STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FAZKAP ASSOCIATES	:	DETERMINATION DTA NO. 811024
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, Fazkap Associates, c/o National Consultants Associates, 447 West 51st Street, New York, New York 10019, 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.

On March 25, 1993, petitioner, by Andrew J. Fair, Esq., and on April 12, 1993, the Division of Taxation, by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel), respectively, agreed to have the controversy determined on submission without hearing. All briefs, documentation, additional arguments and responses thereto were completed by August 12, 1993. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner is liable for the full gains tax determined due after defaulting on a 15-year installment payment plan it entered into with the Division.

II. Whether petitioner's failure to timely pay the real property gains tax was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

Petitioner, Fazkap Associates ("Fazkap"), was a New York partnership at all times relevant herein.

On December 31, 1986, Fazkap entered into a contract of sale with Irving Place Realty Corp. ("Irving") for the sale of premises located at 57-59 Irving Place, New York, New York for

a purchase price of $4,398,780.00 which was payable as follows:

(a) Irving assumed the first mortgage loan held by the Emigrant Savings Bank, having a principal balance of $198,780.00 as of December 31, 1986;

(b) Irving executed a note and mortgage to secure the payment of the remaining $4,200,000.00. Pursuant to the note, Fazkap was to receive only interest on the purchase price for a period of 15 years.

Section "11(b)(iii)" of the contract of sale stated that Fazkap was solely responsible for payment of the real property gains tax on the conveyance of the premises and also for filing any returns or reports required in connection therewith. The contract did not mention how Fazkap would finance the payment of the tax.

On December 31, 1986, Irving executed a Transferee Questionnaire indicating that it had purchased the premises at 57-59 Irving Place on December 31, 1986 for consideration of $4,398,780.00.

Fazkap executed a Transferor Questionnaire on January 9, 1987 indicating that it had sold the same premises to Irving for the same purchase price and that the anticipated real property gains tax due on the transfer date, anticipated to be December 31, 1986, was $379,197.52.

On January 29, 1987, the Division of Taxation ("Division") issued a Tentative Assessment and Return to Fazkap indicating a tentative assessment of tax due of $389,754.59 plus penalty and interest. The difference in the base tax from that stated on the Transferor Questionnaire was an adjustment made by the Division which was explained in the Tentative Assessment as follows:

> "We have added the amount of transfer tax which was paid by the transferee instead of the transferor.
> 105,570.72"

On March 2, 1987, Fazkap filed a Supplemental Return which set forth a corrected tax due of $389,754.59 and indicated that it was electing to defer payment of same because the actual cash received by it on or before the date of transfer, $0.00, was less than or equal to the tax due. Said return also stated that the transfer date had been December 31, 1986. The

following prefatory language was set forth above the election on the form:

> "If the transferor fails to pay any installment on the date on which it is due, the Tax Department may declare the entire unpaid balance of the tax due and owing."

On June 23, 1987, the Division sent Fazkap a letter informing it that the tax due on the transfer of the premises at 57-59 Irving Place qualified for deferred payment based upon the information submitted. The letter also stated the terms of the payment plan:

> "Annual payments in the amount of $25,983.64 will be due on the 31st day of December for the next 15 years."

Fazkap made the first installment payment on December 16, 1987, the second on December 16, 1988 and the third on January 5, 1990. However, no further payments were received from Fazkap.

On March 7, 1991, the Division issued to Fazkap a Statement of Proposed Audit Adjustment which requested payment in the sum of $347,995.97. The statement set forth the following explanation:

> "Our records indicate that on 12/31/90 an installment of the Gains Tax was due under plan number I-641. Section 1442 of the Tax Law provides that if the transferor shall fail to pay any installment on the date on which it is due, the entire balance of the tax is due and owing.
>
> "Installment payment due 25,983.64
> Penalty 12/31/90-4/7/91 4,157.38
> Interest 12/31/90-4/7/91 770.64
>
> "Unpaid balance 285,820.03
> Penalty 3/7/91-4/7/91 28,582.00
> Interest 3/7/91-4/7/91 2,682.28"

Subsequent to the issuance of the Statement of Proposed Audit Adjustment, on May 6, 1991, the Division issued to Fazkap a Notice of Determination for the 1990 installment payment that was not made by petitioner, and accelerated the balance of the gains tax plus penalty and interest pursuant to Tax Law § 1442.

On August 15, 1991, the Division issued to petitioner a Notice and Demand for Payment of Tax Due which set forth additional tax due on or before August 25, 1991 of $311,803.67 plus penalty and interest for a total amount due of $390,023.22.

During the spring of 1991, Fazkap took back the property in lieu of foreclosure and

thereafter leased the property to a third party.

Upon taking the property back, Fazkap found that the City of New York had commenced an in rem tax foreclosure action against the property for the payment of real estate taxes owed by Irving. Fazkap and the City of New York entered into an installment agreement under which Fazkap has agreed to pay the taxes owed.

SUMMARY OF PETITIONER'S POSITION

Fazkap argues that Irving made interest payments to it for the years 1987 and 1988, only ten payments during the year 1989 and only one payment during the year 1990. Further, no payments have been made since. Fazkap had no other income other than the mortgage payments from Irving and therefore could no longer pay the tax installments. It contends that imposing a tax on a gain that will never be realized is in violation of the intent behind the gains tax and is also inequitable.

Fazkap believes that if the gains tax is found due and owing even if the gain is not actually realized, then the gains tax is an unconstitutional taking of property without just compensation.

Finally, Fazkap argues that Tax Law § 1442 does not require the Division automatically to accelerate the tax and impose penalties.

CONCLUSIONS OF LAW

A. The primary issue to be decided in this case is whether the Division acted properly in accelerating the tax due upon Fazkap's default and imposing penalty and interest for said default.

Tax Law § 1441 imposes a tax at the rate of ten percent 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. "Original purchase price" is defined as the consideration paid or required to be paid by the transferor to acquire the interest in real property and for any capital improvements made or required to be made to such real property (Tax Law § 1440.5).

"Consideration" is defined in Tax Law § 1440.1(a) as:

> "the price paid or required to be paid for real property or any interest therein . . . . 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."

As stated, consideration includes the amount of a mortgage, meaning its face amount and not its present value or other value (Matter of Normandy Associates, Tax Appeals Tribunal, March 23, 1989; see also, Matter of Old Farm Lake Co., Tax Appeals Tribunal, April 2, 1992).

The amount of tax calculated by Fazkap and the Division herein was correctly based upon the face amount of the purchase money mortgage from Irving and other consideration at the time of the transfer (see, Matter of Cheltoncort, Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121 [wherein the Tribunal stated that in calculating the amount of tax due upon a taxable transaction, the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer]).

Fazkap elected to defer its payment of the tax it calculated to be due, as modified by the Division and agreed to by it, in accordance with the terms set forth on the Supplemental Return. Those terms were very plainly set forth as follows:

> "If the transferor fails to pay any installment on the date on which it is due, the Tax Department may declare the entire unpaid balance of the tax due and owing."

This language has its genesis in Tax Law § 1442 and is repeated in the regulations at 20 NYCRR 590.70. The Tax Appeals Tribunal has held that it is "contrary to reason" that a taxpayer could ignore the plain meaning of those words (see, Matter of Posner, Tax Appeals Tribunal, June 21, 1990).

Clearly, it is within the discretion of the Division whether it will declare the entire unpaid tax due and owing, since there is nothing in the statute to suggest that the word "may" has anything other than its common permissive meaning (see, Regan v. Heimbach, 91 AD2d 71, 458 NYS2d 286, lv denied 58 NY2d 610, 462 NYS2d 102) and authorizes, but does not require,

the Division to accelerate the tax (cf., F & W Oldsmobile v. State Tax Commn., 106 AD2d 792, 484 NYS2d 188, 189 [where the use of the word "shall" rather than the the permissive "may" was interpreted to mean that the Division was required to act]). Since the Division has exercised its prerogative to declare the unpaid portion of the tax due and owing, and has issued a bill for same, petitioner is obliged to pay it.

Petitioner argues that since the Division is not under a duty to declare the unpaid tax due and owing it should consider the economic straits in which Fazkap finds itself and rescind its demand for payment of the full tax due. However, there is no such requirement in the statute or regulations which provides for same.

Although it is unfortunate that Irving failed to keep its commitment under the purchase money mortgage, said default has no relevance to Fazkap's obligation to make its installment payments under its agreement with the Division. The real property gains tax is due on the date of transfer unless certain criteria are met which entitle the taxpayer to defer payment of tax (Tax Law § 1442). Deferring payment is a privilege granted to the taxpayer which acknowledged on its application for said deferral that the Division could accelerate the unpaid balance of tax due if the taxpayer failed to pay according to the installment plan. There is no mention in the statute, regulations or case law which suggests that a taxpayer's subsequent economic woes will give rise to a duty of the Division to withhold acceleration of payment of the unpaid tax. Therefore, the Division acted properly in accelerating the payments.

Petitioner's argument that the Division's demand for the full unpaid balance of the tax due, in light of the subsequent devaluation of the consideration, amounts to an unconstitutional taking of property without compensation is without merit. The Division is only demanding the tax to which it is rightly entitled under the statute, which is presumed constitutional at this administrative level (see, Matter of Wizard Corp., Tax Appeals Tribunal, January 12, 1989; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

B. Petitioner also raised the argument that it was not liable for the penalty imposed because it did not have the resources to pay the tax. As a result, it contends that its failure to

pay the tax was due to reasonable cause and not willful neglect. The statute (Tax Law § 1446.2[a]) and regulations (20 NYCRR 590.71[b]) provide that if the Commissioner of Taxation and Finance determines that such failure or delay was due to reasonable cause and not due to willful neglect, he shall remit, abate or waive all of such penalty and such interest penalty.

However, inability to pay the tax has not been found to constitute reasonable cause for the failure to pay the tax. In F & W Oldsmobile v. State Tax Commn. (supra), the Appellate Division held that reasonable cause does not include financial inability or the need to use taxes collected for other more pressing obligations. More recently, the Appellate Division has reiterated this point in Matter of Ross-Viking Mdse. Corp. v. Tax Appeals Tribunal (188 AD2d 698, 590 NYS2d 576, 577-578) stating:

> "In determining whether the Department properly assessed a penalty, the burden is on the petitioner to demonstrate that a penalty was improperly assessed [citations omitted].
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> * * *
>
> "[M]oreover, financial difficulties faced by a taxpayer are not reasonable cause within the meaning of Tax Law § 1085 [penalty provision for corporation tax] [citations omitted]."

It is determined that petitioner's inability to pay is equally unconvincing and the penalty and interest imposed by the Division are sustained.

C. The petition of Fazkap Associates is denied and the Notice of Determination, dated May 6, 1991, is sustained.

DATED: Troy, New York
January 27, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE