STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
58 REALOPP CORP.		:DETERMINATION
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, 58 Realopp Corp., 162 West 34th Street, New York, New York 10001, 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. 806464).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on November 1, 1990 at 9:30 A.M., with all briefs to be submitted by March 24, 1991. Petitioner appeared by Kantor, Davidoff, Wolfe, Rabbino & Kass, Esqs., P.C. (Lawrence A. Mandelker, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner is entitled to exemption under Tax Law § 1443.6 in connection with the transfer of its interest in certain premises located on Eighth Avenue in New York City.

FINDINGS OF FACT

On March 16, 1981 petitioner, 58 Realopp Corp., entered into a written agreement under which it granted to 59th Street Equities Corp. an option to acquire petitioner's leasehold interest in certain propertylocated at 987-989 Eighth Avenue in Manhattan. The property in question consisted of a five-story building contiguous to which was a small hotel. 59th Street Equities Corp. was a "shell" corporation of one William Zeckendorf nominated by him to be the optionee under the option agreement.

The option agreement granted the optionee the right to acquire all of petitioner's leasehold interest in the described realty for a price of $4,000,000.00. As consideration for granting this option, petitioner received the sum of $150,000.00 simultaneously with the execution of the option agreement. The option agreement expressly provided that the $150,000.00 was not to be credited against the $4,000,000.00 purchase price for the leasehold interest, but rather was a separate price paid for the option. The option agreement, by its own terms, required that the option be exercised by 5:00 P.M. on September 15, 1982, further specifically providing that "time was of the essence" regarding such exercise. The agreement recited that any change, waiver or modification of the option was to be made only in writing. The option agreement was recorded in the office of the Register of the City of New York, in New York County, in April 1981.

Petitioner, the holder of the lease on the property in question, was a subsidiary of National Restaurant Management Corporation, which in turn is a subsidiary of National Restaurant, Inc. National Restaurant, Inc. is an organization operated by the Riese family (referred to in testimony as "the Riese organization"). The option and ultimate acquisition of the subject leasehold interest was a part of the acquisition or assemblage of several properties on Eighth Avenue (between 57th and 58th Streets) by William Zeckendorf, a well-known New York City real estate developer (referred to in testimony as "the Zeckendorf organization"). Mr. Zeckendorf planned to construct a large combined office and residential structure at the site of the property mentioned in the option agreement.[1] Mr. Zeckendorf was known to the officers of petitioner not only because of his reputation in the New York City real estate community, but also because of several substantial real estate transactions previously consummated between the Riese organization and the Zeckendorf organization.

The Zeckendorf organization was unable to complete acquisition of the surrounding properties as of the September 15, 1982 specified expiration date of the option. As testified to

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[1]The site was ultimately developed to become what is known as Worldwide Plaza.

by petitioner's vice-president, one Larry Abrams, prior to the expiration date Mr. Zeckendorf telephoned the Riese organization and requested a waiver or extension of the exercise termination date for the option. Mr. Abrams testified that petitioner, via the Riese Organization, agreed to waive the expiration date for the option until such time as Mr. Zeckendorf was ready to proceed with the assemblage of the properties at which time a new expiration date would be established. Mr. Abrams testified that the period of extension contemplated was "somewhere in the nature of six months to a year". Petitioner and Mr. Zeckendorf further agreed to an additional payment of $250,000.00, allegedly as consideration for waiver of the expiration date and agreement to fix a new date. These arrangements were finalized during several telephone conversations which occurred prior to the September 15, 1982 expiration date.

Subsequent to the expiration date, petitioner made no efforts to sell the leasehold interest to any other purchaser. Mr. Abrams testified

that to have made any such efforts would have resulted in extremely negative consequences and impact on the reputation of petitioner's officers within the real estate community in Manhattan. It was noted, moreover, that the purchase price of $4,000,000.00 remained attractive to petitioner notwithstanding the lapse of time.

By the summer of 1983, Mr. Zeckendorf was ready to proceed with assembling the properties. A second option agreement was executed on July 25, 1983. Although characterized at hearing (by petitioner) as a modification of the first option agreement to reflect the oral agreement made by the parties prior to September 15, 1982, the document executed indicates by its terms that it is the granting of an option for the purchase of the property in question. It does not reference or otherwise deal with the prior option executed in March of 1981. The second option does, however, reflect itself to be an option on the identical property interest as that covered by the first option, and also maintains the same purchase price of $4,000,000.00. A new optionee, namely Circle West Development Corp., also a shell corporation of

Mr. Zeckendorf, was nominated to be the optionee under the option contract. As with the first optionee, Circle West Development Corp. was described as being a New York corporation having an office in care of Milgrim, Thomajan, Jacobs and Lee, Esqs., 405 Lexington Avenue, New York, New York.

The payment for the second option was $250,000.00, and a new date for exercise of the option was established, to wit January 25, 1984. The option document specifically provides that the $250,000.00 amount, similar to the $150,000.00 amount, was not to be paid as a reduction of the $4,000,000.00 purchase price for the property interest, but rather was paid for the granting of the option.

In both instances, the Riese organization caused no searches or other checks to be made as to the ability of the Zeckendorf nominee corporations to carry out the obligations under the lease (as assignee), and made no inquiries into the sufficiency of capitalization of such nominees. As described by Mr. Abrams, the Riese organization knew they were dealing with Mr. Zeckendorf and knew him, from prior dealings, to be responsible. Within the time prescribed, the second option was exercised and the transaction eventually proceeded to a closing. At the time of transfer (the closing), petitioner paid gains tax under Tax Law Article 31-B in the amount of $436,246.40. Thereafter, petitioner filed a timely claim for refund of such tax paid, premising such claim upon the position that the transaction was exempt from tax pursuant to Tax Law § 1443.6.

By letter dated May 19, 1987, the Division of Taxation denied petitioner's refund claim in full upon two bases. The Division first argues that the March 1981 option expired as of September 1982, thus leaving the July 1983 option as a new contract entered into after the March 28, 1983 effective date of the gains tax. Alternatively, the Division argues that even if the second option were a modification of the first, the increased consideration for the second option and the change of the name of the buyer constitute substantial changes to the contract sufficient to deny exemption under Tax Law § 1443.6. In this latter regard, the Division cites specifically to regulations found at 20 NYCRR 590.21.

CONCLUSIONS OF LAW

A. Section 1443 of Article 31-B of the Tax Law lists a series of exemptions from the real property transfer gains tax ("gains tax"). Subdivision 6 of said section provides for a complete exemption for certain transfers entered into prior to the March 28, 1983 effective date of Tax Law Article 31-B. Said subdivision, providing what is commonly called the "grandfather exemption", follows:

> "6. Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission. A written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for purposes of this subdivision" (emphasis added).

B. Neither party questions that the initial option agreement could qualify for entitlement to exemption as grandfathered. In this regard it is noted that the initial option was entered into prior to March 28, 1983 and that the date of execution was confirmed by the recording of the memorandum of contract. At issue in this proceeding is whether such contract expired with no new contract or option entered into prior to the effective date of the gains tax, thereby eliminating the possibility for grandfather exemption.

C. Petitioner posits that the initial option contract did not expire but rather was orally extended prior to its specified expiration date, and that thereafter such extension agreement including modifications (to price and the named optionee) was memorialized in the July 25, 1983 writing. Petitioner thus argues that the initial option remained in effect, and that the subsequent modifications were not of a substantial manner so as to constitute the execution of a new contract (option) thereby depriving petitioner of eligibility for the grandfather exemption. Petitioner's arguments in this regard are rejected. First, the specific terms of the March 16, 1981 option call for expiration to occur on September 15, 1982 and note that time is of the essence in exercising the option. Such option contract also calls for any modifications or changes thereto to be made in writing. In turn, there is no evidence of any written extension of the option expiration date prior to expiration, nor is there even a specified date on which the alleged oral

extension of the option was agreed to or for how long such extension was to run. Rather, it is simply noted that extension was arranged by telephone conversations prior to the September 1982 expiration date for the option. In addition, petitioner colors the July 1983 written option agreement to be a modification of the prior option constituting an extension thereof. However, the language of the second writing belies this claim. More specifically, nowhere in the second writing is the first option mentioned in terms of the second agreement being a modification thereof. Rather, the simple words of the July 1983 writing reflect the creation of a new option the consideration for which was $250,000.00.

D. Petitioner argues that a party may orally waive any of several terms in a contract including, as relevant to this case, the first option's date of expiration. Petitioner also appears to argue that the need for amendments to the option contract to be written as called for in the agreement itself was also waived by oral agreement, a right petitioner claims it should enjoy. Petitioner backs its claim by saying that the reality of the situation was that the parties knew each other and orally agreed to extend. This "familiarity of the parties" approach, while perhaps the reality in the industry would, if accepted, leave essentially meaningless the gains tax statutory requirement for written agreements with proof confirming the date of execution thereof. In this context, it is noted that acceptance of petitioner's argument leaves petitioner in a position of recovering nearly one-half million dollars in tax paid, thereby at least underscoring the convenience of the oral agreement allegation made by petitioner. In short, the initial option lapsed by its own terms, and a written second option, which made no reference even to being a modification of the first option, was executed after the effective date of the tax in question. It is thus clear that no written agreement existed by which grandfathering under Tax Law § 1443.6 could be allowed.

E. Given the foregoing, it is not strictly necessary to determine whether the change in the name of the buyer coupled with the increased consideration of $250,000.00 constitutes a substantial change rendering grandfathering of the contract unavailable under 20 NYCRR 590.21. As to this argument, it is not unreasonable to believe that the real estate may have

appreciated in value during the period of time between the first and second options, thus leaving the $250,000.00 consideration, (allegedly paid for an extension of the option), in reality being additional consideration reflecting an increase in the value of the property interest being transferred. Even if not the case, it is noted that the first option itself, if viewed as merely extended, gains for petitioner the payment of additional consideration of $250,000.00. In turn, since the original option would be the document under which grandfathering would be available, such agreement itself has undergone a substantial change of consideration (i.e., from $150,000.00 to an additional $250,000.00). Such an increase, coupled with the fact that the named optionee changed, gives rise to a reasonable argument that in effect, a new contract was made. Accordingly, for all of the reasons outlined above, petitioner's claim for refund was properly denied by the Division.

F. The petition of 58 Realopp Corp. is hereby denied and the Division of Taxation's denial of petitioner's claim for refund is sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE