 15, 1983, Mr. Klempner again requested an extension to perform the required computations and elections. Mr. Klempner explained that the delay was due, in part, to the fact that Campac Associates, Inc., the general partner of the sponsor, had only recently acquired the books and records of the operations of the properties. There was no mention in any of these letters that Campac Associates, Inc. had acquired a controlling interest in Prudent Fleetwood Properties.

22. A year and a half later, in response to an inquiry by an auditor of the Division, by letter dated May 23, 1985 (referred to above in Finding of Fact "8"), the accounting firm of Kenneth Leventhal & Company outlined the transactions which occurred in the acquisition of

Netherland Gardens and Fleetwood Park apartment complexes including the cooperative conversions of those complexes and the calculation of original purchase price ("OPP"). The salient portions of that letter are as follows:

"The following summarizes the changes in ownership of the partnerships known as Prudent Fleetwood Properties Company and Prudent Netherland Properties Company from December 10, 1979 through September 1, 1983.

- "A. December 10, 1979 - Johncamp Realty, Inc. liquidates Prudent Real Estate Trust and becomes a 55% owner of Prudent Netherland Properties Company and a 58.82% owner in Prudent Fleetwood Properties Company.
- "B. December 30, 1980 -
 - "1. Johncamp Realty, Inc. acquires an additional 41.08% interest in Prudent Fleetwood Properties Company and a .1% interest on behalf of the Pacific Company.
 - "2. Compac [sic] Associates, a partnership owned 60% by Campeau Corporation and 40% by Nitrew Pacific Corporation, acquires Johncamp Realty's 99.9% interest in Prudent Fleetwood Properties Company and 55% interest in Prudent Fleetwood Properties Company.
- "C. September 1, 1983 - Nitrew Pacific Corporation changes its name to Compac [sic] Associates, Inc. and acquires Campeau Corporation's 60% partnership interest in Campac Associates.

"2. Calculation of Original Purchase Price -

"The original purchase price attributable to Netherland Gardens and Fleetwood Park resulting from the above transactions is calculated as follows:

PRUDENT NETHERLAND PROPERTIES COMPANY
CALCULATION OF ORIGINAL PURCHASE PRICE

Purchase of Johncamp's 55% interest in Prudent Netherland Properties Company by Campac Associates on 12/30/80:

Cash	\$3,300,000
Debt assumed - per 11/30/80 tax return K-1	<u>1,560,280</u>
Total purchase price paid for a 55% interest in Prudent Netherland Properties Company	<u><u>\$4,860,280</u></u>

Purchase of Campeau's 60% interest in Campac Associates by Campac Associates, Inc. on 9/1/83:

Cash	\$ 300
Legal costs	4,336
Debt assumed - (includes respective shares of Campac Associates debt and underlying debt in Prudent Netherland Properties Company)	<u>4,610,426</u>
Total purchase price paid for a 60% interest in Campac Associates	<u><u>\$4,615,062</u></u>
Total cost basis of the Netherland Garden Apartment Building at 9/1/83:	
Cost basis of original 40% interest in Campac Associates plus improvements from 12/30/80 through 9/1/83 (4,860,280 x 40% + \$19,551)	\$1,963,663
Cost basis of 60% interest in Campac Associates acquired by Campac Associates, Inc. on 9/1/83 (determined above)	4,615,062
Limited partners' 45% interest in the unadjusted basis of the apartment building at 9/1/83	<u>1,940,937</u>
Original Purchase Price of the Prudent Netherland apartment building held by Prudent Netherland Properties Company at 9/1/83	<u><u>\$8,519,662</u></u>

Prudent Fleetwood Properties Company
Calculation of Original Purchase Price

Purchase of .1% interest in Prudent Fleetwood Properties Company by
The Pacific Company on 12/30/80:

Cash	\$ 2,922
Debt assumed - per 12/31/80 tax return K-1	<u>4,060</u>
Total purchase price paid for a .1% interest in Prudent Fleetwood Properties Company	<u><u>\$ 6,982</u></u>
Purchase of Johncamp's 99.9% interest in Prudent Fleetwood Properties Company by Campac Associates partnership on 12/30/80:	
Cash	4,998,000
Debt assumed-per 12/31/80 tax return K-1	<u>4,055,911</u>
Total purchase price paid for a 99.9% interest in Prudent Fleetwood Properties Company	<u><u>9,053,911</u></u>

Purchase of Campeau's 60% interest in Campac Associates
by Campac Associates, Inc. on 9/1/83:

Cash	\$ 300
Legal costs	4,335
Debt assumed - (includes respective shares of debt in Campac Associates partnership and underlying debt in Prudent Fleetwood Properties Company partnership)	<u>7,721,166</u>
Total purchase price paid for a 60% interest in Campac Associates	<u><u>\$7,725,801</u></u>
Total cost basis of the Fleetwood Park Apartment building at 9/1/83:	
Cost basis for The Pacific Company's .1% interest in Prudent Fleetwood Properties Company plus its respective share of improvements from 12/30/80 through 9/1/83 (6,982 + \$312)	\$ 7,294
Cost basis for 40% interest in Campac Associates plus improvements from 12/30/80 through 9/1/83 (\$9,053,911 x 40% + 124,774)	3,746,338
Cost basis for 60% interest in Campac Associates acquired by Campac Associates, Inc. on 9/1/83	<u>7,725,801</u>
Original Purchase Price of the Fleetwood Park apartment building held by Prudent Fleetwood Properties Company at 9/1/83	<u><u>\$11,479,433"</u></u>

By letter dated March 11, 1987 to Prudent, the Division informed Prudent that the Division's records indicated that, after the enactment of the gains tax law, a sale of a controlling interest in Prudent had occurred between Campeau Corporation and Campac Associates, Inc., and requested that Prudent provide information with regard to that transfer. The letter also requested transferee questionnaires for apartments sold, sales contracts for those sales, names of purchasers and further explanation of schedules previously submitted. The Division stated that a failure to provide this information would result in the issuance of notices of determination based only upon "available information".

By letter dated March 19, 1987, petitioner, by Paul L. Winther, requested an extension of time to provide the information requested. By letter dated May 7, 1987, Thomas Kearns, Esq., of Olshan, Grundman & Frome, informed the Division that his firm had been retained by Prudent "in connection with your letter dated March 11, 1987." By letter dated May 29, 1987, Mr. Kearns provided some of the documentation requested by the Division in its March 11, 1987 letter.

Mr. Kearns also made the following statement:

"We are attempting to contact the seller of the partnership interest referred to in the first paragraph of your letter [Campeau/Federated] to see what determination was made with respect to the gain [sic] tax on the transfer. It is our understanding that the contract was entered into before the effective date of the tax, and the transaction may therefore not fall under the gains tax law."

An internal Division memorandum dated November 16, 1987, authored by James P. Thomas, requested that Prudent be reaudited because of its claimed step-up in OPP based upon the claimed acquisition of a controlling interest in September 1983; its failure to file questionnaires on time; its allocation of OPP at two different rates without explanation; and problems with its change to "Option B".

Mr. Thomas noted that information regarding the transfer of the controlling interest had been requested but was never received. Mr. Thomas inferred from this that this transfer was never reported to the Division.

The record reflects no further contact between the Division and Mr. Kearns until July 18, 1990, when an auditor reported in her log that Mr. Kearns had called on that day and supplied the name and address of Campeau Corporation.

On July 25, 1990, Campeau Corporation called the auditor and stated that it would review its file concerning the sale of the controlling interest in September 1983.

Despite calls from the Division in the interim, Campeau Corporation did not respond to the Division until November 9, 1990, when it informed the Division that it had filed for bankruptcy on April 30, 1990, that the case had been settled and that it would forward information on the bankruptcy ruling. A log entry for November 9, 1990 made the first mention of potential transferee liability. Campeau Corporation never complied with numerous requests for information between November 9, 1990 and December 2, 1991.

After being informed that both the transferor and transferee were being held liable for potential gains tax due on the sale of the controlling interest from Campeau Corporation to Campac Associates, Inc. on September 1, 1983, Mr. Kearns sent the Division a copy of the

agreement between Campeau Corporation and Campac Associates, Inc. That letter was dated May 10, 1991.

As mentioned above, Mr. Kearns wrote to the Division on June 7, 1991 and urged the State to file a claim against Campeau Corporation (now known as Federated) in its bankruptcy matter. However, the deadline for such claims had expired on August 1, 1990.

Finally, in response to the proposed audit adjustments sent to petitioner with regard to the transfer of the 60% interest in Campac Associates, Mr. Kearns sent a letter to the Division, dated July 29, 1991, in which he asserted that a transfer of a controlling interest in Prudent Netherland was not effectuated by the transfer of the interest in Campac Associates by Campeau Corporation. Further, Mr. Kearns asserted that the statute of limitations barred the Division's claim; that no liability should be enforced against the transferee until after the Federated (f/k/a Campeau Corporation) bankruptcy was completed; and that any amount not collected under a bankruptcy plan should not be collected from petitioner because of the Division's delay in prosecuting its claim against Federated.

It is noted that petitioner has abandoned or otherwise resolved the issue with regard to the transfer of the partnership interest in Prudent Netherland. Also, petitioner has abandoned the issue of whether the assessment should be enforced against it before the Federated bankruptcy matter was completed. The issues were not raised by the parties in their briefs.

Petitioner filed a complaint against its attorneys, Kassel, Hoffman, Neuwirth & Geiger, in October of 1991, for failing to advise it of its obligation to file a transferee questionnaire, but the action was dismissed on motion of defendants as time barred. The decision of Judge Carmen Beauchamp Ciparik was issued on March 19, 1993.

In addition to the facts found by the Administrative Law Judge, we find the following:

The official Bill Jacket for Chapter 61 of the Laws of 1989 (Page 34, [H6]) contains a memorandum in support that states, under "Gains Tax-Administration Changes," that:

"Bill sections 167, 187, and 192 amend, respectively, Tax Law sections 1446, 1440 and 1449 to clarify who is responsible for payment of the tax. The term 'person' is defined to include responsible officers; penalties are imposed on any 'person'

liable for the tax and these amendments provide that collection may proceed against any such person for the failure to pay.

"Bill section 167 also amends section 1446 of the Tax Law to permit the Department to seek interest and penalties from the person liable for the tax, and likewise to authorize payment of interest to the person due a refund. It adds a penalty of \$100 per transfer of real property for which a tentative assessment and return is not filed when it is required to be."

The memorandum goes on to state, on page 39 (H11), that:

"Current law only refers to a transferor in the provisions regarding collection/payment of interest and penalties. Since a transferee may be held liable for the tax, this proposal clarifies that a transferee is also liable for interest and penalties. Similarly, this provision will permit a refund to be paid to the person who paid the tax, unlike current law where refunds can only be paid to the transferor."

OPINION

At the time of petitioner's transaction, Tax Law former § 1446(1) and (2) provided in part:

"If the tax commission determines that there has been an overpayment of tax, interest shall be paid by the comptroller to the transferor, on any refund paid pursuant to the provisions of section fourteen hundred forty-five of this article. If it determines that there has been an underpayment of tax, the transferor shall pay interest to the commission on the amount of any tax not paid" (Tax Law § 1446[1], emphasis added).

"Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount . . ." (Tax Law § 1446[2], emphasis added).

Section 167 of Chapter 61 of the Laws of 1989 amended section 1446 by inter alia, substituting the word "taxpayer" for the word "transferor" in section 1446(1) and by substituting the word "person" for the word "transferor" in section 1446(2).

In this case, the Administrative Law Judge cancelled the Division's assessment of interest, penalty and penalty interest based on our holding in Matter of Goldome Capital Invs. (Tax Appeals Tribunal, May 16, 1991, affd sub nom. Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin., 189 AD2d 39, 594 NYS2d 447, affd 83 NY2d 44, 607 NYS2d 620). Specifically, he stated:

"In Goldome, the Division stated that the amendment in question was a substantive change and not a clarification and, therefore, conceded that the transferee was not liable for penalty or interest penalty with regard to gains tax due on a 1983 transfer of real property . . . applying the rationale used in Goldome, the interest must also be cancelled, the rationale being that, at the time of the transfer when the tax was due, interest was not imposed on the transferee" (Determination, conclusion of law "B").

On exception, the Division asserts that "[t]he sole issue . . . involves the Petitioner's liability for interest assessed on its failure to pay gains tax on a 1983 transaction" (Division's brief in support, p. 4).¹ The Division argues that:

"Tax Law Section 1446(2) that was effective in 1983 stated that penalty and interest penalty was the responsibility of 'any transferor.' The Governor's Bill Jacket to the 1989 amendment, however, clearly enunciates that it was always the Legislature's intention to hold transferees liable for the payment of interest as well as the underlying gains tax obligation" (Division's brief in support, p. 4).

Next, the Division attempts to distinguish Matter of Goldome Capital Invs. (*supra*) from petitioner's case. The Division asserts that in Goldome, one of its employees "erroneously" conceded that the 1989 amendments to section 1446 were substantive as opposed to clarifying. Further, the Division contends that as a result of this error, the "issue of legislative intent of the 1989 amendment to Section 1446(2) was never actually controverted before the Tribunal" (Division's brief in support, p. 5). Additionally, the Division points out that it did not concede the issue of interest in Goldome.

On exception, the Division points out that in Matter of New York Life Ins. Co. & Subsidiary (Tax Appeals Tribunal, August 4, 1994), while the Tribunal

"held against the Division . . . the Tribunal cited the absence of significant legislative history, especially a memorandum issued by the Governor, in determining that an amendment was not clarifying. The Tribunal went on to contrast New York Life with Mayblum v. Chu, 67 NY2d 1008, however, where the Court of Appeals found an amendment to be clarifying where it had been explained as such in a memorandum issued by the Executive Department" (Division's supplemental letter).

¹Neither party has excepted to the Administrative Law Judge's conclusion upholding the tax assessed against petitioner, nor to the Administrative Law Judge's cancellation of penalty and interest penalty.

On exception, petitioner contends that:

"[r]egardless of the 'spin' the Division seeks to put on the language of the Bill Jacket and the usage of the word 'clarify,' there can be no question that prior to the 1989 amendments under the statutory scheme whatever liability a transferee may have had for the tax itself there was no basis in the law for imposition on the transferee of interest, penalty or interest penalty.

Thus, rather than an error, the Division employee was correct in making the concession that these amendments were substantive and the analysis by the Tribunal in Goldome sound" (Petitioner's brief in opposition, p. 2).

Additionally, petitioner argues that:

"[t]he presence or absence of legislative history is not necessarily determinative. In New York Life the Tribunal, while noting the sparsity of legislative history and its less than clear expression, primarily relied upon the fact that Section 1503 of the Tax Law prior to amendment could not be read as applying only to a company's share of dividends and the amendment was therefore substantive Moreover, in its analysis of the . . . amendments to Section 1440 . . . the Court of Appeals in Mayblum principally cited that in its original form the particular section under review could have been read as to encompass the amendment The mention of legislative history by the Court was a judicial aside.

"No such situation exists here because prior to 1989 only the 'transferor' was liable for interest under Section 1446(1). The amendment expanding and redefining the class of those liable must be held to be a substantive change in the law" (Petitioner's supplemental letter, pp. 1-2).

Thus, petitioner asks the Tribunal to affirm the Administrative Law Judge's determination.

We agree with the Division that in Goldome we simply accepted the Division's concession that the 1989 changes to section 1446(2) were substantive and not clarifying and cancelled the assessment of penalty and interest penalty on this basis.² Therefore, we have not previously ruled on the nature of the changes made by Chapter 61 of the Laws of 1989 to section 1446, but we do so now at the Division's request.

²Although the Division contends that the Goldome concession with respect to penalty and interest penalty was an error, in the instant case the Division stipulated that "[a]t the time of the Prudent transaction the Gains Tax law did not permit the imposition of penalties or interest penalties against transferees" (Stipulation, p. 3). As a result, we are confused as to what the Division's current position is with respect to penalty and interest penalty.

We simply cannot read the specific word "transferor" in section 1446(1), prior to its 1989 amendment, to include "transferee." As the Court stated in Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin. (152 AD2d 87, 547 NYS2d 444), when rejecting our interpretation that the word "tax" included penalty and interest:

"inasmuch as section [1446] itself 'describes the particular situations in which it is to apply, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"' (Patrolmen's Benevolent Assn. v. City of New York, 41 NY2d 205, 391 NYS2d 544, 546 quoting McKinney's Cons. Laws of N.Y. Book 1, Statutes § 240)" (Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin., *supra*, 547 NYS2d 444, 446; *cf.*, Matter of Hall v. Tax Appeals Tribunal, 176 AD2d 1006, 574 NYS2d 862 [where the Court found the statutory imposition of liability for penalty and interest on "any person" to include a responsible officer of a corporation]).

Accordingly, we conclude that the Legislature's use of the word "transferor" was intended to exclude a transferee from liability for interest.

It is obvious from the preceding conclusion that we do not find the Division's evidence of legislative intent sufficient to overcome the plain meaning of the words of the statute. In our view, the fact that the memorandum in support of Chapter 61 of the Laws of 1989 describes the substitution of the word "taxpayer" for the word "transferor" as a clarification is inadequate, given the unambiguity and specificity of the word "transferor," to establish that the Legislature always intended "transferor" to include "transferee."

Because Tax Law § 1446(1) did not provide for transferee liability for interest until its amendment by Chapter 61 of the Laws of 1989, we find that the Division improperly assessed interest against petitioner regarding petitioner's 1983 purchase of a controlling interest in Campac Associates from Campeau Corporation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
- 3 The petition of Campac Associates, Inc. is granted to the extent indicated in the Administrative Law Judge's conclusions of law "B" and "C," but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination, dated January 24, 1992, in accordance with paragraph "3" above, but such notice is otherwise sustained.

DATED: Troy, New York
January 12, 1995

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

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