STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH WANAT	:	DECISION DTA No. 811055
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 Joseph Wanat, c/o Leonard I. Ackerman, Esq., 34 Pantigo Road, East Hampton, New York 11937, filed an exception to the determination of the Administrative Law Judge issued on February 3, 1994. Petitioner appeared by Howard M. Koff, P.C. 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 April 21, 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 petitioner is entitled to a refund of gains tax previously paid based upon a change in circumstances subsequent to its transfer of real property.

FINDINGS OF FACT

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

The facts in this matter are not in dispute and are relatively straightforward.[1] On or about November 30, 1989 petitioner, Joseph Wanat, entered into an agreement to sell to Heather Hills Omni Sound Limited Partnership certain real property located in the town of Southhold, New York ("the premises") for the sum of $3,304,644.50. Pursuant to this agreement, petitioner was to receive payment of the contract amount as follows:

- $200,000.00 on account of a prior contract of sale;[2]
- $500,000.00 in cash;
- $1,351,950.00 via a promisory note secured by a certificate of deposit in like amount; and
- $1,252,694.50 via a 10-year note secured by a purchase money subordinate mortgage on the premises.

The pending transfer was reported to the Division of Taxation ("Division") via transferor and transferee questionnaires (forms TP-580 and TP-581). These forms reported consideration of $3,304,644.50, less brokerage fees of $100,000.00 and claimed allowable selling expenses of $40,000.00, thereby resulting in $3,164,644.50 of gain subject to tax and gains tax due (at 10%) in the amount of $316,464.45. In turn, the transfer occurred on or about December 15, 1989 and petitioner timely remitted the noted amount of tax due.

On or about October 1, 1990, petitioner submitted a Claim for Refund of gains tax paid in the amount of $33,684.78. This refund claim was premised upon additional claimed allowable expenses increasing petitioner's original purchase price for the property. The Division, in turn, approved a partial refund in the amount of $27,569.10. The basis for this refund claim and the difference between the claimed refund amount and the approved amount are not at issue in this proceeding.

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[1]The parties have agreed to certain of the facts in this case as set forth in a stipulation signed by the Division of Taxation's representative on September 24, 1993 and by petitioner's representative on September 29, 1993. The content of this stipulation is incorporated as part of the Findings of Fact herein.

[2]The subject contract of sale superseded a prior contract of sale dated October 20, 1987 between petitioner and one Richard T. Carr. The contract vendee herein, Heather Hills Omni Sound Limited Partnership, as successor in interest to Richard T. Carr, received credit for the $200,000.00 amount previously paid to petitioner under the prior contract of sale.

On September 6, 1991, petitioner submitted a second Claim for Refund of gains tax paid in the amount of $125,269.45. The basis for this claim is that the purchaser/mortgagor has defaulted with respect to the subordinated purchase money mortgage given to petitioner on the subject premises, and that such subordinated purchase money mortgage has been eliminated as a result of a foreclosure action instituted by a senior mortgagee. As a result of the foreclosure (and the purchaser/mortgagor's bankruptcy), petitioner has not, and will not, receive cash or any other thing of value in respect of his purchase money mortgage (and note). Petitioner therefore claims entitlement to a refund based upon changed circumstances, to wit, a failure to receive the aforementioned portion of the original consideration.

On or about September 10, 1991, the Division denied petitioner's claim for refund, leaving for determination herein the issue of whether the subsequent (post-transfer) elimination of a purchase money mortgage affects the amount of gains tax due. The parties agree that if such elimination affects the amount of gains tax, then petitioner is entitled to the amount of refund claimed (plus interest) and that, conversely, if such elimination has no affect on the amount of gains tax, then the refund denial was proper.

OPINION

In the determination below, the Administrative Law Judge, in referring to Tax Law § 1441 which imposes a 10% gains tax on the transfer of real property within New York State, held that "[t]here is no dispute that the transfer of property herein constituted a transfer subject to this tax" (Determination, conclusion of law "A").

The Administrative Law Judge's determination discusses the various sections of Tax Law § 1440 including the definitions of "gain," "original purchase price," and "consideration," holding that "[h]ere, it is clear that the transfer in question was subject to gains tax and that the amount of consideration paid or required to be paid included the $1,252,694.50 note secured by the subordinated purchase money mortgage" (Determination, conclusion of law "C").

The Administrative Law Judge also held that: 1) notwithstanding petitioner's claim that he is unable to recover the principal amount due under his note and mortgage and his argument that only an "illusory gain" at best resulted from the transfer, the amount of transfer gains tax due as a result of the transfer remains unchanged; 2) this is a clear instance where the consideration required to be paid, and petitioner's resulting gains tax liability were set and known at the time of transfer; and 3) there is no authority to reduce the consideration received on the transfer due to subsequent conditions, including the fact that the transferor did not and may not, in fact, receive all of the consideration which it had a right to receive at the time of the transfer (Determination, conclusion of law "D").

On exception, petitioner argues: 1) the real question is whether the Legislature, in enacting a tax on "gains," intended to tax illusory profits or air; and 2) there is simply no support in the statute, or its legislative history, for the novel concept that the gains tax is fixed and immutable as of the date of transfer. On the contrary, such tax is payable on the basis of a tentative assessment, which, by statute, "shall not be deemed to be a determination of the actual amount of tax due" (Tax Law § 1447[2], cf., Tax Law § 1444[1]).

The Division, in reply, argues that "[s]ection 1445(1)(a) provides that a refund claim may be filed by '[a] person claiming to have erroneously paid the tax imposed by this article.' Absent an erroneous payment, the Tax Law does not provide for a refund of the real property transfer gains tax" (Division's brief, p. 5).

The Division also argues (see, 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) that: 1) the amount of real property transfer gains tax imposed on this transfer is not affected by the elimination subsequent to the transfer of the purchase money mortgage held by petitioner; and 2) the imposition and payment of this tax by petitioner was not an erroneous payment of tax and the Division, therefore, was justified in denying petitioner's request for refund (Division's brief, pp. 5-6).

The Division, in responding to the cases relied upon by petitioner, agrees with the determination of the Administrative Law Judge which stated, "nor do they indicate that the amount of gain is to be measured and tax liability established at any time other than the date of transfer" (Determination, conclusion of law "D").

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issues before him, we see no reason to analyze these issues further; nor do we see any reason to hold otherwise and, therefore, affirm the Administrative Law Judge based on his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph Wanat is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Joseph Wanat is denied; and
4. The Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
September 15, 1994

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

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