STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CAPITAL DISTRICT PARTNERS	:	DECISION DTA No. 812789
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 Capital District Partners, 101 Richardson Street, Brooklyn, New York 11211, filed an exception to the determination of the Administrative Law Judge issued on October 19, 1995.

Subsequently, petitioner filed a Notice of Motion to "enlarge the record"[1] dated January 17, 1996. This motion, if granted, would have permitted petitioner to submit additional evidence in support of its case. Petitioner's motion was denied by Order dated March 7, 1996 of Administrative Law Judge Frank Barrie. Thereupon, petitioner filed an exception dated April 4, 1996 to said order.

Next, petitioner brought an Order to Show Cause, dated May 3, 1996, in Supreme Court, Albany County, to compel the Tax Appeals Tribunal to reopen the hearing held on December 8, 1994, to permit petitioner to place in evidence a mortgage note and security agreement. This motion was dismissed by Order dated July 10, 1996 by the Honorable Anthony Kane, J.S.C.

Accordingly, petitioner's two exceptions are properly before us and will be considered here as a single exception.

[1]As characterized by petitioner.

Petitioner appeared by Hutton & Solomon, LLP (Roy F. Hutton, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs in support and opposition, respectively, to the exceptions. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

Commissioner Jenkins delivered the decision of the Tax Appeals Tribunal. Commissioners DeWitt and Pinto concur.

ISSUES

I. Whether the Administrative Law Judge properly denied petitioner's motion to "enlarge" or reopen the record at hearing.

II. Whether the Division of Taxation, in calculating consideration for the transfer of an Albany-area shopping center then under construction, properly included a purchase money mortgage of $725,000.00.

III. Whether petitioner has substantiated additional construction expenses which should be included in the calculation of original purchase price.

IV. Whether, if gains tax is determined due, petitioner has shown reasonable cause for the abatement of penalties.

MOTION TO REOPEN

We deal first with petitioner's exception to the order of the Administrative Law Judge denying its motion to "enlarge the record."

FINDINGS OF FACT

We find the following facts.

A determination was issued in this matter on October 19, 1995 and petitioner, by its representative, filed an exception with the Tax Appeals Tribunal (hereinafter "Tribunal") on or

about November 17, 1995. On January 18, 1996, petitioner filed the instant motion with the Division of Tax Appeals for an order granting petitioner leave to enlarge the record.

Petitioner's motion is supported by an affidavit of Irwin Siegel, Esq. ("Siegel"), petitioner's former counsel in this matter. Siegel's affidavit states that upon the sale of the subject property by petitioner to L & T Associates, petitioner received the aforementioned mortgage note of $725,000.00, which, Siegel alleges, was only payable if petitioner was able to obtain a permanent loan for the purchaser of $9,000,000.00 at an interest rate not exceeding 10 percent.

Siegel's affidavit goes on to state that, at the hearing in this matter, the Division of Taxation ("Division") introduced a copy of a mortgage for $725,000.00 to show that the amount of the mortgage was includable as part of the "consideration" received by petitioner upon the sale of its property, but did not also include a copy of the mortgage note as part of the exhibit (see, Exhibit "N").

Siegel notes that the mortgage did not contain any reference to the contingency as to payment of said note.

One of the issues at hearing was the amount of "consideration" in the determination of taxable gain for purposes of the gains tax imposed under former Article 31-B of the Tax Law. Siegel avers that the failure of the Division to introduce a copy of the underlying mortgage note (which presumably makes reference to the contingent nature of the obligation) was damaging and prejudicial to petitioner's case.

Siegel goes on to state that he attempted to introduce the mortgage note into evidence during his opening statement, but the Administrative Law Judge did not permit it. Siegel also states that he never had an opportunity to review the documents that the Division intended to introduce into evidence until the commencement of the proceedings.

Further, he states that in his "hurried glance" at such documents, he assumed that, under "the complete document" doctrine, the attorney for the Division would be required to enter both

the mortgage note and the mortgage into evidence and, as a result, he "failed to notice the omission of the mortgage note."

For the above reasons, Mr. Siegel states, the record of the hearing should be enlarged to include the aforementioned mortgage note (which is attached to the motion papers).

The hearing transcript indicates that Kenneth J. Schultz, Esq., the Division's attorney, makes reference to the mortgage document for $725,000.00 in his opening statement and states that he will be offering that document into evidence. As for the note, Mr. Schultz states, "I'll leave that to Mr. Siegel to put in his proof on" (tr., p. 22).

When the mortgage document was later offered in evidence by Mr. Schultz, it is clearly identified as such, and no reference is made to the mortgage note. Mr. Siegel was asked if he had any objection to the exhibit and he stated, "No" (tr., pp. 36-37).

At the commencement of the hearing, the Administrative Law Judge explained to the parties how he would proceed; that the parties would have an opportunity to state the issues as they perceived them; then, since there was to be no witnesses for either side,[2] the Division would offer its exhibits subject to any objections that petitioner might make; then petitioner would be permitted to offer its exhibits in the same manner; and then the parties could each, if they wished, make closing arguments in support of their respective positions (tr., pp. 1-6). Then the Administrative Law Judge addressed Mr. Siegel and said, "today is the day when you have to make your record. And if you want me to consider something, it has to be introduced at today's hearing" (tr., p. 7).

The transcript also shows that when Mr. Siegel was making his opening statement, he asked the Administrative Law Judge whether he could "put it [presumably the mortgage note] in evidence now" (tr., p. 15). The Administrative Law Judge replied, "[n]o, why don't you wait until we have the State put in their audit report and their additional documents" (tr., p. 16).

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[2]In any event, however, Mr. Siegel was sworn and testified.

Later in the proceeding, petitioner offered three documents in evidence (tr., pp. 39-42). At the conclusion of these offers, the Administrative Law Judge asked Mr. Siegel, "[o]ther than these three documents, you have no further documents for the record?" Mr. Siegel responded, "That is correct" (tr., p. 43).

Still later in the proceeding, the Administrative Law Judge advised the parties as follows:

> "At this point then, I will note that once the record is closed after today's hearing, I won't accept any further documents or evidence into the record. Today was the opportunity to present evidence. So other than briefs that may be submitted, this is the opportunity given for the submission of evidence" (tr., p. 46).

At that point petitioner's representative, Mr. Siegel, requested that the record remain open after the hearing to permit him to submit one additional exhibit, "a letter" (tr., pp. 46-47). This request was granted. Mr. Siegel did not avail himself of this last opportunity to offer the mortgage note in evidence or request additional time to do so.

OPINION

The regulation of the Tax Appeals Tribunal at 20 NYCRR 3000.16 provides for motions to reopen the record or for reargument, and states, in pertinent part, that:

> "(a) Determinations. An administrative law judge may, upon motion of a party, issue an order vacating a determination rendered by such administrative law judge upon the grounds of:
>
> > "(1) newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or
> >
> > "(2) fraud, misrepresentation, or other misconduct of an opposing party."

This regulation goes on to provide that "[a]n administrative law judge shall have no power to grant a motion made pursuant to this section after the filing of an exception with the tax appeals tribunal" (20 NYCRR 3000.16[b]).

The Administrative Law Judge properly concluded that petitioner's motion was, in reality, a motion to reopen the record. Since petitioner had filed its exception to the determination prior

to filing its motion here, the Administrative Law Judge denied petitioner's motion based on this regulation (20 NYCRR 3000.16[b]).

We affirm the Administrative Law Judge on this issue and note that once petitioner filed its exception with the Tribunal, the Administrative Law Judge no longer had authority to grant petitioner's motion.

Although this conclusion was dispositive of the motion, the Administrative Law Judge also concluded in his order that petitioner's motion papers, even if timely filed, presented no facts that would constitute a basis for reopening the record (citing Matter of Trieu, Tax Appeals Tribunal, December 30, 1993, confirmed Matter of Trieu v. Tax Appeals Tribunal, 222 AD2d 743, 634 NYS2d 878, appeal dismissed 87 NY2d 1054, 644 NYS2d 146).

We now address this portion of the Administrative Law Judge's order.

In Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, confirmed Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 157), the Tribunal discussed and set forth the standard to apply on the issue of reopening a matter that under law had finally determined the controversy between the Division and petitioner therein. As we have repeatedly held, we have no statutory authority to reconsider our decisions and, in the absence of statute, our authority to reconsider our decisions is limited (Matter of Trieu, supra; Matter of Capitol Coin Co., Tax Appeals Tribunal, August 23, 1989).

Our authority is limited, due to the long-established principle articulated by the Court of Appeals in the case of Evans v. Monaghan (306 NY 312, 118 NE2d 452, 457), that:

> "[t]he rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction, applies as well to the decisions of special and subordinate tribunals as to decisions of courts exercising general judicial powers [citations omitted]. Security of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible."

Evans establishes that it is appropriate to reopen an administrative hearing where one party offers important, newly discovered evidence which due diligence would not have uncovered in time to be used at the previous hearing (Evans v. Monaghan, supra). This standard is

substantially the same as that developed under Rule 2221 of the Civil Practice Law and Rules for a motion to renew (CPLR 2221[a]). A motion to renew must be based upon additional, material facts which existed at the time the prior motion was made, but were not then known to the party and, thus, were not made known to the court (Foley v. Roche, 68 AD2d 558, 418 NYS2d 588, 594). The additional facts must be ones that could not have readily and with due diligence been made part of the original motion (Foley v. Roche, supra, 418 NYS2d at 594). The motion to renew should be denied if the party fails to offer a valid excuse for not submitting the additional facts upon the original application (Zebrowski v. Pearl Kitchens, 172 AD2d 972, 568 NYS2d 242; Barnes v. State of New York, 159 AD2d 753, 552 NYS2d 57, appeal dismissed 76 NY2d 935, 563 NYS2d 63; Foley v. Roche, supra, 418 NYS2d at 594). Because the basic standard established by Evans is similar to that under Rule 2221(a) and 20 NYCRR 3000.16, we are guided by the case law under Rule 2221(a) and conclude that to obtain reconsideration of a Tribunal decision, the party must show that the newly discovered facts could not have been discovered with due diligence and the party must offer a valid excuse for not submitting the facts upon the original application (Matter of Jenkins Covington, N.Y, supra).

We must now address whether petitioner's claims that: 1) the Division's failure to introduce a copy of the mortgage note was "damaging and prejudicial" to petitioner's case; and 2) that due to Mr. Siegel's "hurried glance" at Exhibit "N" he "assumed" under the "complete document" doctrine that the attorney for the Division would be required to offer both the mortgage and the mortgage note in evidence, constitute proper grounds for opening this record under the Tribunal regulation and cases cited above.

Petitioner notes that a central issue in this case was the amount of "consideration" petitioner received for the transfer of certain real property. Under petitioner's view of the case, the note and mortgage for $725,000.00 was contingent, and if not paid or not obligated to be paid, it should not be included as part of the "consideration" petitioner received. Accordingly,

and without deciding whether this argument would prevail on the merits, it was crucial to petitioner's view of the case to establish the contingent nature of this obligation.

We note first that the mortgage document in this case is complete unto itself and could properly be offered as a separate exhibit without the mortgage note. As pointed out by petitioner, the mortgage document itself makes no reference to its being a contingent obligation. The alleged contingent nature of the $725,000.00 mortgage was, in petitioner's view, central to showing that the mortgage debt should not be included in computing the amount of "consideration" petitioner received upon the sale of its real property. Petitioner claims that the mortgage note would prove that the obligation was contingent. Petitioner's then representative, Mr. Siegel, was sworn at hearing and testified to that fact. We do not view Mr. Siegel's testimony alone as clear and convincing evidence. The best evidence of whether this mortgage note was a contingent obligation was a copy of the mortgage note itself. Yet petitioner never offered it in evidence. Petitioner says that the Division should have offered it in evidence as part of its Exhibit "N," and that it was prejudiced by the Division's failure to do so.

As we have already noted, the contingent nature of the mortgage note was an element of petitioner's proof, not the Division's. Proceedings in the Division of Tax Appeals are formal, adversarial proceedings. While such proceedings are not bound by the strict rules of evidence, the parties' respective burdens of proof do apply. The Division was under no obligation to introduce evidence in support of petitioner's case. Further, we have no knowledge that the Division even possessed a copy of the mortgage note itself.[3] Petitioner opines that it "assumed" the mortgage note was included as part of the Division's Exhibit "N" based on Mr. Siegel's "hurried glance." An attorney in a legal proceeding makes such assumptions at his peril.

In any event, the transcript makes clear that there was never any real doubt that the Division would not be offering the mortgage note. At the hearing, Kenneth J. Schultz, Esq., the

[3]It appears that the Division only had the mortgage document because it obtained a copy from the Albany County Clerk's Office (tr., p. 37).

Division's attorney, expressly stated that he would not be introducing the mortgage note, "I'll leave that to Mr. Siegel to put in his proof on" (tr., p. 22).

When the mortgage document was offered in evidence by Mr. Schultz, Mr. Siegel was asked if he had any objection to the exhibit and he stated, "No" (tr., pp. 36-37).

Did the Administrative Law Judge improperly prevent petitioner from offering the mortgage note in evidence? At the beginning of the proceeding, the Administrative Law Judge explained to the parties how he would proceed; that the parties would have an opportunity to state the issues as they perceived them; then, since there was to be no witnesses for either side, the Division would offer its exhibits subject to any objections that petitioner might make; then petitioner would be permitted to offer its exhibits in the same manner; and then the parties could each, if they wished, make closing arguments in support of their respective positions (tr., pp. 1-6). After these instructions had been given, petitioner's attorney, Mr. Siegel, was making his opening statement and asked the Administrative Law Judge whether he could "put it [presumably the mortgage note] in evidence now" (tr., p. 15). The Administrative Law Judge replied, "[n]o, why don't you wait until we have the State put in their audit report and their additional documents" (tr., p. 16). It is clear from this exchange that the Administrative Law Judge was not preventing Mr. Siegel from offering evidence on behalf of his client, but rather was trying to control the order which the proceedings would take. Petitioner had ample opportunity to present his evidence. This conclusion is buttressed by the number of times the Administrative Law Judge advised the parties that any evidence they wanted considered had to be placed in evidence at the hearing.

The Administrative Law Judge specifically addressed Mr. Siegel on this issue and stated, "today is the day when you have to make your record. And if you want me to consider something, it has to be introduced at today's hearing" (tr., p. 7). We do not interpret these statements as an attempt to keep evidence from being introduced.

Later in the proceeding, petitioner offered three documents (tr., pp. 39-42). At the conclusion of these offers, the Administrative Law Judge asked Mr. Siegel, "[o]ther than these three documents, you have no further

documents for the record?" Mr. Siegel responded, "[t]hat is correct" (tr., p. 43). Further, at the conclusion of the hearing, the Administrative Law Judge again advised that:

> "[a]t this point then, I will note that once the record is closed after today's hearing, I won't accept any further documents or evidence into the record. Today was the opportunity to present evidence. So other than briefs that may be submitted, this is the opportunity given for the submission of evidence" (tr., p. 46).

At that point, petitioner's representative, Mr. Siegel, requested that the record remain open for a few days after the hearing to permit him to submit one additional exhibit, "a letter" (tr., pp. 46-47). It is noteworthy, however, that even at this point, Mr. Siegel did not avail himself of the opportunity to request additional time to offer the mortgage note.

When a petitioner files a petition with the Division of Tax Appeals to challenge an assessment or denial of a refund,[4] it is incumbent upon that petitioner to prepare for formal hearing and to carry his burden of proof (20 NYCRR 3000.10[d][4]). Even though petitioner in this matter had approximately 12 months after the Bureau of Conciliation and Mediation Services conference to prepare for hearing, was afforded a full opportunity by the Administrative Law Judge to present his case, and was given an additional week after the hearing to submit additional documents, it is apparent (specifically from the allegations set forth in this motion) that petitioner failed to adequately present its case. "[W]here a party fails to adequately prepare for trial, he is not entitled to another trial" (see, Grossbaum v. Dil-Hill Realty Corp., 58 AD2d 593, 395 NYS2d 246, 248).

There is neither allegation nor argument, in petitioner's motion to reopen, that the mortgage note did not exist, or was not available at or before the trial date, or that petitioner availed himself of steps to obtain and present such evidence (or that such steps were

[4]Or for other relief.

unavailable). In short, the mortgage note is not newly discovered evidence (see, Matter of Jenkins Covington, N.Y., supra).

To accept the claim that the shortcomings in petitioner's case are due to the Division's attorney or the Administrative Law Judge, and not due to the failure in petitioner's preparation and proof, flies in the face of this record. Petitioner cannot fault the Division for failing to introduce a document that was an element of petitioner's case. If we accept petitioner's argument that the mortgage note was contingent and should not have been included in computing its "consideration" for gains tax purposes,[5] then it was incumbent upon petitioner to prove that contingency. Petitioner did not do so.

Finally, Mr. Siegel's claim that he was deprived of an adequate opportunity to review the Division's exhibits and, for that reason, was not aware that the mortgage note had not been introduced by the Division is without merit. First, the Division's attorney, as already noted, expressly stated that he would not be introducing the note. Second, the transcript in this matter shows that the Administrative Law Judge went off the record at least twice for the express purpose of permitting the parties an opportunity to examine each other's exhibits (tr., pp. 2-3; 39-40). If Mr. Siegel required additional time for this purpose, it was his responsibility to request it. He did not do so.

Accordingly, petitioner's motion to reopen failed to provide any factual basis or excuse which would justify reopening the record in this matter, and its motion was properly denied (Micallef v. Miehle Co., 39 NY2d 376, 384 NYS2d 115; 20 NYCRR 3000.16).

We affirm the order of the Administrative Law Judge denying petitioner's motion to reopen for the reasons stated above.

EXCEPTION TO THE DETERMINATION

We deal next with petitioner's exception to the determination of the Administrative Law Judge.

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[5]And we do not decide the merits of that argument here.

FINDINGS OF FACT

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

In the summer of 1987, petitioner, Capital District Partners, a partnership based in New York City, purchased two contiguous properties located in the Albany area for development into a shopping center. Included in the Division's Exhibit "G" are photocopies of (i) a contract dated July 20, 1987 for purchase and sale of residential property consisting of 1.75 acres, located on Route 9W in the Town of Bethlehem, County of Albany, between petitioner, as purchaser, and CLL Associates, as seller, for the purchase price of $210,000.00, and (ii) a warranty deed dated July 14, 1987 which shows the conveyance of 12.31 acres of land, also located on Route 9W in the Town of Bethlehem, County of Albany, from Glenmont Associates, an Albany-based partnership, to petitioner. The photocopy of the deed shows the payment of transfer tax of $4,594.00. Based upon the tax rate under Tax Law § 1402 of $2.00 for each $500.00 of consideration, the conveyance of the 12.31 acres was for $1,148,500.00, which, in fact, is the amount pencilled-in on the photocopy of the deed by an unidentified individual. Consequently, petitioner acquired the real property which it would develop into a shopping center in southern Albany County at a cost of $1,358,500.00 ($1,148,500.00 + $210,000.00).

A couple of years later, petitioner entered into a standard form construction contract (the twelfth edition of the American Institute of Architects Document A101, Owner Contractor Agreement) dated October 6, 1989 with Ira S. Salk Construction Corporation of New Hyde Park, New York, which is included in the Division's Exhibit "G". This agreement was executed on petitioner's behalf by Kenneth Nemeroff, as partner of Kee Realty Associates, which, in turn, was apparently a partner in petitioner. Ira S. Salk, who was also a partner in petitioner, executed the agreement on behalf of the contractor. This agreement described the work to be performed as "[t]he complete construction of a 136,341 square foot shopping center with parking for 600 cars" with a substantial completion date of October 31, 1990 at the contract sum of $7,415,000.00.

Approximately three months after the execution of the construction contract described in the findings of fact above, petitioner entered into another standard form construction contract, a similar American Institute of Architects form, dated January 16, 1990 with Ira S. Salk Construction Corporation, a photocopy of which is included in the Division's Exhibit "L". Once again, Messrs. Nemeroff and Salk executed the agreement, although Mr. Nemeroff's signature is difficult to decipher and it is not clear if in this instance he was signing on behalf of the partnership, Kee Realty Associates, or as a direct partner of petitioner. This agreement apparently was a substitution for the earlier contract and provided for more limited contract work. The work to be performed was described as follows:

> "1. Develop all sitework in accordance with plans and specs. 2. Construct Ames Department Store, Grand Union Supermarket, CVS Drugs and *shell of all satellite stores except for McDonald's Restaurant. *Shell shall consist of the following (16 units): A) HVAC unit (no distribution, wiring, grilles). B) Storefront (single entry only). C) Electric Service to Panel only. D) One sink and one W.C. with walls, toilet accessory and exhaust fan."

The substantial completion date of November 15, 1990 was only a few days later than the date of October 31, 1990 provided for in the original contract. Article 4 of this later contract provided a contract sum of $6,300,000.00, but included the following obtuse and unexplained limitation:

> "It is understood that the $6,300,000 contract includes for only $53.50 for [sic] the development of the Grand Union Supermarket space in accordance with the Owner's lease agreement. In the event that additional costs are incurred in the development of this space, it is hereby understood and agreed that the terms as provided for in the Owner's lease agreement for the funding of the additional sums of money will be exercised and such additional payments shall be made to this Contractor."

This later construction contract also included a provision in its Article 9 that referenced and incorporated "the General Conditions of the Contract for Construction, AIA Document A201, 1987 Edition" which were not made a part of the administrative record. Consequently, the specific contractual conditions concerning change orders are not reviewable. Included in the Division's Exhibit "L", which is a photocopy of an Order to Show Cause dated August 8, 1991 brought by petitioner and L & T Associates, which purchased the uncompleted shopping center

from petitioner, against Ira S. Salk Construction Corporation and various subcontractors, is a copy of an affidavit dated June 6, 1991 of Kalmon Dolgin, petitioner's general partner. In his affidavit, Mr. Dolgin, who is also apparently a partner in the law firm representing petitioner in this matter, referenced a letter dated January 16, 1990 from Ira S. Salk Construction Corporation to Chemical Bank, the mortgagee for the shopping center property, a photocopy of which is also included in the Division's Exhibit "L". In this letter, the contractor made the following representation concerning the "maximum contract price":

> "Contractor [Salk Construction Corp.] represents and warrants to Lender [Chemical Bank] that . . . (ii) the Construction Contract is in full force and effect . . . (iii) the maximum contract price for performing all work and supplying all materials under the Construction Contract in connection with the construction of the improvements is $6,300,000, and, except as specifically set forth to the contrary in Exhibit A[6] attached hereto, no change orders have been agreed to that would increase or decrease said maximum contract price of $6,300,000 . . . .
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> * * *
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> "5. Contractor will not perform or permit any subcontractor to perform any work pursuant to any change order of any nature whatsoever unless Contractor has obtained the specific prior written approval of Lender to such change order and agrees that if Contractor does not obtain the specific prior written approval of Lender to any such change order Contractor shall not have any right and hereby expressly waives the right to file any mechanic's or materialman's lien against the construction site for any work performed or any material supplied pursuant to any such change order."

As noted above, the substantial completion date set forth in the later construction contract was November 15, 1990. However, the record does not specifically disclose to what extent construction of the shopping center had been completed when petitioner entered into a purchase and sale agreement (included in the Division's Exhibit "F") dated February 7, 1990 with Accommodation Associates Corp., which was acting as an "exchange trustee" under Internal

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[6] Such Exhibit A did not specify any change orders or modifications to the contract price of $6,300,000.00.

Revenue Code ("IRC") § 1031[7] for L & T Associates, which apparently wished to exchange certain property located in Los Angeles, California for the Albany-area shopping center. Accommodation Associates Corp. agreed to purchase the subject property at a selling price of $12,000,000.00 consisting of the following:

$ 600,000.00	Payment on contract
500,000.00	Additional deposit
415,000.00	Payment at closing
9,000,000.00	Purchaser's assumption of Chemical Bank building loan and mortgage
1,000,000.00	Purchase money second mortgage
485,000.00	Purchase money third mortgage
$12,000,000.00	

It is observed that petitioner's individual partners, Kalmon Dolgin, Neil Dolgin, Ira Salk and Kenneth Nemeroff, agreed "to remain liable [on the Chemical Bank building loan] so long as Purchaser [Accommodation Associates Corp.] is liable thereon" (p. 4 of agreement). It is observed that Matthew Dollinger, the attorney representing the purchaser, "has and does represent the interest of Kenneth Nemeroff and Kalmon Dolgin [partners in petitioner] in connection with various legal matters" (p. 15 of the agreement dated February 7, 1990). In addition, Kalmon Dolgin Affiliates, Inc. was the broker for the transaction and apparently received a brokerage commission of $720,000.00, according to a letter dated February 2, 1990 on petitioner's letterhead which is included in the Division's Exhibit "F". The agreement also referenced mortgage terms and conditions pertaining to the purchase money mortgages, as set forth in attached exhibits to such agreement, which, in fact, were not included in the Division's Exhibit "F".

The above breakdown of the selling price of $12,000,000.00 varies from the breakdown shown in the Division's Exhibit "K", which is an incomplete photocopy of an undated "Statement of Sale of Glenmont Shopping Plaza". This document included the following "Financial Statement":

"Due Seller:

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[7]IRC § 1031 provides for the nonrecognition of gain or loss in certain exchanges of property.

Purchaser [sic] Price per Contract of Sale	$12,000,000.00
Total Due Seller	12,000,000.00
Due Purchaser:	
Paid by Purchaser upon execution of the Contract of Sale	$600,000.00
Assumption of obligations under the construction mortgage held by Chemical Bank	9,000,000.00
Purchase Money Second Mortgage	725,000.00
Total Credits to Purchaser	10,325,000.00
Balance Due Seller	1,675,000.00"

Although speculative, the variance in the breakdown of the $12,000,000.00 probably resulted from the restructuring of the transaction after the contract date of February 7, 1990.

Petitioner filed a Form TP-581, real property transfer gains tax transferor questionnaire, dated March 12, 1990 (also included in the Division's Exhibit "F"). This questionnaire disclosed that petitioner, in exchange for gross consideration of $12,000,000.00, was anticipating the transfer on April 4, 1990 of the shopping center under construction in the Town of Bethlehem, Albany County to L & T Associates of Great Neck, New York. The following computation of anticipated tax due was reported on the questionnaire:

Gross consideration to be paid for transfer by transferee		$12,000,000.00
Less: Brokerage fees to be paid by transferor		720,000.00
Consideration		$11,280,000.00
Purchase price paid to acquire real property	$ 1,362,750.00	
Other acquisition costs	32,016.00	
Cost of capital improvements to real property	9,096,282.00	
Allowable selling expenses	45,000.00	
Original purchase price	$10,536,048.00	(10,536,048.00)
Gain subject to tax		743,952.00
Anticipated tax due (10%)		$ 74,395.00

The Division issued a Notice of Determination dated August 31, 1992 (included in Division's Exhibit "B") against petitioner showing real property transfer gains tax due of $120,127.00, plus penalty and interest. An attachment sheet referenced a Statement of Proposed Audit Changes dated June 19, 1992, which was not included in the record. However, included in the Division's Exhibit "D" is an original undated Statement of Proposed Audit

Adjustment which, although not providing any explanation for the adjustment, indicated that "tax due per audit" of $194,521.70 less payments of $74,395.20 equalled the tax asserted due of $120,126.50.

An audit schedule dated March 13, 1992 included in the Division's Exhibit "D" shows the following computation of tax due per audit of $194,522.00:

Gross consideration	$12,000,000.00
Brokerage fee	(786,667.00)
Net consideration	$11,213,333.00
Less original purchase price as per CACIC	(9,268,116.00)
Gain subject to tax	$ 1,945,217.00
Tax due (10%)	194,522.00

A schedule labelled "calculation of acquisition-capital improvement cooping [CACIC] costs" shows the following computation of original purchase price of $9,268,116.00:

"Original cost per contract		1,362,750.00[8]
Acquisition expense		32,016.00
Disallowed costs		(6,654.00)
Total O.P.P. [original purchase price]	1,388,112.00	
Capital Improvements		
Claimed	1,341,612.00	
Additional	8,203,452.00	
Disallowed	(1,702,729.00)	
Balance		7,842,335.00[9]

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[8] Petitioner acquired the property at issue at a cost of $1,358,500.00. The $4,250.00 difference between the $1,362,750.00 above and this smaller amount was not explained.

[9] A later schedule also included in the Division's Exhibit "D" shows that the auditor allowed $6,540,650.00 in construction costs involving Ira S. Salk Construction Corporation out of $7,896,420.00 ($574,067.77 + $7,322,352.23), the total then claimed and estimated by petitioner as follows:

	Claimed as of Feb. 15, 1990	Estimated Additional	Allowed	Disallowed
Ira S. Salk Construction	$550,000.00	$6,871,420.00	$6,065,650.00	$1,355,770.00
Salk Construction Gen. Cond.	24,067.77	450,932.23	475,000.00	-0-
	$574,067.77	$7,322,352.23	$6,540,650.00	$1,355,770.00

Cooping [sic] expenses[10]	69,740.00	
Disallowed	(32,071.00)	37,669.00
Original purchase price		9,268,116.00"

As noted earlier, petitioner reported $12,000,000.00 as gross consideration to be paid for its transfer of the shopping center. The field audit narrative sheet dated August 7, 1992, included in the Division's Exhibit "D", noted that "[t]he consideration of $12,000,000.00 was verified by contract and closings" and that "[n]o adjustment was made." However, petitioner now seeks to exclude from gross consideration a so-called contingent obligation of $725,000.00. In its petition, petitioner alleged as follows:

> "1. The Commissioner of Taxation and Finance erred by including in gross consideration the contingent $725,000 obligation of the Transferee to the Transferor.
>
> "2. It is clearly stated that the $725,000 note is reduced one dollar for each dollar that a permanent first mortgage of less than $10,000,000 is subsequently placed upon the subject property. No subsequent first mortgage has been placed upon the property, and as a result thereof, the $725,000 mortgage note has been assigned back to the Transferee, thereby obviating any obligation, which was always a contingent obligation by the Transferee to the Transferor."

Petitioner did not offer into evidence a copy of the $725,000.00 note so that its allegation concerning the contingency alleged in the petition cannot be verified.

The Division introduced into evidence as its Exhibit "N" a photocopy of a mortgage dated April 3, 1990 between petitioner, as mortgagee, and L & T Associates, as mortgagor, which secured an indebtedness of $725,000.00 by mortgaging the real property at issue. Paragraph 18 of the mortgage noted that it was subordinate to (i) a mortgage dated January 19, 1990 made by petitioner to Chemical Bank in the principal amount of $8,500,000.00 and (ii) a mortgage also dated January 19, 1990 made by petitioner, with no party designated as mortgagee, in the principal amount of $500,000.00.

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[10] A later schedule also included in the Division's Exhibit "D" correctly described these expenses as selling expenses consisting of attorney and recording fees.

The Division also introduced into evidence as its Exhibit "O" a photocopy of an assignment of mortgage dated May 9, 1990 by which petitioner assigned the mortgage of $725,000.00 dated April 3, 1990, made by L & T Associates to petitioner, to Chemical Bank together with the note secured by the mortgage so assigned. Finally, petitioner introduced into evidence as its Exhibit "3" a photocopy of a letter dated September 20, 1993 from attorney Matthew Dollinger, representing L & T Associates, to an accountant named Joseph Hoenigmann noting that the seller has been unable to obtain a $10,000,000.00 permanent mortgage on the premises at issue so that "the Purchase Money Subordinate Mortgage in the original amount of $725,000.00 shall not be paid to the Seller based upon Seller's failure to meet its obligations under the terms and conditions of the Contract of Sale."[11]

In its brief, petitioner noted that the purchase money mortgage note of $725,000.00 is still in Chemical Bank's possession pursuant to its collateral security interest and "notwithstanding the notes [sic] worthlessness, as a practical matter it will not assign its rights therein while the litigation [general contractor's lawsuit against petitioner] is pending" (Petitioner's brief, p. 6). However, no evidence was introduced to establish such facts.

Petitioner's representative also contended that "original purchase price" should be increased to include the cost of certain change orders and extra work performed by Salk Construction Corp. despite the fact that petitioner has not paid such amounts. Rather, the construction contractor is suing petitioner for $1,142,940.04 which it contends represents the cost to perform change orders and extra work for which petitioner is liable. In the construction litigation, petitioner denies liability primarily for the reason that the contractor failed to obtain written approval for any change orders or additional work it performed. As noted supra, the contractor, in a letter dated January 16, 1990 to Chemical Bank, made the representation that the bank would have to approve in writing any change order work. The general conditions of

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[11]The only contract of sale of the premises at issue introduced into evidence is included in the Division's Exhibit "F," as detailed in the findings of fact above. Such agreement did not reference a $725,000.00 mortgage or terms and conditions which would result in such mortgage being contingent on petitioner's obtaining permanent financing for the purchaser.

the construction contract were not made a part of the administrative record, so it is unknown whether the contract documents, as well, required written change orders in order for the contractor to obtain additional compensation for work performed. In any event, petitioner has not introduced any evidence that it paid the contractor any amount greater than what was allowed by the Division in calculating original purchase price.

OPINION

Tax Law § 1441, which became effective March 28, 1983, imposed a 10 percent tax upon gains derived from the transfer of real property located within New York State.[12]

Tax Law § 1440(3) defined "gain" as the:

> "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price."

Tax Law § 1440(5)(a)(i) defined "original purchase price" to mean:

> "the consideration paid or required to be paid by the transferor (A) to acquire the interest in real property, and (B) for any capital improvements made or required to be made to such real property . . . ."

"Consideration," in turn, was defined by Tax Law § 1440(1)(a) to mean:

> "the price paid or required to be paid for real property or any interest therein . . . . 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."

The Administrative Law Judge noted that petitioner filed a transferor questionnaire which included the face amount of two purchase money notes and mortgages, as noted above, in its calculation of gross consideration to be paid by the transferee. This was properly done, because it is well established that consideration includes the face amount of a mortgage determined at the time of the transfer (Matter of South Suffolk Recreation Ventures, Tax Appeals Tribunal, November 3, 1994, confirmed Matter of South Suffolk Recreation Ventures v. Tax Appeals Tribunal, 224 AD2d 874, 638 NYS2d 515, lv denied 88 NY2d 803, 645 NYS2d 446; Matter of

[12]The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

Cheltoncort Co., Tax Appeals Tribunal, December 5, 1991, affd Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121).

Petitioner now contends, however, that the purchase money note and mortgage in the amount of $725,000.00 should be excluded from the $12,000,000.00 reported as gross consideration. The Administrative Law Judge noted that petitioner did not introduce a copy of the $725,000.00 note in the record, and concluded that petitioner failed to provide an explanation why the record discloses two purchase money mortgages in unrelated amounts. The Administrative Law Judge also concluded that petitioner has failed to prove by the introduction of adequate proof (e.g., the mortgage note) the contingency which would make such note worthless. The Administrative Law Judge went on to hold that even if such proof had been offered, as the Tribunal noted in Matter of Cheltoncort Co. (supra), "[s]ubsequent events do not alter the value that the consideration had at the time of the transfer." The Administrative Law Judge concluded that although the contingency might have been contemplated at the time of the closing, a subsequent event, i.e., the seller's inability to find permanent financing for the purchaser, must have transpired at the time of the transfer in order to alter the value of the purchase money mortgage. Therefore, the Administrative Law Judge concluded that the decision of the Tribunal in Cheltoncort would still be determinative.

Petitioner also contends that costs for extra work and change order work asserted due by the general contractor in its lawsuit against petitioner should be included in the computation of original purchase price. Petitioner makes this argument despite the fact that it has vigorously defended against the contractor's lawsuit on the merits and, as its representative noted in his brief, "[s]uch litigation . . . now pending may well not be resolved, after trial and appeals for many years, as many as seven to ten" (Petitioner's brief below, pp. 6-7). The Administrative Law Judge concluded that it would be purely speculative to allow as capital improvement costs expenses which have not actually been paid by petitioner and which it is vigorously contesting (cf., Matter of Eisner, Tax Appeals Tribunal, March 22, 1990).

Pursuant to Tax Law former § 1446(2)(a):

> "[a]ny transferor failing . . . to pay any tax within the time required by [Article 31-B] shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof [which may not exceed 25%]."

Said section further provided that if the Commissioner of Taxation and Finance:

> "determines that such failure or delay was due to reasonable cause and not due to willful neglect, [the commissioner] shall remit, abate or waive all of such penalty and such interest penalty."

Petitioner has the burden of proving both that the failure to timely pay the proper amount of tax was due to reasonable cause and not due to willful neglect so that penalty may be remitted. The Administrative Law Judge concluded that there is nothing in the record, other than the statement in petitioner's brief that any failure to pay tax was not willful, relevant to the issue of penalty. For example, no evidence has been introduced to show the specific steps petitioner or its professional advisors took to ascertain the proper tax liability (see, Matter of Shechter, Tax Appeals Tribunal, October 13, 1994). Consequently, the Administrative Law Judge sustained the imposition of penalty (see, Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Matter of Aire Bon Assocs., Tax Appeals Tribunal, April 18, 1991).

Petitioner takes exception to so much of the Administrative Law Judge's determination as found that petitioner had failed to offer into evidence a copy of the $725,000.00 mortgage note and that, as a result, petitioner's allegations that the underlying debt was a contingent obligation could not be verified. Petitioner also takes exception to that part of the determination that found that specific contractual conditions concerning change orders and additional work had not been offered in evidence and are, therefore, not reviewable.

Petitioner, on exception, continues to argue that the purchase money mortgage for $725,000.00 should not be included in the Division's calculation of the consideration received by petitioner for its sale of the shopping center because it was a contingent obligation that became worthless as a result of petitioner's inability to obtain permanent financing. Petitioner

states that the reduction in the purchase money note and mortgage was contemplated by both the seller and purchaser at the closing. Since the mortgage note was subject to a contingency that never happened, says petitioner, the amount of the note ($725,000.00) cannot be included in "consideration" in computing petitioner's taxable gain.

In addition, petitioner argues that although it is disputing its obligation to pay Salk Construction Corp. additional monies under the construction contract arising from "change orders" and additional work, nonetheless it should be able to include in the computation of "original purchase price" any amounts ultimately found to be due to Salk Construction Corp.

Finally, petitioner asserts that any failure to pay gains tax found to be owing was due to reasonable cause.

We find that the Administrative Law Judge completely and adequately addressed the issues before him. A review of the record below shows that petitioner has failed to present any evidence or legal authority which would cause us to make a change in the findings and conclusions reached by the Administrative Law Judge. We have considered petitioner's remaining arguments and find them to be without merit. Accordingly, we affirm the determination of the Administrative Law Judge for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Capital District Partners are denied;
2. The order of the Administrative Law Judge is affirmed;
3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Capital District Partners is denied; and

5. The Notice of Determination dated August 31, 1992 is sustained.

DATED: Troy, New York
March 13, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner