

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
106 DEVELOPMENT CORP.	:	DETERMINATION
	:	DTA NO. 809803
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, 106 Development Corp., c/o Sheldon Feinstein, Esq., 42-40 Bell Boulevard, Suite 304, Bayside, New York 11361, 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.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 10, 1992 at 9:15 A.M., with additional evidence to be received by February 8, 1993. Petitioner filed a brief on March 11, 1993. The Division of Taxation filed its brief on May 4, 1993. Petitioner filed its reply brief on May 12, 1993. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether, for gains tax purposes, certain payments of interest made prior to a closing pursuant to a contract of sale by petitioner, as purchaser, to the seller constituted "consideration" and were therefore properly includible in petitioner's "original purchase price".

FINDINGS OF FACT

Pursuant to a contract entered into on April 14, 1986 petitioner, 106 Development Corp., agreed to purchase from A. D. Developments, Ltd. certain real property located in the Village of Muttontown, Nassau County, New York. Petitioner purchased the property with the intent of subdividing and developing it.

Paragraph 37 of the rider attached to and made part of the contract of sale provides that the "purchase price" for the property was \$1,930,000.00 payable as follows: (i) \$75,000.00, to be held in escrow, upon the signing of the contract; (ii) \$350,000.00, to be held in escrow, by April 30, 1986; and (iii) \$1,505,000.00 upon delivery of the deed.

Paragraph 30 of the rider provides the following with respect to an adjournment of the closing date:

"If the Purchaser requests an adjournment for any reason other than the inability of the Seller to convey marketable title, the Purchaser agrees, as a condition therefor, that such adjournment shall not be requested nor shall the Seller be obliged to grant such application for adjournment, unless (i) the Purchaser makes such request in writing not later than five (5) days prior to the date hereinbefore fixed for such date of closing; (ii) such application for adjournment be limited to a period not in excess of ten (10) days from the original date hereinbefore set for closing; (iii) all adjustments in such event shall be made as of the original date hereinafter fixed for the closing of title and the Purchaser shall pay to the Seller, at closing, interest at 1% per annum over the prime rate of Chemical Bank from the closing date specified herein to the actual closing date on the cash to be paid at closing. If, however, Seller is unable to close title on the date hereinafter set forth because of the uninsurability of title or for any other reason elsewhere stated in this contract, or if Seller requests an adjournment of title, then and in such event, all adjustments shall be made as of and computed from the adjourned date of closing."

Paragraph 40 of the rider provides the following:

"During the term of this contract until closing of or sooner termination and cancellation of this contract pursuant to the terms hereof, purchaser shall pay to the seller interest on the then balance of the purchase price at a rate per annum equal to 1-1/2% above the rate announced from time to time by Chemical Bank at its principal office in New York City as its prime commercial lending rate payable on the 1st day of the second month following the date of execution of this contract and on the 1st day of each second month thereafter. Any change in the interest rate resulting from a change in the prime rate shall be effective at the beginning of the date on which the prime rate becomes effective. In the event that any such bi-monthly payment of interest is overdue more than ten (10) days, then such failure shall be deemed a default on the part of the purchaser hereunder. At the closing of title or sooner termination or on the earlier date of termination and cancellation of this contract pursuant to the terms hereof, purchaser shall pay to the seller any such interest accrued and unpaid to date thereof. During the period of six (6) months after date hereof interest shall accrue as follows: In the event that the interest computed as above stated is less than 11% per annum the actual interest rate shall be the above rate plus 50% of the difference between the above rate and 11%. For the period subsequent to said six-month period, interest shall accrue at a minimum rate of 11% and a maximum rate of 16%."

Paragraph 41 of the rider provides as follows:

"Purchaser acknowledges that the subdivision map of Belle Sonia Estates referred to herein is being processed by Frederick W. Kahler, Civil Engineer and Surveyor

for final approval by the Planning Board of the Village of Muttontown. In the event that the public hearing before the Village Planning Board for the final approval of said map is not held within six (6) months from date hereof and its approval given to said map, then and in such event purchaser shall have the right to request that the time to obtain such approval shall be extended for an additional period of six (6) months, provided that purchaser shall have given written notice thereof to the seller no later than on a date five (5) months after the date of execution of this contract."

Paragraph 44 of the rider provides, in part, as follows:

"The closing of title hereunder shall take place within fifteen (15) days after the filing and recording of the subdivision map in the office of the Clerk of Nassau County. Purchaser acknowledges that the Village Planning Board may, at its public hearing for the final approval of the subdivision map indicate its approval thereof, but such approval shall be subject to the terms and provisions of the resolution to be issued by the Planning Board thereafter and filed with the Clerk of the Village."

The closing of the contract of sale occurred on July 24, 1987. During the period between the execution of the contract and the closing, petitioner made payments to A. D. Developments, Ltd. totaling \$195,338.34 pursuant to Paragraph 40 of the rider to the contract dated April 14, 1986.

Petitioner filed a real property transfer gains tax transferee questionnaire (Form TP-581) with the Division of Taxation ("Division") in respect of its acquisition of real property from A. D. Developments, Ltd. On said form petitioner indicated that it paid \$1,930,000.00 in consideration to A. D. Developments, Ltd. in respect of said transfer.

Following its acquisition of the property, petitioner subdivided the property and sold six lots between July 1987 and October 1988. Three of the lots were improved with single-family residences and three lots were not.

The Division determined that petitioner owed gains tax on the transfers of the three lots without residences. In connection with such transfers, petitioner filed a real property gains tax transferor questionnaire (Form TP-580). With respect to the computation of its original purchase price for the subject property, petitioner reported on the Form TP-580 \$1,930,000.00 as the purchase price it paid to acquire the property. Petitioner also listed other acquisition costs, costs of capital improvements and allowable selling expenses in connection with the computation of original purchase price. Petitioner did not include on the Form TP-580 as part

of its original purchase price for the subject property the \$195,338.34 paid to A. D. Developments, Ltd. under Paragraph 40 of the Rider.

Petitioner paid gains tax of \$71,095.56 on its transfers of lots within the subdivision.

Petitioner subsequently filed a claim for refund dated March 13, 1989 in the amount of \$74,132.55. By letter dated April 19, 1989, the Division denied petitioner's claim in full.

Petitioner subsequently filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). Following a conciliation conference, BCMS issued a Conciliation Order, dated June 7, 1991, which granted petitioner a refund in the amount of \$6,073.96 and denied \$68,058.59 of the claimed refund.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contended that the payments totalling \$195,338.34 constituted consideration in respect of petitioner's acquisition of the subject property and that such payments were properly includible in petitioner's original purchase price. Petitioner contended that the subject payments were in return for an extension of the closing date and that such payments qualified as consideration pursuant to 20 NYCRR 590.13.

The Division contended that the subject payments were not made in return for an extension of a closing date. The Division noted that Paragraph 30 of the contract provided for payments in return for an extension of the closing date and that the subject payments were made pursuant to Paragraph 40. Accordingly, the Division contended, section 590.13 of the regulations is inapplicable herein. The Division further contended that the applicable regulation is 20 NYCRR 590.15 which, along with Tax Law § 1440(1), defines "consideration". The Division contended that the "consideration" herein consists of the "purchase price" as set forth in the contract, and that such contract, together with the transferor and transferee questionnaires, establishes that the parties' intent was not to include the \$195,338.34 in the consideration paid by petitioner to acquire the subject property.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of

10% on gains derived from the transfer of real property within New York State. Tax Law § 1440(3) defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price for the property." Tax Law § 1440(5)(a) defines "original purchase price" as, generally, the consideration paid or required to be paid by the transferor to acquire the interest in real property, plus the cost of certain improvements and customary expenses as set forth in the statute.

B. Tax Law § 1440(1)(a) defines "consideration" as follows:

"[T]he price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or contract to purchase or use real property. 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. Consideration includes the cancellation or discharge of an indebtedness or obligation."

C. Tax Law § 1440(5)(a) defines "original purchase price", in part, as follows:

"[T]he consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property."

D. The Division's regulations provide the following with respect to a 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." (20 NYCRR 590.13.)

E. Upon review of the record it is concluded that the payments made by petitioner pursuant to Paragraph 40 of the contract did not constitute "consideration" for gains tax purposes.

A review of the contract indicates that the payments under Paragraph 40 were not for real property but were intended to compensate the seller for the period of time between the execution of the contract and the closing. Since the subdivision had not been approved by the local planning board at the time the contract was executed (see, Finding of Fact "5"), the parties appear to have anticipated that a substantial delay before such approval was finally granted was likely. Ultimately, closing occurred some 15 months after the contract was executed. It is noteworthy that the contract categorizes the payments as interest, thereby indicating that the payments were more in the nature of compensation for the length of time between contract and closing, rather than consideration for the real property transferred. Additionally, the intent of the parties to the contract to exclude payments under Paragraph 40 from consideration paid for the property is manifest in the exclusion of such payments from the purchase price for the property under Paragraph 37 and as listed on the gains tax questionnaires filed by petitioner in respect of its acquisition and sale of the property (see, Findings of Fact "2", "8" and "10"). Accordingly, it is concluded that the documents submitted evince an intent by the parties to the transaction that payments made under Paragraph 40 not be considered part of the purchase price for the real property transferred.

F. Regarding the application of 20 NYCRR 590.13 to the instant matter, it is concluded that the payments made under Paragraph 40 were not in return for an extension of the closing date. The provisions of the contract call for a closing date within 15 days of the filing and recording of the subdivision map (see, Finding of Fact "6"). The payments under Paragraph 40 are required whether or not such date is postponed. Indeed, payments in return for a postponement of the closing date are explicitly provided for in Paragraph 30. As previously noted, payments made under Paragraph 40 appear to compensate the seller for the lengthy

period between contract and closing. Accordingly, it is concluded that 20 NYCRR 590.13 is inapplicable to the instant matter.

It should be noted, however, that even if section 590.13 of the regulations were applicable, the result herein would be the same, for the three-part test set forth in the regulation to determine whether the payments are includible as consideration is satisfied by the evidence presented. Specifically, as discussed herein, a review of the contract shows that the payments were to compensate the seller for the period of time between contract and closing. In other words the payments were for "time delay". Second, the amount paid, equal to 1½% above the prime rate, appears reasonable. Third, the transferee (petitioner) did not include the payment in consideration on gains tax questionnaires filed with the Division. Thus, the subject payments did not constitute consideration even under 20 NYCRR 590.13.

G. The petition of 106 Development Corp. is in all respects denied and the Division's denial of petitioner's claim for refund, dated April 19, 1989, as modified by the Conciliation Order dated June 7, 1991, is sustained.

DATED: Troy, New York
August 12, 1993

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE