

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FBE BROADWAY ASSOCIATES	:	DECISION
for Revision of a Determination or for Refund of Tax on	:	DTA No. 811986
Gains Derived from Certain Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

Petitioner FBE Broadway Associates, c/o FBE Limited, 111 Broadway, 20th Floor, New York, New York 10006, filed an exception to the determination of the Administrative Law Judge issued on March 2, 1995. Petitioner appeared by Roberts and Holland, LLP (Carolyn Joy Lee and Ronald A. Morris, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner submitted a brief in support of its exception and a brief in reply to the Division of Taxation's brief in opposition. Oral argument was heard on December 14, 1995, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

I. Whether brokerage fees and commissions incurred in the leasing of real property are includable in original purchase price on the subsequent sale of the fee estate subject to the leases.

FINDINGS OF FACT¹

We find the facts as determined by the Administrative Law Judge except for finding of fact "20" which has been modified. The Administrative Law Judge's findings of fact and the

¹With its brief below, petitioner submitted proposed findings of fact numbered "1" through "20." Said proposed findings of fact have been accepted and are incorporated herein.

modified finding of fact are set forth below.

Petitioner, FBE Broadway Associates, is a New York limited partnership.

On October 19, 1987, petitioner acquired an office building located at 270 Madison Avenue ("the property") for a purchase price of \$33,000,000.00.

At the time of the 1987 purchase, a number of floors at the property were vacant or about to become vacant.

Petitioner acquired the property with the intention of enhancing the property's value by leasing the vacant space, in the expectation of later realizing a greater value upon sale of the leased-up property.

During 1988, 1989 and the early part of 1990, petitioner entered into 13 new leases (the "new leases"), affecting 7 full floors and portions of 4 additional floors at the property, under which petitioner was entitled to receive rents. The terms of such leases ranged from 25 months to 130 months.

Petitioner incurred leasing brokerage fees and commissions aggregating \$1,242,980.15 in order to obtain the tenant/lessees and accompanying right to receive rents under the new leases.

It is customary for owners of rental office buildings in Manhattan to incur such leasing brokerage costs.

The property was sold in 1990 in a transaction that included the sale of petitioner's rights to receive rents under the new leases. The selling price for the property was \$51,450,000.00.

At the time of the 1990 sale, the value of the property inclusive of the landlord's right to receive rents under the new leases was substantially greater than the value of the property exclusive of those rights.

The additional consideration derived by petitioner on the 1990 sale that was attributable to the value of the right to receive rents under the new leases was greatly in excess of the costs incurred by petitioner in obtaining such rights under the new leases.

On the 1990 sale of the property, petitioner filed a Transferor Questionnaire (Form TP-580) reporting thereon a taxable gain of \$9,991,183.00 and a gains tax due of \$999,118.30.

In response, the Division of Taxation ("Division") issued its Tentative Assessment and Return on February 28, 1990, showing a taxable gain of \$11,862,813.66, and a gains tax due of \$1,186,281.37.

Among the adjustments made by the Division was the disallowance of original purchase price claimed for "tenant leasing costs" in the amount of \$1,261,654.00.

On or shortly after February 28, 1992, petitioner paid the gains tax of \$1,186,281.37 as shown per the Tentative Assessment and Return.

On February 28, 1992, petitioner filed a refund claim in the amount of \$293,427.41.

Petitioner's refund claim was allowed in part and denied in part by letter dated August 12, 1992. This letter stated, in relevant part, that:

"The money paid for the leasing commissions rendered in connection with the leasing of the commercial space is considered operating expenses incurred in the normal course of business."

Petitioner timely filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") concerning that portion of the refund claim that had not been allowed.

On March 19, 1993, a Conciliation Order was issued denying petitioner's request for refund.

Petitioner timely filed a petition seeking a refund of gains tax paid as a result of the disallowance of the original purchase price claimed for leasing fees and commissions, as well as additional refunds on other grounds.

We modify finding of fact "20" of the Administrative Law Judge's determination to read as follows:

Following various concessions, the amount of gains tax now

at issue is \$124,298.02, plus interest,² representing gains tax paid as a result of the Division's determination that the original purchase price used to compute the amount of taxable gain on the 1990 sale does not include the costs incurred by petitioner to acquire the right to receive rents under the new leases.³

OPINION

In the determination below, the Administrative Law Judge analyzed the relevant sections of Article 31-B of the Tax Law and stated that the fees would be includible in original purchase price if paid by petitioner "in connection with its acquisition of an interest in real property" (Determination, conclusion of law "B"). Recognizing that the right to receive rents is an interest in real property, the Administrative Law Judge held that the sale of all interests comprising the fee would have to be broken into its component segments in order for petitioner's argument to prevail. However, the Administrative Law Judge held that there was no compelling reason to separate a fee transfer into its components. The Administrative Law Judge noted that petitioner had failed to explain why the broker's fees and commissions did not represent ongoing operating expenses rather than a cost to acquire an interest in real property. Finally, the Administrative Law Judge held that prior to the amendment to subsection 5 of section 1440 of the Tax Law, broker's fees and commissions incurred in leasing real property were not a component of original purchase price under Article 31-B of the Tax Law.

On exception, petitioner argues that the Administrative Law Judge erred in holding that the broker's commissions and fees incurred in leasing the premises are not costs to acquire an interest in real property.

Petitioner's argument can be summarized as follows: (1) the right to receive rents is an interest in real property under the gains tax; (2) petitioner paid commissions in renting the

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The parties' briefs below clarify that there is no dispute as to the dollar amount of tax in question, and that the only issue is whether the leasing fees and commissions may be included in original purchase price.

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We modified this finding of fact to show that the amount at issue is \$124,298.02 and not \$124,980.15.

subject premises; (3) the commissions, therefore, were paid to acquire an interest in real property, i.e., the right to receive the rents; (4) original purchase price includes any price paid or required to paid to acquire an interest in real property; and (5) the commissions are, therefore, included in original purchase price as a price paid to acquire an interest in real property. Petitioner also asserts that the disallowance of the broker's fees and commissions as a component of original purchase price would be unconstitutional.

In response, the Division argues that when petitioner acquired the fee interest in the subject premises, petitioner acquired all the lesser interests that comprise the fee which included the right to receive rents. Accordingly, the rental commissions were incurred after petitioner acquired the right to receive rents and, therefore, the commissions were not paid to acquire an interest in real property. The Division states that the commissions "were not related to the acquisition of this right, rather they were expenses associated with the exercise of [the] previously acquired right to receive rents" (Division's brief, p. 7). The Division also notes that "original purchase price" is very narrowly defined under the gains tax.

We reverse the determination of the Administrative Law Judge for the reasons set forth below.

Article 31-B of the Tax Law imposes a tax of ten percent on the gain derived from the transfer of real property (Tax Law § 1441). Gain is defined as the difference between consideration received on the transfer and original purchase price (Tax Law § 1440[3]). "Transfer of real property" is defined as "the transfer or transfers of any interest in real property by any method, including but not limited to sale . . ." (Tax Law former § 1440[7]). Original purchase price is defined to include the consideration paid to acquire the interest in real property (Tax Law former § 1440[5][a]). Brokerage fees are an allowable element of original purchase price in other instances, i.e., when paid to a mortgage broker (20 NYCRR 590.15) and when paid by a lessee to acquire a leasehold interest (20 NYCRR 590.29[c]).

"'Interest' when used in connection with real property includes, but is not limited to, title in fee, a leasehold interest, a beneficial interest,

an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property" (Tax Law § 1440[4], emphasis added).

As argued by the parties on exception, the essence of the issue is whether petitioner acquired the right to receive rents when it purchased the fee or whether this right was acquired as a result of paying brokerage fees. We hold the latter to be true rather than the former.

"Right" is defined, in part, as "[a] legally enforceable claim of one person against another that the other shall do a given act, or shall not do a given act" (Blacks Law Dictionary 1189 [5th ed 1979]; see also, Restatement of the Law of Property, § 1). Petitioner did not have a legally enforceable claim to rents when it took title to the property. Instead, petitioner incurred brokerage fees and commissions to acquire tenants and, in turn, to acquire the right to receive rents. When petitioner subsequently transferred the property, the right to receive rents was among the interests transferred. Accordingly, we hold that the broker's fees and commissions are properly included in original purchase price as a cost to acquire an interest in real property.

The Division asserts that this interpretation would countermand the principle that a fee interest is the largest possible interest that one can own in real property because other interests in real property could be acquired subsequent to acquiring title in fee.

While we acknowledge that under general principles of property law an estate in fee is the largest possible interest which can be owned (Rasch, New York Law and Practice of Real Property, § 5.1, at 59 [2d ed]), and includes title, the right of possession, and the right to use for any lawful purpose (Matter of Brookfield, 176 NY 138, 68 NE 138, 140), we agree with petitioner that this principle is not determinative of the issue before us. Instead, the matter must be resolved by the application of the statutory rules, which in this case specifically define an interest in real property to include the right to receive rents. As petitioner points out, the statutory scheme allows for other instances where the owner of a fee interest could subsequently acquire another, lesser, interest in the real property, specifically, the acquisition of development rights or of a leasehold interest. Thus, we conclude that common law principles cannot dictate a

result inconsistent with the operation of the statute.

Having held for petitioner, it is unnecessary to address petitioner's constitutional argument since the Division is precluded from further review (Tax Law § 2016).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of FBE Broadway Associates is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of FBE Broadway Associates is granted; and
4. Petitioner's request for refund of \$124,298.02 is granted.

DATED: Troy, New York
June 6, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner