STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LANDMARK DINING SYSTEMS, INC.	:	DECISION DTA No. 810920
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 Landmark Dining Systems, Inc., c/o Lewis Cohen, Esq., 162 West 34th Street, New York, New York 10001, filed an exception to the determination of the Administrative Law Judge issued on December 23, 1993. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner filed a brief with its exception. The Division of Taxation filed a brief in opposition to petitioner's exception. The six-month period to issue this decision began on March 10, 1994, the date by which petitioner could submit a reply brief. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether certain payments made by petitioner pursuant to a consulting agreement constituted "consideration" paid to acquire an interest in real property and were therefore includible in petitioner's "original purchase price."

FINDINGS OF FACT

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

Petitioner, Landmark Dining Systems, Inc. ("Landmark"), is a subsidiary of National Restaurant Management, Inc. ("National Restaurant").

National Restaurant is a privately-held firm which has been in business for over 50 years. Over the years, National Restaurant has acquired numerous chains of restaurants. It holds leases on approximately 200 restaurants and rents to approximately 500 tenants. National Restaurant is also a tenant in hundreds of places.

At the hearing, the head of National Restaurant's real estate department, Lawrence Abrams, explained that the employees of National Restaurant are considered experts in real estate in New York City. National Restaurant has the expertise to build its own restaurants as well as the ability to negotiate from the perspective of a tenant or a landlord.

An example of National Restaurant's practices is shown by its activity following its acquisition of the leases of Schraffts Restaurants, Childs Restaurants and Chock Full O' Nuts restaurants. According to Mr. Abrams, these restaurants became obsolete in the 1960's and 1970's. However, the restaurants had two valuable assets: superb locations and long-term leases. National Restaurant divided each space which had been used by these restaurants and built new restaurants which it considered more contemporary. The balance of each space was sublet to third parties which reduced National Restaurant's overhead.

It is National Restaurant's practice to conduct its affairs with its own staff. It feels it knows the value of the space and does not seek outside expertise.

Petitioner entered into a Lease, dated April 3, 1985, with Empire Hotel - Lincoln Center Associates for the lease of 21,000 square feet in the premises at 1889-1895 Broadway in the building known as the Empire Hotel in the City of New York. Article 37 of the lease was entitled "Brokerage" and provided:

> "SECTION 37.01. The parties acknowledge and represent to each other that they had no dealings or negotiations with any broker, agent or finder in connection with the consummation of this Lease. Each party covenants and agrees to pay, hold harmless and indemnify the other from and against any and all cost, expense (including reasonable attorney's fees and court costs), loss and liability for any compensation, commissions or charges claimed by any broker, agent or finder with

respect to this Lease or the negotiation thereof if such claim or claims by any such broker, agent or finder are based in whole or in part on dealing with such party or its representatives."

Section 41.07 of the Lease stated:

> "SECTION 41.07. It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this lease, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representative, not embodied in this lease, made by the other. The Tenant has inspected the Premises and is thoroughly acquainted with their condition and accepts the Premises 'AS IS'."

Petitioner entered into a Consulting Agreement dated April 3, 1985 with a Mr. Sheldon Blittner. At this time, Mr. Blittner was a general partner of the Empire Hotel and negotiated the Lease on behalf of the hotel. The second whereas clause on the first page of the agreement stated:

> "WHEREAS, Landmark entered into a lese [sic] for certain portions of the ground floor and basement of said real property, dated April 3, 1985 between EMPIRE HOTEL - LINCOLN CENTER ASSOCIATES, as Landlord and LANDMARK DINING SYSTEMS, INC., as Tenant (hereinafter 'Lease') and desires to retain Consultant to advise, counsel and make recommendations to it regarding the leasing and subleasing of Landmark's demised premises at said real property . . . ."

The first paragraph of the Consulting Agreement provided that the consultant would act in a consulting capacity to Landmark with respect to the leasing and subleasing of commercial space at the Empire Hotel and that the consultant would "advise, counsel and make such recommendations" to petitioner with respect to petitioner's leasing and subleasing of commercial space at the Empire Hotel. The second paragraph of the Consulting Agreement stated that petitioner agreed to pay the consultant $1,150,000.00 in consideration for the consultant's services. Paragraph 4.01 of the Consulting Agreement contained a provision that the Lease would be held in escrow and that, under certain circumstances, petitioner's failure to perform as required by the Consulting Agreement would result in the forfeiture of the Lease to the consultant.

Petitioner paid $1,150,000.00 to Mr. Blittner as prescribed by the Consulting Agreement. It was petitioner's understanding that if it did not accept the Consulting Agreement, it would not have been awarded the Lease.

Mr. Blittner was never consulted by Landmark concerning the leasing or subleasing of space.

In the over 30 years that Mr. Abrams has been employed by National Restaurant, he has never known National Restaurant to pay for the services of an outside consultant in the real estate area.

At the time petitioner signed the Lease for space in the Empire Hotel, there were four tenants in the premises: a coffee shop, a bank, a restaurant called O'Neal's Saloon and a small store that sold items that had to do with the arts such as ballet and opera.

After petitioner signed the Lease, it had to wait for the existing leases to expire. When the lease for the store which sold items pertaining to the arts expired, petitioner renewed the lease with an increase in the annual rent from $27,000.00 to $65,000.00. The new rent amounted to about $162.00 a square foot. Since petitioner was paying approximately $100.00 a square foot for its tenancy, all it had to do to make a profit was renew with the existing tenant.

The lease for O'Neal's Saloon expired in April 1986. Thereafter, petitioner renewed the lease with an increase in the rent from $106,000.00 to $400,000.00 per year. At the new rent, petitioner received $166.00 a square foot.

In April 1986, the lease for the coffee shop also expired. In this space petitioner built a food court which contained a Roy Rogers, a Pizza Hut and a Del Taco Restaurant.

Petitioner leased 1,600 square feet of space for use as an exclusive sit-down restaurant. The rent for this space was approximately $182.00 a square foot. Petitioner also leased 1,200 square feet for $169,000.00 which amounted to approximately $140.00 a square foot.

Each of the uses of the foregoing space was part of a plan which petitioner had devised. Petitioner knew what it wanted to build, what it wanted to sublet and what rents it could obtain.

It was not necessary for petitioner to confer with outside consultants to know what to do with the property.

In his experience with National Restaurant, Mr. Abrams has never seen another agreement where a consulting agreement ties in with a lease and the lessor could lose the rented premises.

On February 25, 1991, the Division received Questionnaires which were filed by petitioner, as transferor, and MET Dining, Inc., as transferee. The transferor form reported that on March 10, 1991 petitioner anticipated a leasehold assignment or surrender of property at 1889 Broadway, New York, New York. The form also reported that the gross consideration was $4,500,000.00 and that the original purchase price was $3,651,708.00. The original purchase price was made up of four items as follows:

Purchase price paid to acquire real property	$1,400,000.00
Other acquisition costs	13,500.00
Cost of capital improvements to real property	2,212,208.00
Allowable selling expenses	26,000.00

The gain subject to tax was listed as $848,292.00 and the anticipated tax due was reported as $84,829.00.

The Division prepared a Tentative Assessment and Return, dated March 8, 1991, which increased the gain subject to tax by $1,638,481.12. As adjusted, the Division determined that the gain subject to tax was $2,486,773.12 and the amount of the tentative assessment of tax due was $248,677.31. To the extent at issue herein, the Schedule of Adjustments, which was attached to the Tentative Assessment and Return, explained that the purchase price paid to acquire the interest in real property was adjusted by $1,150,000.00 because the amount paid for services relating to the subleasing of commercial space for the period April 3, 1985 through April 1, 1990 was viewed as operating expenses incurred in the normal conduct of business. Accordingly, the Division disallowed the fees paid pursuant to the Consulting Agreement.

The transfer between petitioner and MET Dining, Inc. was consummated on or about March 15, 1991 and petitioner paid the full amount of the real property transfer gains tax sought by the Division. On or about May 30, 1991, petitioner applied for a refund of a portion of the

gains tax paid. In the refund claim, petitioner maintained that the $1,150,000.00 paid to the consultant was key money for execution of the Lease rather than for consulting services.

In a letter dated June 18, 1991, the Division responded that, on the basis of the Consulting Agreement dated April 3, 1985, the $1,150,000.00 paid to the consultant must be considered a consulting fee. The Division also reiterated its position that the money paid for consulting services rendered in connection with the subleasing of commercial space is considered an operating expense. Therefore, the Division denied petitioner's refund claim.

OPINION

The Administrative Law Judge sustained the Division's denial of petitioner's refund claim because the $1,150,000.00 paid pursuant to the Consulting Agreement was a consulting fee and, therefore, was considered an operating expense not includible in original purchase price. Specifically, the Administrative Law Judge determined that the provisions of the Lease, which petitioner executed, contradict petitioner's position that it had to enter into the Consulting Agreement in order to be awarded the Lease. The Administrative Law Judge further found that if petitioner's argument was accepted, i.e., that the execution of the Lease was dependent upon the Consulting Agreement because the Lease could be forfeited for failure to pay the consultant, then the other provisions of the Lease would be meaningless. The Administrative Law Judge stated that "petitioner's argument violates the principle that, where possible, every provision of a contract should be given meaning (see, 22 NY Jur 2d, Contracts, § 221)" (Determination, conclusion of law "D").

The Administrative Law Judge, relying on Matter of Capital District Better TV (Tax Appeals Tribunal, July 30, 1992, affd Matter of Capital District Better TV v. Tax Appeals Tribunal, 200 AD2d 911, 606 NYS2d 930) and Matter of Emery Air Freight Corp. (Tax Appeals Tribunal, October 17, 1991, affd Matter of Emery Air Freight Corp. v. New York State Tax Appeals Tribunal, 188 AD2d 772, 591 NYS2d 264), found that petitioner's evidence could not be used to contradict the unambiguous terms of the Lease.

Finally, the Administrative Law Judge found that while petitioner's contention that the economic reality of the transaction should be controlling is well established (see, e.g., Matter of Bredero Vast Goed, N.V. v. Tax Commn., 138 Misc 2d 27, 523 NYS2d 754, affd 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105), "it does not allow petitioner to rely on testimony to contradict the unambiguous terms of a contract" (Determination, conclusion of law "F").

On exception, petitioner, citing Matter of Bredero Vast Goed, N.V. v. Tax Commn. (146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105), Matter of General Builders Corp. (Tax Appeals Tribunal, December 24, 1992), Matter of Schrier (Tax Appeals Tribunal, July 16, 1992, affd Matter of Schrier v. Tax Appeals Tribunal, 194 AD2d 273, 606 NYS2d 384) and Matter of Von Mar Realty Co. (Tax Appeals Tribunal, December 19, 1991, affd Matter of Von Mar Realty Co. v. Tax Appeals Tribunal, 191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803), argues that the Administrative Law Judge, while recognizing that the economic reality principle is well established, erred in not applying the principle to this matter. Petitioner also continues to argue that the $1,150,000.00 payment constituted key money for the acquisition of the Lease and is allowable as a cost of acquisition.

In response, the Division argues that petitioner is bound by the unambiguous language of the Lease and the terms of the Consulting Agreement and cannot resort to testimony to prove that it had to agree to the Consulting Agreement in order to obtain the Lease.

With respect to petitioner's argument that the economic reality of the transaction is controlling, the Division argues that:

> "the cases relied on by the petitioner support reliance on economic reality only to determine whether the transaction itself is subject to tax. There is no issue as to the taxability of the transfer by the petitioner. Rather, the issue in this proceeding concerns whether the petitioner is entitled to reduce the amount of its taxable gain by deducting the amount paid pursuant to the Closing Agreement. The petitioner has a heavy burden of proof to show entitlement to such a deduction" (Division's brief, p. 8).

The Division further argues that "[t]here is no language in either the Consulting Agreement or the Lease to support the petitioner's allegation that the payments to Blittner were

part of the acquisition cost of the leasehold" (Division's brief, p. 9). In this regard, the Division states that "[t]here is no evidence that the payments to Blittner were in satisfaction of any liability or indebtedness of Empire to Blittner or that, in any way, Empire received any benefit from these payments" (Division's brief, p. 10).

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Landmark Dining Systems, Inc. is denied;

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

3. The petition of Landmark Dining Systems, Inc. is denied.

DATED: Troy, New York
September 8, 1994

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

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