

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHED DEVELOPERS	:	DECISION
	:	DTA No. 812289
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 Shed Developers, c/o Stanley Mishkin, Esq., 5018 Express Drive South, Suite LL-4, Ronkonkoma, New York 11779, filed an exception to the determination of the Administrative Law Judge issued on March 23, 1995. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul Lefebvre and Donald C. DeWitt, Esqs., of counsel).

Petitioner did not file a brief in support of its exception nor in reply to the brief in opposition filed by the Division of Taxation. Petitioner's reply brief was due on July 17, 1995, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Donald C. DeWitt took no part in the consideration of this decision.

ISSUE

Whether the full amount of the mortgage indebtedness is included in "consideration," as defined in Tax Law § 1440(1)(a), even if it exceeds the fair market value of the subject property.¹

FINDINGS OF FACT

¹The Division of Taxation and petitioner agreed to the stipulated issue on April 19, 1994 and April 20, 1994, respectively.

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

The Division of Taxation ("Division") and petitioner, Shed Developers, agreed to a stipulation of facts which has been incorporated into the following Findings of Fact.

On December 15, 1986, Shed Associates, Inc. acquired title to 15 lots on the proposed Map of Manhasset Glen, sections No. 1 and No. 2 ("the property"), from John W. Walter and William T. Walter.

Shed Associates, Inc. gave three mortgages to The Greater New York Savings Bank ("Greater"): one in the amount of \$3,885,000.00, which is dated December 15, 1986; another in the amount of \$400,000.00, which is dated March 12, 1987; and the third in the amount of \$915,000.00, dated December 7, 1988. These three mortgages were consolidated to form a lien of \$5,200,000.00. The record does not contain copies of the three mortgages held by Greater or the mortgage notes.

Shed Associates, Inc. transferred the property without consideration to petitioner, Shed Developers ("Shed").² According to the affidavit of Stanley Gross, dated August 2, 1991, the partners of Shed were the shareholders of Shed Associates, Inc.³

On May 10, 1991, petitioner and Greater entered into an agreement in which Shed agreed to convey a portion of the property, together with certain other parcels, to Greater by executing and delivering to Greater a deed in lieu of foreclosure.

According to the agreement, Messrs. Stanley Gross, Theodore H. Hindes, Stewart Dickler and Joseph Einbinder had personally guaranteed the mortgage indebtedness to Greater.

Paragraph "Fourth" of the agreement provided, in pertinent part, that:

²The record is silent as to when this transfer took place.

³Mr. Gross was a partner of Shed.

"Upon the occurrence of the following conditions, the obligations of Messrs. Stanley Gross, Theodore H. Hindes, Stewart Dickler and Joseph Einbinder pursuant to the Guarantees of Payment of the Mortgage loans given by them to Greater shall be deemed extinguished and of no further force and effect:

"(a) That the subdivision map known as the Map of Manhasset Glen . . . is filed in the Nassau County Clerk's Office.

"(b) That simultaneously with the execution and delivery of the exchange deeds and release of part of mortgage by Greater, Shed shall convey to Greater or its designees by bargain and sale

deed with covenants against grantor's acts, all of its right, title and interest in and to all of the property described in paragraph 'FIRST' above. Such conveyance shall not be deemed to merge the fee to such property and the Mortgage held by Greater and shall provide that such conveyance is subject to the outstanding Mortgage held by Greater.

"(c) That Chicago Title Insurance Company insure title to the mortgage premises so conveyed in the amount of \$4,969,879.21

"(d) Shed shall pay all transfer and gains taxes due in connection with the transfer of said premises to Greater as well as title insurance for the Greater."

Greater was the sole stockholder of two separate corporate entities known as The Glen at Manhasset Associates, Ltd. and Plandome-Manhasset Associates, Ltd. ("the corporations"), respectively.

On June 20, 1991, pursuant to the May 10, 1991 agreement, Greater assigned to the corporations its right, title and interest to receive a deed to the mortgaged property.

On June 20, 1991, Peter M. Boger, first vice-president of the corporations, signed the Real Property Transfer Gains Tax Questionnaire - Transferee, TP-581 ("transferee questionnaire"). According to the transferee questionnaire, the corporations were the transferees which were acquiring a 100% fee interest in Section 3, Block 167, Lots 663B, 663C, 663D, 664A, 664B, 683, 684 and 685 on the Land and Tax Map of Nassau County on June 24, 1991 for \$4,969,879.21 "[m]ortgage balance per agreement" from transferor Shed.

On August 2, 1991, Stanley Gross, partner of Shed, executed a Real Property Transfer Gains Tax Questionnaire - Transferor, TP-580 ("transferor questionnaire"). According to the transferor questionnaire, Shed was the transferor which was transferring a 100% fee interest in Section 3, Block 167, Lots 663B, 663C, 663D, 664A, 664B, 683, 684 and 685 on the Land and Tax Map of Nassau County on August 20, 1991 for gross consideration "at Fair Market Value" of \$3,450,000.00. According to the transferor questionnaire, the original purchase price was \$4,688,453.94.

The transferee and transferor questionnaires were received by the Division on August 6, 1991.

On August 27, 1991, the Division issued a Tentative Assessment and Return to petitioner asserting real property transfer gains tax due of \$72,600.00 which amount petitioner paid.

On or about December 13, 1991, petitioner transferred its interest in certain real property located within Nassau County, State of New York to Greater in lieu of foreclosure.⁴

At the time of such transfer, the subject property was encumbered by a mortgage indebtedness in favor of Greater of \$4,969,879.21.

The mortgage indebtedness to Greater was nonrecourse.

On January 29, 1992, petitioner filed a claim for refund of real property transfer gains tax in the amount of \$72,600.00 with the Division.

Petitioner applied to the Division for a refund of the gains tax paid as a result of the transfer, based in part on the claim that because the indebtedness discharged by the transfer in lieu of foreclosure exceeded the fair market value of the property at the time of its transfer, the consideration for the transfer was limited to such fair market value.

On April 4, 1992, petitioner's claim for refund was amended to include an additional \$53,108.68 in real property transfer gains tax, which it had paid.

⁴A copy of the deed is not part of the record.

On October 28, 1992, the Division approved a refund of \$4,800.00 and denied the remainder of the amended claim for refund. In a letter dated October 28, 1992, addressed to petitioner's representative, Karen Galarneau, Tax Technician in the Division's Transaction and Transfer Tax Bureau, stated the reasons for the Division's actions.

The Division denied this claim for refund, in part, because Tax Law § 1440(1)(a) provides that consideration includes the cancellation or discharge of an indebtedness or obligation and is not limited by the fair market value of the property at the time of its transfer.

Petitioner timely requested a conciliation conference.

A Bureau of Conciliation and Mediation Services ("BCMS") conference was held on July 27, 1993. Petitioner appeared by Howard Koff, Esq. Pursuant to the BCMS conference, a Conciliation Order (CMS No. 127065) dated September 24, 1993 was issued to petitioner with the following recomputation of the refund claim:

Refund	\$53,108.68 refund approved
Penalty	-0-
Interest	Computed at Applicable Rate

Petitioner timely filed a petition, on October 1, 1993, which requested a refund of \$67,800.00, the amount remaining from its original refund claim. Petitioner alleged that the Commissioner: (1) erred "in treating as 'consideration' the amount of the subject indebtedness in excess of the fair market value of the real property"; and (2) erred "in denying Petitioner's claim for refund." Petitioner asserted the following facts:

1. "The subject indebtedness due The Greater New York Savings Bank ('The Greater') was non-recourse."
2. "The property was transferred to The Greater in lieu of foreclosure."
3. "The fair market value of the real estate, as of the date of transfer, was \$3,450,000.00."

The Division served its answer, dated January 13, 1994, to petitioner by a transmittal letter also dated January 13, 1994.

The sole issue involved herein is whether the full amount of the mortgage indebtedness is included in "consideration", as defined in Tax Law § 1440(1)(a), even if it exceeds the fair market value of the subject property.

If it is finally determined in this proceeding by the Division of Tax Appeals, the Tax Appeals Tribunal or a court of competent jurisdiction that consideration for the transfer by petitioner is limited to no more than the fair market value of the property at the time of its transfer, then the parties agree that this matter shall be remanded to the Division of Tax Appeals for a hearing by an Administrative Law Judge to determine the fair market value of the property at the time of its transfer on December 13, 1991.

OPINION

Tax Law § 1440(1)(a) defines consideration, in part, as follows:

"'Consideration' means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or contract to purchase or use real property. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation."

Relying on Tax Law § 1440(1)(a), the Administrative Law Judge concluded that:

"[c]onsideration for gains tax purposes includes the amount of any mortgage on the real property 'which was assumed or taken subject to' (see, Conclusions of Law 'A' and 'D'). The Division is correct in that Tax Law § 1440(1)(a) does not distinguish between a recourse mortgage and a nonrecourse mortgage. Applying the analysis of the Tribunal stated in Conclusion of Law "D" to the instant case, the Division properly used the figure of \$4,969,879.21 as the amount of the consideration which petitioner received. In lieu of foreclosure, petitioner transferred the property to the corporations, which were Greater's assignees, subject to the three mortgages which had been consolidated. At the time of the transfer, the subject property was encumbered by mortgage indebtedness to Greater in the amount of \$4,969,879.21 [citation omitted]. This is the amount of the mortgage which was taken subject to by the corporations as transferee and as such constitutes consideration for

gains tax purposes. . . . Lastly, it should also be noted that, according to paragraph 4 of the agreement, at the time of the transfer of the property to the corporations, Greater released the individual partners from their personal guarantees on the mortgage [citation omitted]. This discharge constituted valid consideration as well" (Determination, conclusion of law "F").

On exception, petitioner repeats the same argument that was made to the Administrative Law Judge, i.e., that because the indebtedness here was nonrecourse "then consideration cannot exceed the fair market value of the real property, since the mortgagor is entitled to 'walk' from the 'forgiven' liability" (Petitioner's exception).

We find that the Administrative Law Judge correctly and adequately addressed this issue and we affirm the determination of the Administrative Law Judge for the reasons stated in her determination.

Petitioner also asserts that the Administrative Law Judge erred in treating the release given to the individual partners as consideration because the stipulation of facts provides that the mortgage indebtedness was nonrecourse.

It is clear from the passage quoted above that the Administrative Law Judge recognized that the mortgage was nonrecourse and held that this fact was not relevant to the question of whether the amount of the mortgage was consideration for purposes of section 1440(1)(a) of the Tax Law.

Next petitioner states that "[t]his case is not governed by the 'mortgage' rule, since the transfer involved herein was made to the mortgagee in lieu of foreclosure. In such cases, the consideration for the transfer is, in economic reality, the fair market value of the cancellation or discharge of the subject indebtedness" (Petitioner's exception).

The Legislature did amend the gains tax to provide the rule that petitioner seeks. Section 1440(1)(d)(ii) provides that:

"In the case of a transfer of real property to a mortgagee or lienor (or to any agent or nominee thereof) in lieu of foreclosure or any other action to enforce a security interest, consideration means the sum of (A) the unpaid balance of the debt secured by the

mortgage or lien and (B) the amount of all other liens or encumbrances remaining on the real property or interest therein after the transfer, whether the underlying indebtedness is assumed or taken subject to. Provided, however, where such sum exceeds the fair market value of the real property or interest therein, such consideration shall be equal to the fair market value of the real property or interest therein."

This change was made by section 60 of Chapter 57 of the Laws of 1993. Unfortunately for petitioner, the amendment applies only to transfers that took place on or after April 15, 1993 (L 1993, ch 57, § 418[8]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Shed Developers is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Shed Developers is denied; and
4. The denial of Shed Developer's refund claim, as modified by the Conciliation Order, is sustained.

DATED: Troy, New York
October 26, 1995

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

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