STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEHAL REALTY ASSOCIATES	:	DETERMINATION DTA NO. 810377
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, Lehal Realty Associates, c/o Barr and Rosenbaum, 664 Chestnut Ridge Road, P.O. Box 664, Spring Valley, New York 10977, 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.

Petitioner, appearing by Barr and Rosenbaum (Harvey S. Barr, Esq., of counsel), and the Division of Taxation, appearing by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel), consented to have the controversy determined on submission without hearing by their respective signatures on October 19, 1993 and October 22, 1993. The Division of Taxation submitted pertinent documentation in this matter on November 29, 1993. Petitioner's memorandum of law, with attachments, was received by the Division of Tax Appeals on January 14, 1994. Thereafter, on February 23, 1994, the Division of Tax Appeals was in receipt of correspondence in lieu of a memorandum of law from the Division of Taxation. A letter reply was filed by petitioner and received on March 4, 1994. After due consideration of the record, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly asserted that the Division of Tax Appeals has no jurisdiction to consider the petition of Lehal Realty Associates since petitioner failed to apply for a hearing with the Division of Tax Appeals or request a conference with the Bureau of Conciliation and Mediation Services within 90 days of the issuance of the gains tax refund

denial letter issued by the Division of Taxation.

II. Whether the time period in which to file a timely petition was extended by the trustee's filing of a proceeding pursuant to 11 USC §§ 505 and 1146 in Bankruptcy Court.

III. Whether the trustee's filing pursuant to 11 USC §§ 505 and 1146 was the equivalent of filing a petition seeking refund of the taxes paid by the trustee in bankruptcy since the Division of Taxation was placed on notice of the claim for refund.

IV. Whether the time to file a petition was tolled by the automatic stay provisions of 11 USC § 362.

FINDINGS OF FACT

On February 2, 1989, an involuntary petition in bankruptcy was filed in the matter of Lehal Realty Associates ("Lehal") pursuant to Title 11 of the Bankruptcy Code. According to a document entitled Certificate of Commencement of Case, such matter was still pending as of January 11, 1994. On August 11, 1989, John Scheffel, Esq., was appointed the Chapter 11 Trustee in Bankruptcy in the matter of Lehal. A certified copy of the Notice of Appointment of Trustee was submitted into evidence.

In accordance with his duties as trustee and pursuant to a court order dated December 27, 1989, Mr. Scheffel sold Lehal's principal asset, a parcel of real estate located in the Village of New Hempstead, Town of Ramapo, Rockland County, New York. Such sale resulted in the real property gains tax assessment in issue.

The New York State Real Property Transfer Gains Tax Tentative Assessment and Return introduced into evidence reflects John Scheffel as operating trustee of Lehal Realty Associates, Chapter 11 Debtor, and the transferee as Three Little Willows Corporation. It is dated February 12, 1990 and reflects gain subject to tax of $6,463,288.50, with total tax due of $646,328.85. As a consequence of the sale and in compliance with the New York State real property gains tax law, the trustee remitted $646,328.85 on February 13, 1990. Petitioner asserts such payment was made under protest with the understanding that the trustee would commence proceedings to recover the funds.

A Claim for Refund of Real Property Transfer Gains Tax was filed with the Division of Taxation ("Division") dated November 6, 1990. The claim for refund asserts that, pursuant to 11 USC § 1146(c) and a pertinent U.S. Bankruptcy Court decision, petitioner's real property transfer is exempt from New York State transfer gains tax as a stamp or similar tax imposed on an instrument transferring an interest in property within the context of a confirmed plan of bankruptcy.

By correspondence dated May 13, 1991, the Division denied petitioner's refund claim and provided the following explanation:

> "The basis of the claim is that the transfer of real property pursuant to a confirmed plan of bankruptcy under Chapter 11 of the United States Bankruptcy Code is exempt from Real Property Transfer Gains Tax. Your claim is based on the provisions of Section 1146(c) of the United States Bankruptcy Code which provides in pertinent part that '. . . the making or delivery of an instrument of transfer under a plan confirmed under Section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax'.
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> "The Department has and continues to take the position (affirmed by the United States Bankruptcy Court decision in New York's Eastern District - In Re Jacoby Bender Inc.) that the Gains Tax is not such a stamp or similar tax and therefore a transfer pursuant to a plan of bankruptcy is not exempt pursuant to the provisions of Section 1146(c) of the United States Bankruptcy Code.
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> "Based on the foregoing, the refund claim of $646,328.85 is hereby denied in its entirety.
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> "In accordance with Section 1445.2 of the Tax Law, this determination shall be final and irrevocable unless claimant within ninety (90) days files with [sic] a request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition for Tax Appeals Hearing with the Division of Tax Appeals. The enclosed Form TA-9.1 explains this procedure."

The trustee thereafter on June 3, 1991, commenced a proceeding in the Bankruptcy Court pursuant to 11 USC §§ 505 and 1146 to recover the gains tax paid in full at the court-ordered sale of petitioner's property. The Division, by Robert Abrams, Attorney General, defended this action.

The U.S. Bankruptcy Judge in that action, by decision dated October 23, 1991, concluded that the Bankruptcy Court had the authority to determine the amount or legality of the gains tax pursuant to 11 USC § 505, but had no authority to compel the refund of any portion of the tax because the Division had not waived its Eleventh Amendment right of sovereign immunity,

which is accomplished when the Division files a proof of claim in a bankruptcy matter. An order in conformity with such decision was entered by the court on November 14, 1991.

On December 13, 1991, the Division of Tax Appeals received petitioner's petition dated December 10, 1991, which sets forth the merits of petitioner's refund claim. The envelope in which the petition was mailed bears a U.S. postmark dated December 11, 1991.

The Division raised the issue of the timeliness of the filing of the petition in this matter with the Division of Tax Appeals. In support of its position that the jurisdictional document (which in this case is represented by the refund denial letter of May 13, 1991) was mailed to petitioner, the Division submitted the affidavit of Anne Kasson and a document from the U.S. Postal Service. The affidavit of Ms. Kasson provided the following information:

(a) Ms. Kasson, as a principal clerk in the Real Property Transfer Gains Tax Unit of the Division, bears the responsibility for supervision of the clerical staff of such unit with respect to the generation and issuance of notices of determination to taxpayers. Her affidavit set forth the procedures for the issuance of such notices.

(b) She states that after a determination is made that a transferor applying for a refund of real property transfer gains tax is not entitled to such refund, the gains tax unit prepares a notice of determination denying such application. In this case, correspondence dated May 13, 1991 was issued to John F. Scheffel, as Trustee for Lehal Realty Associates.

(c) A prepared notice is brought to the clerical staff of the gains tax unit for mailing where an envelope is prepared in which the notice is placed. Two items of certified mail documentation are then prepared: Postal Service Form 3877 (a firm registration book) and Postal Service Form 3811 (a domestic return receipt). Introduced into evidence are the original forms 3877 and 3811 in this matter.

(d) After Postal Service Form 3877[1] is prepared and

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[1]Although the affidavit mentions attaching a Form 3877 to the envelope, it is Form 3811 (Domestic Return Receipt) which is actually attached to the envelope.

attached to the envelope containing the notice of determination, both are delivered to the registry unit of the Division's mailroom located on the W. A. Harriman Campus, Albany, New York. It is at this location that metered postage is affixed to the envelope containing the notice.

(e) Once proper postage is affixed to the envelope, together with its completed forms 3877 and 3811, the envelope is delivered by a Division mailroom employee to the United States Postal Service. In this case the postmark on the pertinent Form 3877 indicates that the notice in this matter sent to John F. Scheffel was delivered to the Roessleville Branch of the U.S. Postal Service on May 14, 1991 with 14 other documents. A Postal Service employee reviews the Form 3877 and verifies that the mail pieces listed on such form were received by the post office. The postal employee handwrites the number of pieces listed on the Postal Service Form 3877 and the total number of pieces received. Thereafter, the employee signs his name to Form 3877 and affixes a U.S. Postal Service date stamp to the form.

(f) Ms. Kasson's examination of the Form 3877 submitted in this case reveals that P. Guynup, a Postal Service employee, received 15 pieces of mail on May 14, 1991, including the notice at issue herein. Although the refund denial letter was dated May 13, 1991, Ms. Kasson certifies that such notice was actually mailed on May 14, 1991. Form 3811, the domestic return receipt, further reveals that the notice in question sent to John F. Scheffel on May 14, 1991 was actually received by petitioner on May 16, 1991.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that the filing of the complaint in the Bankruptcy Court extended the time to file a petition with the Division of Tax Appeals and since such complaint was duly served well within the 90-day time period, petitioner's petition should also be deemed timely. Further, petitioner asserts that the filing of such complaint is the equivalent of filing a timely petition as this would be consistent with the public policy of the Division of Tax Appeals and its goals to provide a just system of resolving controversies. Petitioner alternatively argues that the automatic stay provisions provided by 11 USC § 362 stayed the continuation of the refund proceedings and acted to toll the running of the 90-day statute of limitations provided by Tax

Law § 1445(2).

The Division contends that petitioner failed to apply for a hearing with the Division of Tax Appeals or request a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days of the issuance of the refund denial correspondence by the Division and, as such, the refund denial became final and irrevocable. The Division asserts that no authority exists for a determination which would deem the trustee's bankruptcy complaint to be a valid petition filed with the Division of Tax Appeals. The Division further claims that petitioner's argument with respect to the automatic stay provisions is flawed since such provision operates to prevent any action taken against the debtor, unlike the facts of this case.

CONCLUSIONS OF LAW

A. Tax Law § 1445(1) provides as follows:

> "A transferor claiming to have erroneously paid the tax imposed by this article may file an application for refund within two years from either the date of transfer or the date of payment, whichever is later."

Tax Law § 1445(2) provides as follows:

> "The tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing."

Tax Law § 2006(4) provides the Division of Tax Appeals with the power to provide a hearing as a matter of right, "unless a right to such hearing is specifically provided for, modified or denied by another provision of [the Tax Law]." There is no dispute that the gains tax refund denial letter was issued by May 14, 1991 and received by petitioner within several days. Additionally, the Division has adequately provided evidence of the general office procedures followed in the preparation and mailing of such notices and has clearly shown, in this particular case, that such procedures were adhered to. Thus, the facts bear out the Division's proper and timely issuance, as well as petitioner's receipt, of the governing notice. Since petitioner did not file its petition until December 11, 1991, it failed to petition the Division of Tax Appeals within 90 days, as required by Tax Law § 1445(2), and the Division of Tax Appeals has no jurisdiction to provide a hearing to consider the substantive merits of petitioner's refund claim.

B. 11 USC § 505, with respect to the Bankruptcy Court's determination of tax liability, states as follows:

"Determination of tax liability

> "(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."

Subsequent to the issuance of the refund denial letter, petitioner had two options to pursue its refund claim. One was to petition for a hearing with the Division of Tax Appeals within 90 days after the mailing of such notice. It has been established herein petitioner did not choose this option. Instead, petitioner chose an alternative method of determining its tax liability pursuant to 11 USC § 505. This statutory provision enables the Bankruptcy Court to determine the tax liability herein, whether or not previously assessed or paid and whether or not contested before an alternative jurisdiction such as the Division of Tax Appeals. There is no authority which allows an action pursuant to section 505 to replace the action which the Division asserts should have been commenced before the Division of Tax Appeals. Based on the facts and circumstances in this matter, petitioner should have filed a petition with the Division of Tax Appeals as a protective claim even if the same was requested to be held in abeyance until the bankruptcy matter was resolved. Petitioner did not choose to pursue this course of action. Although petitioner may have had an opportunity to extend the time period to pursue such proceeding with the Division of Tax Appeals, the mere filing of the action in Bankruptcy Court did not act to extend the time period for filing with the Division of Tax Appeals.

Although it is true that the State (of which the Division of Taxation is a unit) defended the refund claim action filed by the trustee with the Bankruptcy Court, the choice of forum and resulting consequences of seeking such refund there cannot be ignored. Neither the Division of Taxation nor the Division of Tax Appeals are placed on notice that a refund is being sought merely by petitioner's filing in an alternative proceeding with the Bankruptcy Court. This is not

a case where a petition is submitted to request a hearing before the Division of Tax Appeals and is imperfect in its content or is improperly delivered to the wrong processing unit. This is a case where petitioner argues that a filing with one court should be the equivalent of filing in an alternative administrative jurisdiction since the Division of Taxation is placed on notice in both cases. There is no basis in law for such conclusion.

C. Petitioner asserts that the time to file for refund was tolled by the automatic stay provisions of 11 USC § 362 which state as follows:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of --
>
> > "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . ., or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ."

Petitioner asserts that at the time the refund claim was denied by the Division, the automatic stay provisions of Bankruptcy Code § 362 were in effect and stayed the administrative proceedings in connection with the tax refund claim by tolling the running of the 90-day period provided by Tax Law § 1445(2). The policy of the automatic stay provisions does not support such an interpretation. The policy behind the automatic stay is intended to give the debtor breathing room from its creditors by stopping all collection efforts, all harassment and all foreclosure actions (In Re Bloom, 875 F2d 224, 226). Although the legislative history emphasizes that the stay is intended to be broad in scope, it must be applied in the proper context. Congress designed it to protect debtors and creditors from piecemeal dismemberment and allows the debtor time to reorganize (In Re Computer Communications, 824 F2d 725, 731). The Division entered the case as a result of a refund claim for taxes paid on the sale of an asset ordered to be sold within the context of the bankruptcy, and which arose as a consequence thereof. As such, the Division was not a creditor attempting to collect tax which arose from an event prior to the petition for bankruptcy. In addition, and perhaps more importantly, section 362 specifically states that the stay prevents commencement or

continuation of an administrative proceeding against the debtor that was or could have been commenced before the bankruptcy matter. In this case, it was the debtor (petitioner) who sought a refund of real property gains tax paid and no action was taken by the Division which would fall within the purview of the stay provision. Furthermore, if petitioner's position is that any proceeding with the Division of Tax Appeals would be stayed because the Bankruptcy Court has exclusive jurisdiction, it could not then seek its refund of real property gains tax in this forum, though the stay is not permanent in nature, because the Division of Tax Appeals would lack jurisdiction in that case as well (see, In Re Computer Communications, supra).

D. The petition of Lehal Realty Associates is hereby dismissed.

DATED: Troy, New York
August 18, 1994

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE