STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STRATAGEM DEVELOPMENT CORPORATION	:	DECISION DTA No. 812315
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 Stratagem Development Corporation, 50 West 55th Street, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on July 27, 1995. Petitioner appeared by Ferber Greilsheimer Chan & Essner (Allen P. Essner, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation submitted a letter in lieu of a brief in opposition. Petitioner filed a letter stating it waived its right to file a reply brief, which was received on January 12, 1996 and began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the November 17, 1989 transactions entered into by petitioner whereby it assigned its option to purchase certain real property in consideration of the sum of $2,500,000.00 constituted a transfer of an interest in real property subject to gains tax under Article 31-B of the Tax Law.

II. If so, whether penalty assessed should be abated.

FINDINGS OF FACT

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

On March 22, 1985, Fidelity Service Corporation ("FSC"), Heron International P.L.C. and East 55th Street Holdings Limited ("Holdings") entered into a Phase II Joint Venture Agreement for the development of an office and commercial building located at 56 through 64 East 55th Street, New York, New York.

Pursuant to paragraph 30 thereof, Holdings was granted an option to purchase this property or a portion thereof from FSC in the event that FSC had not commenced construction of the Phase II Building within four years from the date of the agreement, or March 22, 1989. The Phase II Joint Venture Agreement further provided that the option to purchase would expire if not exercised within 18 months of the date in which it became exercisable (therefore, the option was exercisable from March 22, 1989 until September 21, 1990).

Holdings assigned its interest under the Phase II Joint Venture Agreement to Stratagem Development Corporation ("petitioner") by instrument dated May 14, 1985.

On November 17, 1989, FSC assigned its interest in the Phase II Joint Venture Agreement and the Phase II Property to Heron Properties, Inc., the indirect parent of FSC.

On November 17, 1989, an Assignment of Option Agreement was executed by petitioner and Heron Properties, Inc. whereby petitioner assigned all of its right, title and interest in and to the option to purchase the Phase II Property to Heron Properties, Inc. for the sum of $2,500,000.00.

Preamble Clause E of the Assignment of Option Agreement stated as follows:

> "The Option to Purchase which was not exercisable until March 22, 1989 is now capable of being exercised and it is of material benefit to Assignee to acquire such option."

The Assignee under this agreement was Heron Properties, Inc. Paragraph 4 of the Assignment of Option Agreement provided:

> "Notwithstanding any provisions to the contrary contained herein, the Option to Purchase is hereby merged with Assignee's interest in the Phase II Site, and is terminated and of no further force or effect."

Paragraph 6 of the Assignment of Option Agreement stated:

> "Subject to this Assignment of Option Agreement, the Phase II Joint Venture Agreement, including the Option to Purchase, are and shall remain in full force and effect."

Also on November 17, 1989, a document entitled "Amendment to Phase II Joint Venture Agreement" was executed by, among others, the five owning corporations, Heron Properties, Inc. and petitioner. Paragraph 9 provided as follows:

> "Option to Purchase. In the event Heron has not commenced construction of the Phase II building by November 30, 1990, Stratagem shall have the option to purchase the Phase II Site at a purchase price equal to the Development Cost, with respect to Heron's acquiring and holding of the Phase II Site, through the date of sale to Stratagem. This option shall be exercised by notice from Stratagem to Heron fixing a closing date (which shall be between 30 and 90 days after the date of the notice). Heron shall within 10 days thereafter cause its auditors to compute Heron's Development Cost and certify the same to Holdings. The provisions of paragraph 13(c) of the Phase II Joint Venture Agreement shall be applicable to the foregoing certification. The foregoing option shall expire (a) if not exercised within six months of the date it becomes exercisable or (b) if exercised and Stratagem does not close the purchase of the Phase II Site within ninety days of such exercise, notwithstanding Heron having been ready, willing and able to do so. Notwithstanding the foregoing in all other respects this Agreement shall continue in full force and effect."

A letter dated November 27, 1989 (on the letterhead of Heron Financial Corporation) was sent to petitioner which stated as follows:

> "To expedite matters, we enclose a signed Transfer Tax Return for you to complete, sign and file as soon as possible. Our tax counsel prepared this form assuming Stratagem had no tax basis in the Option Agreement. In addition, Stratagem is required to file a Form TP-580, Transferor's New York State Real Property Transfer Gains Tax Questionnaire, attached to which must be the Form TP-581, Transferee's Questionnaire. We have caused the Transferee's Questionnaire to be completed, signed and notarized and we enclose that form so that you can attach it to the Transferor's Questionnaire and file them together."

Attached to the letter were an executed transferee questionnaire (Form TP-581) and a combined real property transfer gains tax affidavit (Form TP-584).

The affidavit of Fred Havenbrook, Tax Technician II, of the Division's Real Property Transfer Gains Tax Unit (see, Division's Exhibit "F") stated that by letter dated November 9, 1990, the transferee (Heron Properties, Inc.) had informed the Division that, at the time of the November 17, 1989 transactions, it had appeared to the transferee that the transaction was subject to gains tax and real estate transfer tax. Accordingly, Heron Properties, Inc. had prepared and submitted the required documents (see, above) to petitioner for its signature and filing, but was concerned that petitioner had failed to file these documents with the Division.

The affidavit further states that, as a result of the letter from Heron Properties, Inc., communications between the Division and petitioner commenced and, by letter dated January 23, 1991, Mr. Havenbrook advised petitioner's representatives as follows:

> "After review of the information packet you sent, dated January 14, 1991, the Department has determined that there was a transfer of an interest in real property subject to tax under Article 31-B of the Tax Law.
>
> Please send in the completed Form TP-580 Gains Tax Questionnaire, along with documentation for any claimed original purchase price (legal fees, etc.).
>
> Please send the requested questionnaire/documentation, within 10 days of the date of this letter, to the attention of the undersigned at 75 Watervliet Ave., Albany, NY 12206."

The affidavit of Fred Havenbrook also stated that, as a courtesy to petitioner, a meeting with petitioner's representative was held at the Division's offices in Albany, New York on March 27, 1991 (see, Exhibit "7" attached to affidavit), the purpose of which was to permit petitioner to present an argument as to why the November 17, 1989 transaction should not be subject to gains tax.

Mr. Havenbrook's affidavit stated that, at the conclusion of the meeting, the Division's position remained unchanged. However, the Division's representatives at the meeting agreed to

inquire as to whether petitioner could file a request for an advisory opinion with the Division's Technical Services Bureau while the case was under audit. Petitioner's representatives were subsequently informed that such a request could be filed and that the Division would hold off on issuing an assessment for two weeks in order to permit time for making the request. When petitioner failed to make the request within the two-week period, Mr. Havenbrook's supervisor instructed him to prepare and issue the assessment.

On April 26, 1991, the Division issued a Notice of Determination to petitioner in the amount of $250,000.00, plus penalty and interest, for a total amount due of $378,820.56.

An attachment to the Notice of Determination explained:

> "As previously set forth in our letter, dated December 10, 1990, no filing was made for the Assignment of Option Agreement, dated November 17, 1989, for Phase II Property at 56-64 East 55th Street, NY, NY.
>
> It has been the determination by the Tax Department that the subject transfer is a taxable event in accordance with Article 31-B of the Tax Law, and taxes, plus penalties and interest are due.
>
> | | |
> |---|---|
> | Consideration | $2,500,000.00 |
> | Tax at 10% of the above | $250,000.00" |

OPINION

The Administrative Law Judge found that the assignment of a contract or an option to purchase real property is included in the definition of "transfer of real property" (Tax Law § 1440[7]) and, therefore, is subject to the gains tax. The Administrative Law Judge further found that "[p]ursuant to 20 NYCRR 590.58, this is a transaction which is subject to the imposition of gains tax" (Determination, conclusion of law "F").

The Administrative Law Judge next found that 20 NYCRR 590.13[1] is inapplicable to this matter because the November 17, 1989 transactions did not extend a closing date. The Administrative Law Judge determined that there were two separate and distinct agreements, i.e., an existing option to purchase was terminated and a new one was created. In this regard, the Administrative Law Judge also determined that even if 20 NYCRR 590.13 was applicable herein, petitioner has not met the three criteria set forth in the regulation. First, the Administrative Law Judge found that the payment was not for a time delay. The Administrative Law Judge stated that Heron Properties, Inc. "simply bought time to enable itself to permanently keep title to the Phase II property" (Determination, conclusion of law "D"). Second, the Administrative Law Judge found that petitioner failed to prove that the amount of money it received was reasonable for the length of the delay. Third, the Administrative Law Judge found that the transferee, Heron Properties, Inc., completed the questionnaire with the view that the payment was for real property and, therefore, the requirement for nontaxability under the regulation was not met.

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[1]20 NYCRR 590.13 provides as follows:

> "§ 590.13 Postponed closing date.
>
> "Question: When a transferor agrees to extend the closing date of the contract in return for an additional sum of money, is that additional sum included as consideration?
>
> "Answer: Yes, unless the following three criteria are met:
>
> (1) The agreement between the parties must state that the payment is for the time delay (similar to the allocation that must be made when personal property is also transferred).
>
> (2) The amount of money must be reasonable for the length of delay.
>
> (3) The transferee must complete the questionnaire consistent with the view that the payment is not for real property; thus, he may not include such payment in consideration and may not include such payment in his original purchase price for the property."

The Administrative Law Judge sustained the penalties because petitioner did not show reasonable cause for failing to file a tentative assessment or pay the tax. The Administrative Law Judge found that "petitioner made no attempt to ascertain the Division's policy . . . at any time prior or subsequent to the November 17, 1989 transactions" and "petitioner was put on notice of the potential taxability of these transactions . . . through the documentation furnished to petitioner by Heron Properties, Inc." (Determination, conclusion of law "G").

On exception, petitioner continues to argue that the option was modified to delay its exercise date and that it was not necessary to terminate the option so that the exercise date could be delayed (Petitioner's attachment to exception). In addition, petitioner argues that although the provisions of the option prior and subsequent to modification were not identical, this is not "evidence that the option was surrendered or terminated rather than merely modified" (Petitioner's attachment to exception).

On exception, petitioner has raised the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stratagem Development Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Stratagem Development Corporation is denied; and

4. The Notice of Determination issued April 26, 1991 is sustained.

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