

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

52nd ST. DESIGNEE CORP. :

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. :

DECISION
DTA Nos. 816343
and 816561

In the Matter of the Petition :

of :

E.L.C. HOTEL CORP. :

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. :

Petitioners 52nd Street Designee Corp., 162 West 34th Street, New York, New York
10001-2102 and E.L.C. Hotel Corp., c/o Howard M. Koff, Esq., Pieter Schuyler Building, 600
Broadway, Albany, New York 12207, filed an exception to the determination of the
Administrative Law Judge issued on July 22, 1999. Petitioners appeared by Howard M. Koff,
Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Jr.,
Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner DeWitt took no part in the consideration of this decision.

ISSUE

Whether the imposition of the tax on gains derived from certain real property transfers¹ on the proceeds of a condemnation award is unconstitutional.

FINDINGS OF FACT

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

Petitioner 52nd St. Designee Corp. (“52nd St.”) filed a petition with the Division of Tax Appeals on February 6, 1998. 52nd St. asserted that the tax at issue “was imposed on the proceeds from a condemnation award,” and that the tax, and interest thereon, had been paid under protest. A refund in the amount of \$149,399.95 was requested. The basis of the refund request was that the application of the tax to the proceeds of a condemnation award was unconstitutional. A copy of a Notice of Determination (identification number L-014575351-4) dated January 12, 1998 was attached to the petition. The notice asserted a total amount due of \$149,399.95 which matched the amount of the requested refund set forth in the petition. Also, the notice identification number matched the notice identification number set forth in the petition. The notice indicates that it is for the tax period ended April 18, 1990.² There was no

¹The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996.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).

²It is presumed that the real property transaction in question occurred on or before April 18, 1990 and is thereby subject to the provisions of Tax Law former Article 31-B (*see*, footnote 1).

copy of a formal request for refund or a denial of such request by the Division of Taxation (“Division”) submitted.

The Division submitted an answer dated April 16, 1998 asserting that 52nd St. had paid notice identification number “L014575351,” a notice for tax and interest due on the proceeds of a condemnation award, that the petition was seeking a refund of such tax and that the refund request was denied. The answer further asserted that the Division’s determination of tax in this matter was correct.

Petitioner E.L.C. Hotel Corp. (“E.L.C.”) filed a petition with the Division of Tax Appeals on June 4, 1998. E.L.C. asserted that the tax at issue “was imposed on the proceeds from a condemnation award,” and that the tax, and interest thereon, had been paid under protest. A refund in the amount of \$606,224.86 was requested. The basis of the refund request was that the application of the tax to the proceeds of a condemnation award was unconstitutional. Attached to the petition was a copy of a denial of E.L.C.’s refund claim in the amount of \$606,224.86, by letter dated June 3, 1998 and signed by Patrick C. Finnen of the Division.

The Division submitted an answer dated August 6, 1998 asserting that E.L.C. had paid tax on the proceeds of a condemnation award, had filed a claim for refund on July 14, 1997, and that the claim had been denied by the Division on June 3, 1998. The answer further asserted that the Division’s determination of tax in this matter was correct.

Also submitted into evidence with regard to E.L.C. was a copy of a document entitled “Claim For Refund of Real Property Transfer Gains Tax.” The assessment number listed on this document is L-011822341-7 and the amount of tax paid is listed as \$606,224.86. There is a space on the form to fill in the date of the transfer in question or the date of payment of the tax,

whichever is later. In this space appears the typewritten response of “On or about April 17, 1996,” and the handwritten notation “4-17-96.”

On October 28, 1998 the Division of Tax Appeals received a stipulation executed by the parties in this matter. The stipulation provided that the matter of 52nd St. and the matter of E.L.C. both involved the imposition of the gains tax (former Article 31-B of the Tax Law) on the proceeds of a condemnation award and that the sole issue in both cases was whether such imposition was constitutional. Since both cases involved the same issue the parties agreed to consolidate these cases. Finally, the stipulation provided that should the Division prevail before the Tax Appeals Tribunal, either or both petitioners would be allowed to proceed with an Article 78 proceeding and that the stipulation was not intended to restrict any party’s presentation of their case regarding the agreed upon issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the real property transfer gains tax (hereinafter “gains tax”) was a 10% tax imposed upon the transfer of real property located within New York State where the consideration received for such transfer was \$1,000,000.00 or more (Tax Law former §§ 1441, 1443[1]). Tax Law former § 1440(7) defined the term transfer to include the taking of property by eminent domain. Petitioners’ sole argument before the Administrative Law Judge was that the gains tax, when imposed upon the proceeds of a condemnation, was unconstitutional. The Administrative Law Judge pointed out that this is an argument that former Article 31-B of the Tax Law was unconstitutional on its face. Indeed, petitioners specifically state in their brief below that former Article 31-B of the Tax Law was unconstitutional as written. Petitioners made no argument that the gains tax was unconstitutional as applied. The

Administrative Law Judge found that the enabling legislation of the Division of Tax Appeals and Tax Appeals Tribunal does not provide the requisite authority for the Division of Tax Appeals or Tax Appeals Tribunal to declare a statute unconstitutional on its face (*Matter of Allied Grocers Coop.*, Tax Appeals Tribunal, November 30, 1989, *confirmed Matter of Allied Grocers Coop. v. Tax Appeals Tribunal*, 162 AD2d 791, 557 NYS2d 707; *Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988) and, at the administrative level, the constitutionality of a statute is presumed (*Matter of Allied Grocers Coop.*, *supra*; *Matter of Fourth Day Enters.*, *supra*). Thus, the Administrative Law Judge concluded that the Division of Tax Appeals was without subject matter jurisdiction and the petitions were denied.

ARGUMENTS ON EXCEPTION

Petitioners have not taken exception to any of the findings of fact of the Administrative Law Judge. While petitioners have taken exception to conclusions of law “A” and “B” of the Administrative Law Judge’s determination, they have not posited any legal theories as to why they believe those conclusions are incorrect. Petitioners did not file a brief in support of their exception.

OPINION

The determination of the Administrative Law Judge held that the Division of Tax Appeals was without jurisdiction to rule on the facial constitutionality of former Article 31-B of the Tax Law. Petitioners have taken exception to that determination, but have offered no legal theories or arguments to show why that conclusion is incorrect.

We, therefore, affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 52nd St. Designee Corp. and E.L.C. Hotel Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of 52nd St. Designee Corp. and E.L.C. Hotel Corp. are denied;
4. The denial of the refund requested by 52nd Street Designee Corp. is sustained; and
5. The denial of the refund dated June 3, 1998 issued to E.L.C. Hotel Corp. is sustained.

DATED: Troy, New York
February 10, 2000

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner