

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
E.L.C. HOTEL CORPORATION,	:	DETERMINATION
52ND STREET DESIGNEE CORPORATION	:	DTA NOS. 811074,
AND RADIO AMUSEMENT CORPORATION	:	811075, 811076,
	:	811641 AND
	:	811642
for Revision of Determinations or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioners, E.L.C. Hotel Corporation, c/o Robert Gottlieb, Esq., 29 Broadway, Suite 1412, New York, New York 10006, 52nd Street Designee Corporation, c/o Lewis Cohen, Esq., 167 West 34th Street, New York, New York 10001, and Radio Amusement Corporation, c/o Robert Gottlieb, Esq., 29 Broadway, Suite 1412, New York, New York 10006, filed petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On June 28, 1993 and July 8, 1993, respectively, petitioners, appearing by Howard M. Koff, Esq., and the Division of Taxation by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) consented to have the instant controversy determined on submission without hearing. Documentary evidence was submitted by the Division of Taxation on July 22, 1993. Petitioners submitted letters in lieu of briefs on September 21, 1993. The Division of Taxation submitted a letter in lieu of a brief on November 1, 1993 and petitioners submitted letters in lieu of briefs on November 12, 1993. After review of the entire record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether interest is due on petitioners' gains tax payments made after the transfer of title where property was taken by eminent domain, title passed to the State of New York, but

payment for the property was not made until approximately one year after the passing of title.

FINDINGS OF FACT

There are three buildings involved in this matter: 592-594 Seventh Avenue, New York, New York 10036; 1491 Broadway, New York, New York 10036; and 216 West 42nd Street, New York, New York 10036.

Stipulated Facts

The proceedings before the Division of Tax Appeals identified as DTA Nos. 811074, 811075, 811076, 811641 and 811642 all involve a common legal issue; viz., whether interest is due (and therefore accrues) from the date of the takings in condemnation where, as here, the amounts of the condemnation awards (i.e., advance and supplemental payments) were contingent and not ascertained or determined until long after the takings.

In each case, the amount of the respective advance and/or supplemental payment was contingent and was not ascertained or determined until long after the respective taking (and long after the 15-day period following such taking).

If interest was due from the date of the takings (or within 15 days thereof) despite the fact that the amounts of the awards were then contingent and unascertained, then the claims for refund should be denied and the notices of determination sustained.

On the other hand, if interest was not due from the date of the takings (or within 15 days thereof) then petitioners are entitled to the claimed refunds and cancellation of the notices of determination insofar as such notices of determination contain an assessment of interest.

The amounts of interest involved herein are set forth in the respective claims for refund and notices of determination, which are part of the record in each such proceeding.

Additional Facts

The buildings and property herein involve the plan of the New York State Urban Development Corporation ("UDC") and its subsidiary (Times Square Redevelopment Corporation) to redevelop the Times Square area of Manhattan. A condensed review of the project and its history may prove helpful in understanding these matters.

The project began with the UDC and New York City ("NYC") agreeing to participate in a plan, involving private business, to redevelop the Times Square area. The goals of the plan included the elimination of blight, revitalization of the area as an entertainment center, development of commercial potential and strengthening of nearby areas. With these ends, the proposal included a mix of office towers, hotel space, theaters and retail space; presented options for the development of eight sites within the tentatively designated project area; and solicited public comment.

UDC authorized formation of a subsidiary and acquisition of property by negotiated purchase or eminent domain, and invited private developers to submit proposals. A general project plan, together with a series of findings, were adopted by the UDC. On November 9, 1984, the NYC Board of Estimate authorized the Mayor to execute agreements for site development with the UDC and developers.

On May 3, 1989, the UDC filed its petition with the Supreme Court of the State of New York, County of New York with respect to the acquisition of the properties at issue. The petition requested that the Court issue an order to condemn the real property and to set the compensation which should be made to the respective owners of, or persons interested in, such property.

The Order of the Supreme Court, New York County (Stanley Parness, J.) entered April 18, 1990 provided, in part, as follows: that the UDC was authorized to file the acquisition map in the Office of the Clerk of the County of New York or the Office of the City Register; that upon filing of the court's order and the acquisition map with said Clerk of the County of New York or the City Register, the title to all of the property sought to be acquired pursuant to the petition and described in the acquisition map would vest in the UDC; and that the UDC shall promptly complete vesting date appraisals and make advance payments thereon with 9% interest from date of vesting.

E.L.C. Hotel Corporation: 592-594 Seventh Avenue

Petitioner E.L.C. Hotel Corporation ("ELC") did not file any real property transfer gains

tax reports or pay any gains tax following the transfer of the property to the UDC on April 18, 1990. On March 13, 1991, ELC filed a Transferor Questionnaire which indicated that the gross consideration to be paid for transfer by the transferee was "TO BE DETERMINED." An affidavit attached to the questionnaire of one of the attorneys of ELC indicated that the UDC acquired title to the property from ELC on April 18, 1990 for the 42nd Street Development Project.

The UDC notified ELC, by letter dated March 19, 1991, that on April 15, 1991 it was making available to ELC an advance payment of \$5,100,000.00. On April 4, 1991, ELC filed a Supplemental Transferor Questionnaire indicating gross consideration of \$5,100,000.00 and real property transfer gains tax due of \$335,404.24. The Supplemental Transferee Questionnaire filed by the UDC indicated April 18, 1990 as the date of condemnation, April 15, 1991 as the date the advance payment of \$5,100,000.00 would be available and that the final award was to be determined. The Division of Taxation ("Division") issued a Tentative Assessment and Return on April 12, 1991 to ELC for the transfer of the property of 592-594 Seventh Avenue, assessing tax due of \$348,829.24, plus interest of \$40,041.76. The tax and interest was paid by ELC on April 26, 1991, and ELC then filed a claim for refund of the interest paid. In response, the Division rejected the claim for refund in a letter dated October 30, 1991, stating, in part, that:

"The court order has established that title to the property was vested in the UDC on April 18, 1990. This becomes the date of transfer. The court also recognized that any money paid for the property was due to the condemnee from this date by the fact that interest had to be paid on any compensation from April 18, 1990 to the date of payment. Since Section 1442 of the Tax Law provides that the tax is due no later than the fifteenth day after the date of transfer, it is not when the tentative assessment was issued or when the actual payment of consideration is made that determines when the tax is due. Since the courts have acknowledged that any compensation due was due from the vesting or transfer of title into the UDC, the Department has concurred with this position, and feels that any tax due is also due from that date. Therefore, when the tax was not paid when due, as provided for in Section 1442 of the Tax Law, there was an underpayment and interest was imposed from that date to the date of payment. This treatment is in conformity with the court and UDC who paid the \$5,100,000 with interest to the claimant from April 18, 1990 to the date payment was made."

52nd Street Designee Corporation: 1491 Broadway

Petitioner 52nd Street Designee Corporation ("52nd Street") filed a Transferor Questionnaire for the property located at 1491 Broadway, New York, New York 10036, indicating the gross consideration to be paid for transfer by transferee was "not yet determined." An affidavit of the secretary of 52nd Street attached to the questionnaire indicated that the property was acquired by UDC on April 18, 1990. The Transferor Questionnaire was filed on February 26, 1991. Accompanying the Transferor Questionnaire was a Notice of Extension of Period of Limitation for Assessment of Tax on Gains Derived from Certain Real Property Transfers, signed on behalf of 52nd Street on February 25, 1991. The notice of extension was not signed by a representative of the Department of Taxation and Finance.

On March 19, 1991, the UDC notified 52nd Street that it was making available an advance fee payment of \$2,200,000.00 on April 15, 1991. Following receipt of the UDC letter, 52nd Street filed a Supplemental Transferor Questionnaire on April 4, 1991 indicating gross consideration to be paid of \$2,200,000.00 and anticipated tax due of \$24,584.00. The Division issued a Tentative Assessment and Return dated April 11, 1991 showing tax and interest due of \$28,572.37 and \$3,279.79, respectively, which were paid by 52nd Street on April 25, 1991. 52nd Street's claim for refund of the interest paid of \$3,279.79 was denied by the Division in a letter dated October 30, 1991 that was similar to the one issued to ELC. Finally, 52nd Street filed a Supplemental Return on October 15, 1991 showing additional tax due of \$201,543.10 resulting from a supplemental advance fee payment of \$2,600,000.00 from the UDC on October 10, 1991. Interest was paid to 52nd Street from April 18, 1990 through October 9, 1991. On March 16, 1992, the Division issued a Notice of Determination to 52nd Street imposing interest from May 3, 1990 through March 16, 1992 on the supplemental payment of \$2,600,000.00.

Radio Amusement Corporation: 216 West 42nd Street

Petitioner Radio Amusement Corporation ("Radio") owned the property located at 216 West 42nd Street, New York, New York. On May 2, 1990, Radio filed a Transferor Questionnaire stating that the gross consideration to be paid for transfer by transferee was "to be

determined" and a Supplemental Return electing to pay the tax due in installment payments pursuant to Tax Law § 1442(c). Radio and the Division executed, on May 29, 1990 and August 14, 1990, respectively, a Notice of Extension of Period of Limitation for Assessment of Tax on Gains Derived from Certain Real Property Transfers. After receiving a letter from the UDC dated March 19, 1991 indicating an advance fee payment of \$1,150,000.00 would be available on April 15, 1991, Radio filed a Supplemental Transferor Questionnaire showing tax due of \$73,898.90 based upon the gross consideration of \$1,150,000.00. The Division responded by issuing a Tentative Assessment and Return for tax due of \$73,898.90, plus interest of \$8,482.78, which was paid on April 25, 1991. Radio's claim for refund of the interest paid of \$8,482.78 was denied by the Division in a letter dated October 30, 1991. The letter was similar to the one issued to ELC on the same date.

On October 22, 1992, the UDC notified Radio that a supplemental advance fee payment would be available as of November 20, 1992. Radio then filed a Supplemental Return with the additional consideration of \$1,350,000.00 and tax due of \$105,650.00. The Tentative Assessment and Return issued by the Division to Radio indicated tax due of \$105,650.00 and interest due of \$30,273.40, both of which were paid on November 24, 1992. On the same date, a claim for refund was filed for total interest paid of \$38,756.18 (\$8,482.78 + \$30,273.40), which the Division rejected on January 5, 1993.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that since the amount of the consideration in these matters was unascertainable at the time of the transfer, the due date of the tax was postponed until the amounts were determined. Until the amount of the consideration is determined, the amount of gain subject to tax, and the gains tax due, cannot be calculated. Thus, interest could not have accrued until the amount of consideration was determined.

Petitioners further contend that implicit in the provisions of Tax Law § 1444(3)(b), which provides that where the total consideration is not determinable at the time the questionnaires are submitted, the commencement of the three-year period of assessment is delayed until the

taxpayer notifies the Division of the amount of consideration, is the recognition that the due date of such tax liability is similarly postponed until consideration is determined.

The Division contends that the situation herein is analogous to that of a taxpayer who elects to defer payment of all or a portion of the tax due pursuant to Tax Law § 1442(c) and pay the same in annual installments. In such cases, the transferor may be allowed up to three years to pay the tax due or, when the consideration is in the form of a purchase money mortgage, such time may extend up to 15 years. However, in all such cases, interest is due on the amount of the unpaid tax from the date of transfer (Tax Law § 1446).

CONCLUSIONS OF LAW

A. The UDC (the "condemnor" under Eminent Domain Procedure Law ["EDPL"] 103[D]) properly presented its petition to the Supreme Court, New York County, accompanied by a copy of the proposed acquisition map to be filed (EDPL 402[B]). The petition requested that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate county clerk or register and that, upon such filing, title shall vest in the condemnor (EDPL 402[B][3]). On April 18, 1990, the order of the court was entered, the acquisition map was filed and title to the property at issue vested in the UDC (City of Buffalo Urban Renewal Agency v. Moreton, 100 AD2d 20, 473 NYS2d 278; Voorhis v. State of New York, 107 Misc 2d 956, 436 NYS2d 187; EDPL 402[B][5]; see, Order, Sup Ct, NY County, Parness, J., affd Matter of New York State Urban Development Corp., 165 AD2d 733, 563 NYS2d 788). The lack of payment from the UDC to the petitioners did not defeat the transfer of title, as compensation need not be specifically provided by an appropriation of funds before the property is appropriated since the faith of the State may be ample security if it opens the door to the claimant to obtain the obligation of the State to pay (Patchogue Land Corp. v. Long Island State Park Commn., 243 NY 15, rearg denied 243 NY 542).

Petitioners were entitled to interest on the condemnation judgment to compensate for the delay in payment of the award and the interest was payable at such rate as was fixed by statute. Interest on the value of the property taken was required by the just compensation clauses of the

Federal and State constitutions as a substitute for the beneficial use of the property during the period between the date of the taking and the date of final judgment (Adventurers Whitestone Corp. v. City of New York, 65 NY2d 83, 489 NYS2d 896). Interest was payable from the date that title was transferred to the date of the advance payment (LaPorte v. State of New York, 6 NY2d 1, 187 NYS2d 737; Amsterdam Urban Renewal Agency v. McGrallon, 91 AD2d 792, 458 NYS2d 67, affd 59 NY2d 624, 463 NYS2d 195; Marine Midland Bank, N.A. v. State of New York, 118 Misc 2d 472, 460 NYS2d 902; EDPL 514[A]). Therefore, petitioners were entitled to receive interest on the payments from the UDC from April 18, 1990 to date of payment.

B. 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. As noted, neither party disputes the fact that the taking of the subject property by eminent domain constituted the transfer of an interest in real property subject to the gains tax (Tax Law § 1440[7]).

C. Tax Law § 1440.3 defines "gain" as the "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price." Tax Law § 1440.5 defines "original purchase price" to mean:

"the consideration paid or required to be paid by the transferor; (i) to acquire the interest in the property, and (ii) for any capital improvements made or required to be made to such real property"

"Consideration", in turn, is defined by Tax Law § 1440.1(a) to mean:

"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" (emphasis added).

D. Tax Law § 1442, at all times relevant hereto, provided that the gains tax imposed was to be paid by the transferor on the date of transfer.

In Matter of Cheltoncort (Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121) 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" (emphasis added).

Here, it is clear that the consideration for the property taken by eminent domain was subject to tax but that the amount of consideration paid or required to be paid was not determinable at the date of transfer. In Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), the Tribunal considered an analogous (though converse) situation to that found in the Cheltoncort matter. There, the petitioner sought to include in consideration (for purposes of calculating its original purchase price) certain liabilities it had assumed from its seller upon its acquisition of real estate. Though it appeared the petitioner in V & V may not in fact have ultimately paid such liabilities, the Tribunal nonetheless allowed the same as part of consideration, holding that original purchase price includes "any consideration paid or required to be paid by the transferor." The Tribunal noted that:

"[W]hether petitioner has paid this amount is not determinative, but rather, the determinative factor is whether petitioner was required to pay this amount at the time the transfer occurred. Subsequent events do not affect the amount of liability assumed by petitioner at the time it acquired the property" (emphasis added).

A footnote included in the Tribunal's decision in V & V specifically affirmed this holding as being consistent with prior Tribunal decisions holding that the amount of consideration must be determined at the time of transfer and cannot be reduced based on subsequent events (citing Matter of Cheltoncort Co., supra; Matter of Perry Thompson Third Co., Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121). In sum, "gain" subject to gains tax is computed as the difference between the original purchase price and the consideration as determined as of the date of the transfer. In the present matter, however, since the consideration could not be determined as of the date of transfer, the gain, and thus the gains tax, could also not be determined on such date.

E. At the time of the transfer, the actual dollar amount of consideration (and hence the ultimate dollar amount of tax) was dependent upon future events and, while includible, was unknown at the time of transfer (see, e.g., Matter of V & V Properties, supra). The

consideration required to be paid, and petitioners' tax liability, was not set and known at the time of transfer. Petitioners' right to receive a certain amount of consideration at the time of the transfer was not established at the time of transfer, but, in this matter, was set approximately one year later with the UDC's offer of payment and the review by the courts. The difference in timing between the taking of title and the establishment of the amount of consideration was not controlled by petitioners, but by outside parties and events. This situation involves a "contingent" consideration arrangement where the amount of the consideration, although includible, is dependent upon future events and unknown at the time of transfer. In such a situation, the tax is due and determinable at the time the "contingent" consideration is received, and interest begins to accrue as of this date.

A Division memorandum, TSB-M-86(4)R, contains a brief discussion of contingent future payments. The memorandum states:

"Where a contract contains an unvalued benefit or provides for a contingent payment, the Department will issue either a statement of tentative assessment or statement of no tax due based on the known consideration. An agreement extending the statute of limitation of time for assessment will be required to be filed. If there is additional consideration received for the transfer at a later date, the transferor and transferee, [sic] are required to file updated questionnaires disclosing the actual consideration for the transfer of real property."

In these cases, there are no contracts containing "an unvalued benefit" or "contingent payment". However, the consideration to be paid was contingent and unknown at the time that transfer of the subject property occurred. It appears that the above procedure was partially followed as both 52nd Street and Radio signed agreements to extend the statute of limitation of time for assessment. In addition, petitioners filed, following receipt of the advance payments from the UDC, updated questionnaires disclosing the actual consideration for the transfers of the real property.

Under the circumstances presented, where the consideration was unknown and contingent at the time of transfer and could not be determined at such time, the gain could not be computed and the gains tax due was undeterminable and therefore not due, no interest accrued between the date of the taking of the subject property by eminent domain and the date that the UDC paid

the advance payments to petitioners. This is consistent with Tax Law § 1446.1, which imposes interest "on the amount of any tax not paid." Here, the amount of any tax not paid was indeterminable until the consideration was paid by the UDC. At the time that title to the subject property passed to the UDC, the amount of tax due could not be computed and, thus, there could be no "amount of any tax not paid" and no accrual of interest. Finally, a similar issue arose in the V & V matter previously discussed. There, the Tax Appeals Tribunal, in summarizing the issue in its decision, stated:

"With respect to the time at which interest began to accrue for petitioner's failure to timely pay its gains tax liability, the Administrative Law Judge reasoned that since the 'kicker' consideration represented contingent consideration, unknown in amount until actually received by petitioner, interest on tax due for such amount properly runs only from such dates of receipt".

It is noted that this conclusion of law in the determination of the Administrative Law Judge was not disturbed by the Tax Appeals Tribunal in its decision.

F. Tax Law § 1444(3)(a) provides that the assessment of gains tax must be made prior to three years from the date of transfer. Pursuant to Tax Law § 1444(3)(b), where the total consideration is not determinable at the time the questionnaires are submitted:

"no assessment of additional tax under this article shall be made after the expiration of three years from the date the taxpayer notifies the commissioner of taxation and finance of the amount of consideration finally determined".

Under these circumstances, it follows that the date of transfer becomes the date when the taxpayer notifies the Division of the amount of consideration, and the taxpayer and the Division are able to compute the consideration, gain and gains tax due. No interest would accrue because the taxpayer, like the petitioners herein, has paid the tax on the date of notification of the amount of consideration finally determined, i.e., the date of transfer, as required by the statute.

G. The Division argues that this matter is similar to situations where a taxpayer elects to defer payment of all or a portion of the tax due pursuant to Tax Law § 1442(c) and pay the same in annual installments. In such cases, the transferor may be allowed up to three years to pay the tax due or, when the consideration is in the form of a purchase money mortgage, such time

period may extend up to 15 years. However, in all cases, interest is due on the amount of the unpaid tax from the date of transfer (Tax Law § 1446).

The specific language of the installment payment provisions, however, leaves clear the fact that the amount of tax due on the transfer is established as of the date of transfer, with the installment provisions affording only a deferral of the payment of such liability over time. In this regard, the installment payment provisions of Tax Law § 1442 speak of the installment payments as representing annual portions of the "balance" of "total tax due". Here lies the difference between these installment provisions and the present matters. Petitioners herein could not elect to pay the total tax due in installment payments because at the time of the transfers the amount of consideration and therefore the gains tax due could not be determined. Accordingly, petitioners' requests to refund the amount of interest previously paid is granted.

H. The petitions of E.L.C. Hotel Corporation, 52nd Street Designee Corporation and Radio Amusement Corporation are granted.

DATED: Troy, New York
May 19, 1994

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE