

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>E.L.C. HOTEL CORPORATION</b>	:	DECISION
<b>52ND STREET DESIGNEE CORPORATION</b>	:	DTA No. 811074
<b>AND RADIO AMUSEMENT CORPORATION</b>	:	811075, 811076
	:	811641 AND 811642
for Revision of Determinations or for Refund of Tax on	:	
Gains Derived from Certain Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 19, 1994 with respect to the petitions of E.L.C. Hotel Corporation, c/o Robert Gottlieb, Esq., 29 Broadway, Suite 1412, New York, New York 10006, 52nd Street Designee Corporation, c/o Lewis Cohen, Esq., 167 West 34th Street, New York, New York 10001 and Radio Amusement Corporation, c/o Robert Gottlieb, Esq., 29 Broadway, Suite 1412, New York, New York 10006. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition and the Division of Taxation filed a brief in reply. Oral argument was heard on October 20, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUE***

Whether interest is due on petitioners' gains tax payments made after the transfer of title where property was taken by eminent domain, title passed to the State of New York, but payment for the property was not made until approximately one year after the passing of title.

***FINDINGS OF FACT***

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

There are three buildings involved in this matter: 592-594 Seventh Avenue, New York, New York 10036; 1491 Broadway, New York, New York 10036; and 216 West 42nd Street, New York, New York 10036.

***STIPULATED FACTS***

The proceedings before the Division of Tax Appeals identified as DTA Nos. 811074, 811075, 811076, 811641 and 811642 all involve a common legal issue; viz., whether interest is due (and therefore accrues) from the date of the takings in condemnation where, as here, the amounts of the condemnation awards (i.e., advance and supplemental payments) were contingent and not ascertained or determined until long after the takings.

In each case, the amount of the respective advance and/or supplemental payment was contingent and was not ascertained or determined until long after the respective taking (and long after the 15-day period following such taking).

If interest was due from the date of the takings (or within 15 days thereof) despite the fact that the amounts of the awards were then contingent and unascertained, then the claims for refund should be denied and the notices of determination sustained.

On the other hand, if interest was not due from the date of the takings (or within 15 days thereof) then petitioners are entitled to the claimed refunds and cancellation of the notices of determination insofar as such notices of determination contain an assessment of interest.

The amounts of interest involved herein are set forth in the respective claims for refund and notices of determination, which are part of the record in each such proceeding.

***ADDITIONAL FACTS***

The buildings and property herein involve the plan of the New York State Urban Development Corporation ("UDC") and its subsidiary (Times Square Redevelopment

Corporation) to redevelop the Times Square area of Manhattan. A condensed review of the project and its history may prove helpful in understanding these matters.

The project began with the UDC and New York City ("NYC") agreeing to participate in a plan, involving private business, to redevelop the Times Square area. The goals of the plan included the elimination of blight, revitalization of the area as an entertainment center, development of commercial potential and strengthening of nearby areas. With these ends, the proposal included a mix of office towers, hotel space, theaters and retail space; presented options for the development of eight sites within the tentatively designated project area; and solicited public comment.

UDC authorized formation of a subsidiary and acquisition of property by negotiated purchase or eminent domain, and invited private developers to submit proposals. A general project plan, together with a series of findings, were adopted by the UDC. On November 9, 1984, the NYC Board of Estimate authorized the Mayor to execute agreements for site development with the UDC and developers.

On May 3, 1989, the UDC filed its petition with the Supreme Court of the State of New York, County of New York with respect to the acquisition of the properties at issue. The petition requested that the Court issue an order to condemn the real property and to set the compensation which should be made to the respective owners of, or persons interested in, such property.

The Order of the Supreme Court, New York County (Stanley Parness, J.) entered April 18, 1990 provided, in part, as follows: that the UDC was authorized to file the acquisition map in the Office of the Clerk of the County of New York or the Office of the City Register; that upon filing of the court's order and the acquisition map with said Clerk of the County of New York or the City Register, the title to all of the property sought to be acquired pursuant to the petition and described in the acquisition map would vest in the UDC; and that the UDC shall promptly complete vesting date appraisals and make advance payments thereon with 9% interest from date of vesting.

***E.L.C. HOTEL CORPORATION: 592-594 SEVENTH AVENUE***

Petitioner E.L.C. Hotel Corporation ("ELC") did not file any real property transfer gains tax reports or pay any gains tax following the transfer of the property to the UDC on April 18, 1990. On March 13, 1991, ELC filed a Transferor Questionnaire which indicated that the gross consideration to be paid for transfer by the transferee was "TO BE DETERMINED." An affidavit attached to the questionnaire of one of the attorneys of ELC indicated that the UDC acquired title to the property from ELC on April 18, 1990 for the 42nd Street Development Project.

The UDC notified ELC, by letter dated March 19, 1991, that on April 15, 1991 it was making available to ELC an advance payment of \$5,100,000.00. On April 4, 1991, ELC filed a Supplemental Transferor Questionnaire indicating gross consideration of \$5,100,000.00 and real property transfer gains tax due of \$335,404.24. The Supplemental Transferee Questionnaire filed by the UDC indicated April 18, 1990 as the date of condemnation, April 15, 1991 as the date the advance payment of \$5,100,000.00 would be available and that the final award was to be determined. The Division of Taxation ("Division") issued a Tentative Assessment and Return on April 12, 1991 to ELC for the transfer of the property of 592-594 Seventh Avenue, assessing tax due of \$348,829.24, plus interest of \$40,041.76. The tax and interest was paid by ELC on April 26, 1991, and ELC then filed a claim for refund of the interest paid. In response, the Division rejected the claim for refund in a letter dated October 30, 1991, stating, in part, that:

"The court order has established that title to the property was vested in the UDC on April 18, 1990. This becomes the date of transfer. The court also recognized that any money paid for the property was due to the condemnee from this date by the fact that interest had to be paid on any compensation from April 18, 1990 to the date of payment. Since Section 1442 of the Tax Law provides that the tax is due no later than the fifteenth day after the date of transfer, it is not when the tentative assessment was issued or when the actual payment of consideration is made that determines when the tax is due. Since the courts have acknowledged that any compensation due was due from the vesting or transfer of title into the UDC, the Department has concurred with this position, and feels that any tax due is also due from that date. Therefore, when the tax was not paid when due, as provided for in Section 1442 of the Tax Law, there was an underpayment and interest was imposed from that date to the date of payment. This treatment is in conformity with the court and UDC who paid the \$5,100,000 with interest to the claimant from April

18, 1990 to the date payment was made."

***52ND STREET DESIGNEE CORPORATION: 1491 BROADWAY***

Petitioner 52nd Street Designee Corporation ("52nd Street") filed a Transferor Questionnaire for the property located at 1491 Broadway, New York, New York 10036, indicating the gross consideration to be paid for transfer by transferee was "not yet determined." An affidavit of the secretary of 52nd Street attached to the questionnaire indicated that the property was acquired by UDC on April 18, 1990. The Transferor Questionnaire was filed on February 26, 1991. Accompanying the Transferor Questionnaire was a Notice of Extension of Period of Limitation for Assessment of Tax on Gains Derived from Certain Real Property Transfers, signed on behalf of 52nd Street on February 25, 1991. The notice of extension was not signed by a representative of the Department of Taxation and Finance.

On March 19, 1991, the UDC notified 52nd Street that it was making available an advance fee payment of \$2,200,000.00 on April 15, 1991. Following receipt of the UDC letter, 52nd Street filed a Supplemental Transferor Questionnaire on April 4, 1991 indicating gross consideration to be paid of \$2,200,000.00 and anticipated tax due of \$24,584.00. The Division issued a Tentative Assessment and Return dated April 11, 1991 showing tax and interest due of \$28,572.37 and \$3,279.79, respectively, which were paid by 52nd Street on April 25, 1991. 52nd Street's claim for refund of the interest paid of \$3,279.79 was denied by the Division in a letter dated October 30, 1991 that was similar to the one issued to ELC. Finally, 52nd Street filed a Supplemental Return on October 15, 1991 showing additional tax due of \$201,543.10 resulting from a supplemental advance fee payment of \$2,600,000.00 from the UDC on October 10, 1991. Interest was paid to 52nd Street from April 18, 1990 through October 9, 1991. On March 16, 1992, the Division issued a Notice of Determination to 52nd Street imposing interest from May 3, 1990 through March 16, 1992 on the supplemental payment of \$2,600,000.00.

***RADIO AMUSEMENT CORPORATION: 216 WEST 42ND STREET***

Petitioner Radio Amusement Corporation ("Radio") owned the property located at

216 West 42nd Street, New York, New York. On May 2, 1990, Radio filed a Transferor Questionnaire stating that the gross consideration to be paid for transfer by transferee was "to be determined" and a Supplemental Return electing to pay the tax due in installment payments pursuant to Tax Law § 1442(c). Radio and the Division executed, on May 29, 1990 and August 14, 1990, respectively, a Notice of Extension of Period of Limitation for Assessment of Tax on Gains Derived from Certain Real Property Transfers. After receiving a letter from the UDC dated March 19, 1991 indicating an advance fee payment of \$1,150,000.00 would be available on April 15, 1991, Radio filed a Supplemental Transferor Questionnaire showing tax due of \$73,898.90 based upon the gross consideration of \$1,150,000.00. The Division responded by issuing a Tentative Assessment and Return for tax due of \$73,898.90, plus interest of \$8,482.78, which was paid on April 25, 1991. Radio's claim for refund of the interest paid of \$8,482.78 was denied by the Division in a letter dated October 30, 1991. The letter was similar to the one issued to ELC on the same date.

On October 22, 1992, the UDC notified Radio that a supplemental advance fee payment would be available as of November 20, 1992. Radio then filed a Supplemental Return with the additional consideration of \$1,350,000.00 and tax due of \$105,650.00. The Tentative Assessment and Return issued by the Division to Radio indicated tax due of \$105,650.00 and interest due of \$30,273.40, both of which were paid on November 24, 1992. On the same date, a claim for refund was filed for total interest paid of \$38,756.18 (\$8,482.78 + \$30,273.40), which the Division rejected on January 5, 1993.

### ***OPINION***

The Administrative Law Judge concluded that:

"[u]nder the circumstances presented, where the consideration was unknown and contingent at the time of transfer and could not be determined at such time, the gain could not be computed and the gains tax due was undeterminable and therefore not due, no interest accrued between the date of the taking of the subject property by eminent domain and the date that UDC paid the advance payments to petitioners" (Determination, conclusion of law "E").

On exception, the Division argues that the instant transactions are analogous to certain

acquisitions of a controlling interest in an entity where it may not be possible to determine the fair market value of the real property owned by the entity (the consideration in such a transaction) until some time after the acquisition has occurred, but the Division's policy is that interest is due on the tax from the time the acquisition occurred. The Division also notes that a transferor who elects, under section 1442(c) of the Tax Law, to pay the tax in installments is required by section 1446(3) to pay interest on the installments. The Division states that no reason has been advanced which justifies a different result in this case. The Division also argues that petitioners' receipt of interest from the UDC on the deferred receipt of their compensation supports the Division's right to interest on the tax due. Finally, the Division asserts that the consideration in this case was not determined but it was determinable.

Petitioners assert that the Administrative Law Judge correctly decided this case.

Although we are sympathetic to petitioners' circumstances in this case, we cannot find a basis in the law to hold that interest was not due from the date of transfer.

The gains tax is imposed on the gain derived from the transfer of real property in the State (Tax Law § 1441). Section 1442(a) of the Tax Law provides that tax is due no later than 15 days after the date of transfer. There is no special rule in Article 31-B that establishes a different date for payment of tax when the consideration is contingent, not determinable or not determined.

Section 1446(1) of the Tax Law provides that interest is due on any underpayment of tax. Although underpayment is not defined, we think its obvious meaning is a payment that is less than the amount of tax due. Because tax was due on these transfers 15 days after the date of each transfer and no tax was paid at this time, we conclude that there was an underpayment of tax upon which interest accrued.

We appreciate that petitioners could not precisely calculate the amount of tax due at the time of transfer. However, for the taking of their properties, petitioners were entitled to receive the market value of their properties at the time the properties were appropriated (Matter of Town of Islip, 49 NY2d 354, 426 NYS2d 220). Given this standard, petitioners could have

estimated the tax due on the transfer and paid the tax within 15 days of the transfer. If petitioners overestimated the amount of tax due, they would receive interest under section 1446(1) on this overpayment of tax.

The conclusion that Article 31-B requires the payment of interest is consistent with petitioners' right to receive interest payments from the UDC from the date of acquisition to the date of payment under section 514 of the Eminent Domain Procedure Law. "Interest on the value of the property taken is required by the just compensation clauses of the Federal and State Constitutions as a substitute for the beneficial use of the property during the period between the date of the taking and the date of final judgment" (Adventurers Whitestone Corp. v. City of New York, 65 NY2d 83, 489 NYS2d 896, appeal dismissed 474 US 935). The condemnee's right to interest reflects the fact that the transfer of the property took place at the date of the appropriation and at that date the condemnee was entitled to the market value of his property, even though that value may have not been determined at that date. Similarly, interest on the gains tax is due because the transfer occurred and tax was due on the date of transfer.

Contrary to petitioners' contention, our decision in Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992) did not decide this issue adversely to the Division. The Administrative Law Judge's determination in V & V Properties held that interest did not accrue on gains tax due from contingent consideration; however, the correctness of this ruling was not raised in the exception filed in V & V Properties. Therefore, we did not rule on this issue and our decision is not precedent on this point (Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin., 152 AD2d 87, 547 NYS2d 444).

We also do not agree with the Administrative Law Judge that section 1444(3)(a) of the Tax Law indicates that the date of transfer is the date the taxpayer notifies the Division of the amount of consideration finally determined. This section extends the general statute of limitations, which is three years from the date of transfer, to, in the case of a transfer where the total consideration is not determinable, "three years from the date the taxpayer notifies the commissioner of taxation and finance of the amount of consideration finally determined" (Tax

Law § 1444[3][b]). There is nothing on the face of this statute that indicates it is intended to change the date of transfer to the date the consideration is finally determined. Further, such an interpretation would lead to absurd results, e.g., as the Division points out, it would mean that a transferor who received all of the contingent consideration that he was due, but who did not notify the Division that the consideration was finally determined would never owe tax or interest because the transfer would never occur. Instead, we think that the extension provided by section 1444(3)(b) is simply an extension of the statute of limitations, just like that provided by section 1444(3)(b) where no questionnaires, or false or fraudulent ones are filed, with no effect on the date of transfer.

The result in this case appears particularly harsh because the transfers were not voluntary on the part of petitioners. In a case where the transferor had freely negotiated the consideration that would be subsequently determined it would not seem so harsh to require the transferor to pay interest on the tax related to the delayed consideration. However, we can find no basis in Article 31-B that would allow us to treat the consideration received in these involuntary transfers differently from that in a negotiated transfer. In our view, if there is to be relief for these types of transactions it requires a legislative change.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed; and

3. The petitions of E.L.C. Hotel Corporation, 52nd Street Designee Corporation and Radio Amusement Corporation are denied.

DATED: Troy, New York  
April 6, 1995

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

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