

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GOLDOME CAPITAL INVESTMENTS, INC.	:	DETERMINATION
F/K/A GOLDEN BUFFALO, INC.	:	
	:	
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, Goldome Capital Investments, Inc. f/k/a Golden Buffalo, Inc., Goldome Center, One Fountain Plaza, Buffalo, New York 14203, filed a petition 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 (File No. 802506).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on March 9, 1987 at 1:15 P.M., with all briefs to be submitted by June 29, 1987. Petitioner appeared by Saperston & Day, P.C. (John P. Hains, Esq. and Charles C. Swanekamp, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the consideration reported by petitioner for gains tax purposes with respect to its leasehold interest in a property located at 745 Fifth Avenue, New York, New York, which consideration was equal to the fair market value of that interest on the date of the transfer, was proper.

FINDINGS OF FACT

1. On July 22, 1985, the Audit Division issued to petitioner, Golden Buffalo, Inc., a Notice of Determination of Tax Due under Real Property Gains Tax Law which asserted gains tax plus penalty and interest due as follows:

Gains Tax	\$652,747.00
Penalty and Interest Thereon	156,660.00

Interest on Tax, Penalty and Interest	46,025.00
Total Amount Due	<u>\$855,432.00</u>

2. The notice of determination set forth the basis of the deficiency as follows:

"Gross consideration for the transfer of your 50% interest in real property located at 745 Fifth Avenue, New York City, was understated by \$6,527,473.00."

3. Petitioner subsequently paid the amount asserted in the notice of determination under protest and petitioned the Tax Commission for refund of said amount plus interest.

4. Petitioner is a Delaware corporation and was incorporated under the name Golden Buffalo, Inc. Golden Buffalo, Inc. changed its name to Goldome Capital Investments, Inc. in September 1985.

5. On May 13, 1983, petitioner acquired 100 percent of the voting stock of United National Corporation. Following this acquisition, United National Corporation changed its name to Goldome National Corporation ("GNC"). GNC was a real estate management firm, and it owned and operated shopping centers, office buildings and other properties in several states, including New York.

6. Among the assets of GNC when it was acquired by petitioner was a 50 percent partnership interest in 745 Associates, a general partnership. GNC remained a 50 percent partner in 745 Associates at all times relevant herein.

7. 745 Associates was, at all times relevant herein, lessee of a long-term lease on a parcel of land located at the southeast corner of Fifth Avenue and 58th Street in Manhattan, and was also lessee pursuant to a long-term lease of an office building located thereon, designated 745 Fifth Avenue.

8. 745 Associates was obligated on a note originally given to the New York Bank for Savings by United National Investors Corporation, secured by a collateral leasehold mortgage on 745 Fifth Avenue, which note was, at all times relevant, held by Goldome Realty Credit Corp.

9. On November 27, 1984, Golden Buffalo, Inc. and TransAmerican Partners ("TAP")

executed a contract pursuant to which Golden Buffalo would sell and TAP would buy all of the issued and outstanding shares of Goldome National Corporation.

10. At the time the shares were sold, among the assets of GNC located in New York State was the 50 percent partnership interest in 745 Associates and a title in fee to Thruway Mall, Cheektowaga, New York.¹

11. Section 2 of the Contract, captioned "Purchase Price," provided, in relevant part, the following:

"The purchase price ("Purchase Price") for the Shares shall be the sum of \$144,710,834 less the aggregate amount of the unpaid principal balances as of the Closing of the mortgages or deeds of trust described in Exhibit B annexed hereto (collectively, the "Mortgages"), subject to the adjustments, increases and reductions provided for elsewhere in this Agreement and in Annex A attached hereto."

12. The mortgage obligation of 745 Associates (described herein at Finding of Fact "8") was not included among the mortgage obligations set forth in Exhibit B to the Contract.

13. Annex A to the Contract provides, in relevant part, as follows:

"[N]o adjustment shall be made in the Purchase Price payable pursuant to Section 2 of the Agreement [Contract] for the unpaid principal balance of any Mortgages encumbering the Partnership Property or the fee interest in the premises known as 745 Fifth Avenue, New York City, New York."

14. Section 26 of the Contract, captioned "New York State Gains Tax; Recapture", provided for amounts allocable to property interests located in New York State for gains tax purposes. Specifically, this section provided, in relevant part, as follows:

"Purchaser and Seller hereby agree that the amount allocable to the Properties located in the State of New York shall be as set forth in Exhibit N hereto."

15. Exhibit N provided that \$50,850,000.00 of the total consideration paid for the GNC

¹The gains tax consequences in respect of the transfer of petitioner's interest in the Thruway Mall property are not at issue herein.

shares was allocable to GNC's partnership interest.

16. On December 18, 1984, both Golden Buffalo and TAP submitted questionnaires (Forms TP-580 and TP-581) as required by Tax Law Article 31-B in respect of transfer of the stock of GNC. Each questionnaire was signed by an appropriate official of the declarant, and each was sworn before a notary public.

17. In their respective questionnaires, both Golden Buffalo and TAP provided a sworn statement that of the consideration (as defined in Tax Law Article 31-B) given by TAP in respect of the stock of GNC, \$50,850,000.00 was allocated to the 50 percent interest in the leasehold at 745 Fifth Avenue.

18. On January 30, 1985, closing of acquisition of the common stock of GNC by TAP took place.

19. On the date of the transfer, the principal balance of the mortgage encumbering the leasehold at 745 Fifth Avenue was \$13,054,945.00. GNC's liability in respect of its 50 percent partnership interest was thus \$6,527,473.00, on the transfer date.

20. The Audit Division subsequently determined that, for gains tax purposes, petitioner had understated the consideration allocable to the partnership interest by this \$6,527,473.00 because the purchaser in the transaction had assumed this liability and the Contract had not allowed for an adjustment in the consideration allocable to the partnership interest despite the purchaser's assumption of the mortgage.

21. In early 1984, Landauer Associates, Inc. ("Landauer"), 335 Madison Avenue, New York, New York, prepared an appraisal (the "Appraisal") of 745 Fifth Avenue for Hexalon Real Estate, Inc. ("HRE"), a corporation which is the other 50 percent partner in 745 Associates. The Appraisal was prepared by a qualified appraiser, in the ordinary course of business.

22. In the Appraisal, Landauer stated its opinion that, as of December 31, 1983, the "equity value" of HRE's 50 percent leasehold interest in 745 Fifth Avenue was \$42,400,000.00.

23. Fair market value of the leasehold interest in 745 Fifth Avenue was determined by

Landauer by adding together the appraised "equity value" of the leasehold plus the principal amount of debt encumbering said leasehold.

24. As of December 31, 1983, the fair market value of the leasehold interest in 745 Fifth Avenue was \$97,854,945.00, derived as follows:

(1) Landauer appraisal of 50% interest x 2	\$42,400,000 x 2 \$84,800,000
(2) Mortgage balance	<u>+13,054,945</u> \$97,854,945

Thus the fair market value of the partnership interest of each 50 percent partner as of December 31, 1983 was \$48,927,473.00.

25. In a letter dated July 6, 1984 from Samuel G. Long, Jr., vice president of Landauer, to Zel Kelvin, president of GNC, Landauer issued an update to its December 31, 1983 appraisal of 745 Fifth Avenue, stating that the value of a 50 percent interest in the leasehold had increased by \$1,800,000.00.

26. As of July 6, 1984, the fair market value of a 50 percent partnership interest in 745 Associates was \$50,727,473.00, derived as follows:

FMV at 12/31/83	\$48,927,473
Increase at 7/6/84	<u>1,800,000</u>
	\$50,727,473

27. The \$50,850,000.00 allocated by the transferor and transferee of 745 Fifth Avenue represents the fair market value, at the time, of the interest in real property being transferred.

28. Petitioner and the Audit Division, by their respective representatives, entered into a stipulation of facts, dated March 3, 1987, in respect of this matter. Those stipulated facts relevant to this determination have been incorporated, in substance, herein as Findings of Fact "4" through "27".

CONCLUSIONS OF LAW

A. Article 31-B of the Tax Law, which became effective March 28, 1983, imposes a tax

on gains derived from the transfer of real property within New York State. "Real property" is defined for purposes of Article 31-B to include "lands...and leaseholds, which are located in whole or in part within the state." (Tax Law § 1440[6]. Emphasis supplied.) A "transfer of real property" includes an "acquisition of a controlling interest in any entity with an interest in real property." (Tax Law § 1440[7].) "Controlling interest" is defined "in the case of a partnership...fifty percent or more of the capital, profits or beneficial interest in such partnership". (Tax Law § 1440[2].)

B. In light of the foregoing definitions, the transfer of 100 percent of GNC stock from petitioner to TAP constituted a transfer of real property (real property interests located within New York State), together with other assets (real property interests located outside New York State), for purposes of Article 31-B. The transfer of petitioner's 50 percent partnership interest, that is, a 50 percent interest in the leasehold on property at 745 Fifth Avenue, was a transfer of real property for gains tax purposes.

C. Tax Law § 1440(1) defines "consideration", in relevant part, as follows:

"(a) 'Consideration' means the price paid or required to be paid for real property or an interest therein....[It] includes...the amount of any mortgage...or other encumbrance, whether the underlying indebtedness is assumed or taken subject to....

* * *

(c) In the case of a transfer which includes other assets which are in addition to real property or an interest therein and for which there is no reasonable apportionment of the consideration for such real property or interest, consideration means that portion of the total consideration which represents the fair market value of such real property or interest. In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of such controlling interest."

D. Where, as here, the transfer at issue involves the sale of the stock of a corporation which possesses "real property" (as defined in Tax Law § 1440[6]) and other assets, the "consideration" deemed paid for gains tax purposes for said "real property" (here, the leasehold

interest) is properly determined pursuant the provisions of Tax Law § 1440(1)(c). Accordingly, where, as here, the consideration allocated to the real property interest is the fair market value of that interest (Finding of Fact "27"), and given that the calculation of the property's fair market value took into account the amount of the unpaid principal mortgage balance (Finding of Fact "23"), it is improper to adjust the consideration allocated to that real property interest for gains tax purposes in the amount of the encumbrance on the property (see Tax Law § 1440[1][c]). The Audit Division therefore improperly increased the consideration allocable to petitioner's interest in the leasehold at 745 Fifth Avenue by adding to that consideration the then-outstanding liability of \$6,527,473.00 representing one-half of the unpaid principal mortgage balance.

E. The Audit Division's position appears to be premised upon the notion that "real property" was sold in the transaction between petitioner and TAP. That is, notwithstanding the fact that petitioner allocated the fair market value to the leasehold interest, TAP was also deemed to have assumed, as a result of the transfer, the mortgage liability in respect of the leasehold interest. Therefore, the Audit Division seems to argue, petitioner was "paid" fair market value plus the mortgage balance on its "sale" of the leasehold interest. This argument, however, fails to recognize that real property was not sold in the transaction at issue -- only shares of stock in the entity which had an interest in real property were transferred. GNC owned the interest in 745 Fifth Avenue both before and after the transaction. The allocation of consideration for the leasehold interest did not, therefore, represent consideration "paid" to petitioner for that property; rather, it was an allocation made for gains tax purposes only. Additionally, the total consideration of \$144,710,834.00 for the GNC shares is irrelevant to the determination of "consideration" for gains tax purposes in the transaction at issue. What is relevant is whether, in the language of Tax Law § 1440(1)(c), there has been a "reasonable apportionment of the consideration" for the "real property" (as defined in Tax Law § 1440[6]). Where, as here, the fair market value of the real property is allocated for gains tax purposes, there has been such a "reasonable apportionment".

F. The petition of Goldome Capital Investments, Inc. f/k/a Golden Buffalo, Inc. is granted and the Audit Division is hereby directed to refund in full amounts paid under protest in respect of the notice of determination herein dated July 22, 1985, together with such interest as may be lawfully due and owing.

DATED: Albany, New York
November 19, 1987

ADMINISTRATIVE LAW JUDGE