STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MERCER MOUNTAIN PARTNERS	:	DECISION DTA No. 812295
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 Mercer Mountain Partners, c/o Robert Ross, P.O. Box 300, East Chatham, New York 12060, filed an exception to the determination of the Administrative Law Judge issued on September 22, 1994. Petitioner appeared by Many & Pehl (Jeffrey M. Many, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. Any reply brief by petitioner was due on January 11, 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.

ISSUE

Whether petitioner has a right to a hearing under Tax Law § 2006(4) to challenge a tax liability asserted in a Statement of Proposed Audit Adjustment once petitioner signed the consent to the proposed audit adjustment.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner a Statement of Proposed Audit Adjustment, dated July 5, 1991, asserting additional tax owed for real property transfer gains tax in the amount of $43,715.00.

On the bottom of the Statement of Proposed Audit Adjustment ("Statement"), the document informed petitioner that if it agreed that it owed the real property transfer gains tax contained on the Statement, then it should sign the bottom of the Statement and return the form with a certified check within 30 days. The Statement also contained the following printed words above the signature line:

> "The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this Statement constitutes such a consent."

On November 27, 1991, Robert A. Ross, president and partner of petitioner, signed the consent agreeing to the tax amount indicated in the Statement.

Petitioner thereafter filed a request for conciliation conference, dated May 11, 1993, for redetermination of a tax deficiency in the amount of $33,307.00, plus penalty and/or interest in the amount of $13,043.47. The request form referred to a notice dated February 20, 1992 with an identification number of L-004983422-4. Petitioner alleged that the tax was not owing because the allowable costs in computing the transfer gains tax had exceeded the original projections, the market value of the unsold lots within the development had decreased by 50% and, therefore, the sale of such lots would generate a loss for gains tax purposes. Attached to the request was a Consolidated Statement of Tax Liabilities, dated February 20, 1992, from the Division to petitioner, with the assessment identification number L-004983422-4 for the same amount as indicated on the request.

The conciliation conferee dismissed the request, by order dated July 23, 1993, stating that a request must be filed within 90 days from the date of the statutory notice and that because the notice was issued on December 30, 1991, the request was untimely filed.

Petitioner filed a petition, dated October 6, 1993, with the Division of Tax Appeals challenging the tax owed. Petitioner alleged that the tax assessment was correct at the time of the transfers, but that because the fair market value of the remaining lots declined and the lots are currently being sold at a loss, these losses should be used to offset the transfer gains tax owed. Petitioner, therefore, urged that the assessment be reviewed at a hearing before the Division of Tax Appeals to avoid overpayment of the tax.

The Division filed a motion to dismiss the petition arguing that petitioner was not entitled to a hearing before the Division of Tax Appeals under Tax Law § 2006(5) because the tax was "finally and irrevocably fixed" under Tax Law § 1444(2) when petitioner signed the consent.

In support of its motion, the Division submitted an affidavit of Michael Parada, an employee of the Division's real property gains tax unit. In that affidavit, Mr. Parada stated that when petitioner signed the consent on the Statement, the form was returned to his unit and assigned, for tracking purposes, an assessment identification number of L004983422. He noted that because petitioner agreed to the tax owed, no Notice of Determination was issued, but that a Notice and Demand dated December 30, 1991 was issued to petitioner for the amount owed. He further noted that collection activities were initiated when no payment was received in response to the Notice and Demand. These collection activities included a warrant filed in April of 1992 and levies served in June of 1992.

Also attached to the motion to dismiss was an affidavit of John E. Skorenski, the conciliation conferee who issued the Conciliation Order. Mr. Skorenski explained that the "notice" referred to in the Conciliation Order was the Notice and Demand issued on December 30, 1991.

In its responding papers, petitioner argues that the Division's reliance on the language "finally and irrevocably fixed" in section 1444(2) is misplaced because the transfer gains tax law provides for periodic updates on the tax due with respect to the sale of lots in a real estate project. Petitioner contends that the Statement signed on November 27, 1991 did not take into account lot sales that took place after that date as well as certain allowable project costs. Petitioner opines that the transfer gains tax is not finally and irrevocably fixed until completion of the project and that it is entitled to a reaudit of the project to determine what the proper tax is at this point in time.

OPINION

The Administrative Law Judge, relying on Matter of BAP Appliance Corp. (Tax Appeals Tribunal, May 28, 1992) and Matter of Rosemellia (Tax Appeals Tribunal, March 12, 1992) found that petitioner is not entitled to a hearing under Tax Law § 2006(4) because it is bound by the signed consent which finally and irrevocably fixed the tax due. The Administrative Law Judge stated that, while Bap Appliance and Rosemellia involve consents signed under the sales tax, the language of the sales tax provision in Tax Law § 1138(c) and that of Tax Law § 1444(2) is identical. The Administrative Law Judge further found that petitioner's president and partner voluntarily signed the consent. In addition, the Administrative Law Judge found that "[a]ny subsequent losses or costs incurred by petitioner may be taken into account in determining its subsequent gains tax liability on sales not covered by the consent, but do not affect the binding nature of the tax liability covered by the consent itself" (Determination, conclusion of law "A").

On exception, petitioner argues that Bap Appliance and Rosemellia are not "precedent setting cases." Petitioner asserts that the gains tax, unlike the sales tax which is for a given period and can be finally determined, "is an ongoing process which is not finally determinable until the final transfer subject to transfer gains tax for a particular project is made" (Attachment to Exception, p. 1).

Petitioner also requests this Tribunal to review documentation submitted regarding additional expenses that were not considered at the original audit.

Finally, petitioner argues that the "consent does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law" (Attachment to Exception, p. 2).

In response, the Division argues that the determination of the Administrative Law Judge should be affirmed. Specifically, the Division argues that the cases relied on by the Administrative Law Judge, Bap Appliance and Rosemellia, are on point. The Division, citing Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), also argues that the documentation submitted regarding additional expenses may not be considered by the Tribunal at this time.

The Division, however, does agree with petitioner's statement that the consent does not waive petitioner's right to apply for a credit or refund within the applicable time period.

The Administrative Law Judge correctly and adequately addressed all of the issues raised before her and we find no basis in the record before us for modifying the Administrative Law Judge's determination on these issues in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

We would point out that petitioner's assertion with respect to its right to apply for a credit or refund is correct; section 1445(3) specifically allows a taxpayer to apply for a refund as long as such application is made within the time limitation set forth in the statute.

In addition, with respect to petitioner's request that the Tribunal review documentation submitted regarding additional expenses, as we held in Matter of Schoonover (supra):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)."

Finally, we reject petitioner's argument on exception that "as shown in the Odessa Meat Corporation case [Matter of Abdel Mustafa, as Officer of Adassa Meat Corp., Tax Appeals Tribunal, December 27, 1991], the fact that the taxpayer signs a consent does not preclude the taxpayer from contesting the assessment and penalty." In the Mustafa determination, the Administrative Law Judge cancelled the corporation's assessment because the Division ignored the taxpayer's conditional consent to the assessment, i.e., the taxpayer wrote on the consent that it was "subject to request for reduction in penalty assessed," and incorrectly issued notices and demands instead of notices of determination. The Division did not take exception to this ruling; therefore, the Tribunal's decision did not address it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mercer Mountain Partners is denied;

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

3. The petition of Mercer Mountain Partners is dismissed.

DATED: Troy, New York
June 29, 1995

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

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

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