

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CALVERTON PROPERTY COMPANY	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 810782
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner Calverton Property Company, c/o Keith H. Archer, Esq., 201 North Service Road, Melville, New York 11747, filed an exception to the determination of the Administrative Law Judge issued on April 14, 1994. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner did not file a brief. The Division of Taxation filed a brief in opposition to the exception. The six-month period to issue this decision began on July 5, 1994, the date by which petitioner could submit a reply brief. Oral argument, requested by petitioner, was denied.

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

ISSUE

Whether the original purchase price of real property sold by petitioner must be stepped-up to reflect the consideration paid for the 1987 acquisition by two of the partners of less than a controlling interest in the partnership.

FINDINGS OF FACT

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

Petitioner, Calverton Property Company, c/o Keith H. Archer, Esq., Morton Weber & Associates, 534 Broad Hollow Road, Melville, New York 11747 (hereinafter "petitioner" or "Calverton") is a co-partnership.

In July 1954, Jack Nelson, David Einbinder, Sidney Horowitz, Benjamin Spencer, Jay E. Rubinow and Stanley Bray entered into a syndication agreement for the purpose of purchasing certain real property in Suffolk County, New York.

On August 31, 1954, Jack Nelson, pursuant to the syndication agreement, purchased 405 acres of Suffolk County real property ("the property") for \$263,250.00 (\$650.00 per acre). On December 18, 1954, Nelson executed a declaration of trust whereby he agreed to hold the property as trustee for the other five members of the syndicate.

Under the trust agreement, Nelson, his heirs and assigns, were required, upon demand, to convey to any member of the syndicate his proportionate interest in the property. In the event the property was sold, the net proceeds would be paid to each of these individuals in proportion to his contributions.

There is no evidence in the record that Suffolk County ever approved a subdivision plan for the property and there is no evidence that any structures or capital improvements were ever placed on the property.

Between 1954 and 1974, some of the property was conveyed and some was taken by eminent domain.

On or about 1974, the then owners of a 76% interest in the property (i.e., Nelson, Spencer, Horowitz, Libman, etc., or their successors in interest) agreed to hold their interests as a partnership, i.e., Calverton Property Company,¹ and accordingly, on August 19, 1974, their 76% interest was jointly conveyed by deed to petitioner. From that point, the individuals comprising the Calverton partnership (owners of a 76% interest in the property) appear to have

¹Apparently Stanley Bray and Jay Rubinow decided to hold their interests in the property separately from Calverton.

held the property as co-partners with Stanley Bray and Jay Rubinow or their successors (owners of a 24% interest in the property).²

In 1987, Benjamin Spencer, a partner in petitioner, conveyed all of his 23.68% interest in the partnership to Alvin Gindel and Sidney Horowitz for \$339,862.00. That same year, Morris Libman, also a partner, conveyed all of his 17.54% interest in petitioner to Gindel and Horowitz for \$251,687.00. By these purchases, it is undisputed that Gindel and Horowitz acquired a 41% interest in the partnership.³ Of the amounts paid in 1987, the record does not show how much was paid by Gindel and how much was paid by Horowitz. Further, the record does not show what percentage of the partnership interests purchased in 1987 went to Horowitz and what percentage went to Gindel. The record is also silent with regard to whether Gindel and Horowitz, in making the 1987 purchases of interests in the partnership, were acting independently of each other or were acting in concert.

On December 5, 1991, Calverton, together with Stanley Bray, Judith Gartner, and David and Laurence Rubinow (then owners of the remaining 24% interest in the property) entered into an agreement to sell to Suffolk County, for \$2,437,751.60, the remainder of the subject property, which consisted of 265 acres of vacant land.⁴

The County and petitioner, as seller,⁵ duly filed real property gains tax transferor and transferee questionnaires with the Division of Taxation ("Division"). The transferor questionnaire filed by petitioner reported:

²Jay Rubinow's interest was gifted to Judith Gartner, David Rubinow and Laurence Rubinow in 1983 and 1984.

³Since the parties have stipulated that it was Gindel and Horowitz that purchased this 41% interest in 1987, it has been adopted as a finding. However, it is noted that the question of "who received what" percentage of that 41% is not addressed in the record. It is also noted that the two agreements of sale in the record are only between Spencer and Gindel and Libman and Gindel. Horowitz is only mentioned in both agreements in the "hold harmless" clauses, not as a buyer or grantee.

⁴Actually, the purchase price appearing on the contract is \$2,436,160.00. The contract provides that the per acre price is \$9,200.00. The sellers warranted that the premises contained at least 264.8 acres. The parties agreed to adjust the price to the actual acreage after a survey had been conducted. That appears to account for the difference in purchase price appearing in the contract and that appearing in the transferee's questionnaire (TP-581[8/84]), i.e., \$2,437,751.60. This latter figure was the actual selling price.

⁵From this point, this discussion relates only to petitioner and its 76% share.

Gross consideration paid to petitioner:	\$1,852,691.20
LESS:	
Purchase price to acquire the property:	668,481.00
Expenses of sale:	<u>39,605.00</u>
Total original purchase price:	\$ (708,086.00)
Gain Subject to Tax:	\$1,144,605.20
GAINS TAX DUE:	\$ 114,460.00

Petitioner computed its "price to acquire the property", supra, by including the amounts paid by Gindel and Horowitz (\$591,549.00) in 1987. Petitioner's computation was as follows:

265 Acres x \$650.00 per acre ⁶	=	\$ 172,250.00
Calverton's allocated cost	<u>x 76%</u>	
	\$ 130,910.00	Adjust for 1987 partnership
acquisitions (2)	<u>x 41.233%</u>	
	- 53,978.12	
		\$ 76,931.88
Add cost of 1987 acquisitions		
by Gindel and Horowitz		<u>591,549.00</u>
Petitioner's "stepped-up" basis		\$ 688,480.88

Attached to petitioner's transferor questionnaire was a page detailing the claimed "Expenses of Sale." This page shows "legal fees" relating to the sale of the property totalling \$31,993.00 for the period from May 3, 1990 to August 2, 1991. This page also showed engineering expenses of \$12,680.00 incurred in 1989 relating to subdivision of the property. Reported legal fees for 1989 relating to subdivision of the property were \$7,439.25. The total of these reported "Expenses of Sale" was \$52,112.25, with petitioner's 76% allocation of these expenses being \$39,605.31.

On or about December 30, 1991, the Division issued a Tentative Assessment and Return asserting real property transfer gains tax ("gains tax") due based upon information contained in the filed transferor and transferee questionnaires. Attached to the Tentative Assessment and Return was a Schedule of Adjustments explaining the basis of the Division's recomputation of gains tax due.

The tentative return and statement of adjustments recomputed gains tax by disallowing petitioner's "stepped-up" price to acquire the property, and by disallowing

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Price paid per acre in 1954.

petitioner's claimed selling expenses relating to legal and engineering fees associated with subdivision of the property.

These adjustments appear on the Statement of Adjustments as follows:

PURCHASE PRICE PAID TO ACQUIRE REAL PROPERTY

265 acres x \$650.00/acre	\$172,250.00
Petitioner's 76% interest	x <u>76%</u>
Petitioner's price to acquire the property	\$130,910.00
Original purchase price claimed	668,481.00
Original purchase price allowed	<u>-130,910.00</u>
Resulting disallowed portion	\$537,571.00

Allowable Selling Expenses

"Section 1440.5(a) of the Tax Law limits allowable selling expenses to legal, engineering and architectural fees incurred in selling real property. Accordingly, the expenses claimed regarding the subdivision are being disallowed."	<u>20,119.25</u>
Total Disallowed:	\$557,690.25

The Division computed the gains tax on the tentative assessment and return as follows:

Gain subject to tax as computed by petitioner:	\$1,144,605.20
Total Amounts disallowed (Line 2)	<u>557,690.25</u>
Gain Subject to tax as adjusted:	\$1,702,295.45
GAINS TAX DUE:	\$ 170,229.55

Petitioner paid the adjusted gains tax asserted of \$170,229.55 on January 22, 1992. Thereafter, petitioner filed a claim for refund with the Division in the amount of \$70,808.57. Petitioner's refund claim asserted that: (a) the legal (\$7,439.25 x 76% = \$5,653.83) and engineering expenses (\$12,680.00 x 76% = \$9,636.80) it incurred in obtaining subdivision approval should have been allowed as part of "selling expenses"; and (b) the consideration paid by Gindel and Horowitz (\$591,549.00) in 1987 to acquire their interest in the partnership was

improperly disallowed, and should have been included as a "step-up" in the partnership's cost to acquire the property.

By letter dated March 13, 1992, petitioner's application for refund was denied. Thereupon, petitioner filed the instant petition dated May 4, 1992.

OPINION

In the determination below, the Administrative Law Judge held that "[p]etitioner does not take issue with the tax imposed on the gain derived from the transfer of real property herein, rather the computation of that gain and, more specifically, whether there should be an adjustment to the original purchase price of the real property, is the matter in dispute" (Determination, conclusion of law "A").

The Administrative Law Judge reviewed Tax Law §§ 1441, 1440(7), 1440(2)(ii), 1440(3), 1440(5)(a), 1440(5) and the regulations promulgated relevant thereto as they relate to the question of stepping up the basis in the original purchase price and then held "[t]hus, where a partner or partners acquire less than a controlling interest in a partnership, the entity (and thereby the individual partners) may not step-up its basis in the original purchase price of the real property" (Determination, conclusion of law "C"). Further, "[i]n either event, the insurmountable and undisputed fact is, whether acting together or separately, Gindel and Horowitz failed to acquire a controlling interest in the partnership" (Determination, conclusion of law "E").

The Administrative Law Judge rejected petitioner's "fairness" argument holding "[t]he fact is that the statute and applicable regulations clearly apprise a taxpayer, such as petitioner, as to what is required before a partnership is entitled to step-up its basis in partnership-owned real property for purposes of computing original purchase price" (Determination, conclusion of law "D").

The Administrative Law Judge also rejected petitioner's argument, relying on Matter of 307 McKibbin St. Realty Corp. (Tax Appeals Tribunal, October 14, 1988) relating to the "look through rule," because the present case is not concerned with the tax treatment of two

corporations and, further, it does not involve an "aggregation" issue or the tax treatment arising from the transfer of two contiguous parcels.

Finally, the Administrative Law Judge held that while petitioner argues that the Division improperly disallowed its legal and engineering fees attributable to subdivision of the property, the record lacks proof that the property was subdivided and, further, there is no evidence to support its claim that said fees were "customary, reasonable and necessary" or that they were "incurred to sell the property."

On exception, petitioner argues, as he did below, that he is entitled to a "stepped-up" original purchase price as well as the claimed refund, with interest.

The Division, in reply, argues that the 1987 acquisition of the 41% interest in the partnership by Gindel and Horowitz was not the acquisition of a controlling interest and, therefore, did not constitute a "transfer of real property" for purposes of Article 31-B of the Tax Law. As a result, the Division asserts no step-up in original purchase price was authorized.

The Division, in requesting that petitioner's exception be denied and the determination of the Administrative Law Judge be sustained, further argues, based on the law and the facts of this case, that petitioner has not met its burden of proof to show that the Administrative Law Judge's determination is erroneous or that the Division erroneously denied its refund.

We uphold the determination of the Administrative Law Judge for the reasons stated in that determination. Petitioner has not raised any issues on exception that were not raised below and adequately and correctly discussed by the Administrative Law Judge in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Calverton Property Company is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Calverton Property Company is denied; and

4. The denial of refund dated March 13, 1992 is sustained.

DATED: Troy, New York
December 15, 1994

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner