

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
RIAL REALTY CORP.	:	DETERMINATION DTA NO. 811643
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.	:	

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Petitioner, Rial Realty Corp., c/o Anthony J. Cincotta, Esq., 100 Crossways Park West, Woodbury, New York 11797, 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, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on December 10, 1993 at 11:00 A.M. Petitioner filed a brief on January 31, 1994. The Division of Taxation filed a brief on February 4, 1994. The due date for petitioner's reply brief was March 21, 1994. Petitioner did not file a reply brief. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUE

Whether petitioner has shown that the Division of Taxation's disallowance of certain expenditures claimed as part of petitioner's original purchase price was erroneous.

FINDINGS OF FACT

On February 12, 1986, petitioner, Rial Realty Corp., acquired a two-acre parcel of vacant land located on the Oyster Bay Harbor waterfront at West End Avenue, Oyster Bay, New York. The property was purchased at a price of \$575,000.00.

The property was located in a limited-use zone under the Town Code of the Town of Oyster Bay and petitioner determined that none of the permitted uses were feasible.

Consequently, petitioner brought an application for a special use permit before the Town Board of the Town of Oyster Bay to construct and operate a private tennis club and public restaurant. The application was filed on May 8, 1986. Petitioner subsequently decided that this proposed use would not generate a sufficient return on its investment and the special use application was withdrawn.

Thereafter, petitioner considered various uses for the subject property and in or about April 1988, petitioner filed an application before the Town Board of the Town of Oyster Bay for a special use permit to erect a three-story office building with a penthouse restaurant.

In or about August 1988, the Town of Oyster Bay declared a moratorium on all waterfront zoning applications for the purpose of conducting a comprehensive study of all of its waterfront. The Town Board was concerned about the environmental and aesthetic impact of further waterfront development on Oyster Bay Harbor. Additionally, at about this time, the owners of the seven-acre parcel adjacent to the subject property were also seeking a special use permit. Various citizens' groups vigorously lobbied the Town Board against further development.

During the period of the moratorium, the Town would not accept any building permit applications for any property within the waterfront zone, nor would the Town afford any applicant a public hearing. The subject property was within the waterfront zone.

The moratorium imposed by the Town Board expired in or about February 1990. At about that time, the Town, through its supervisor, commenced discussions with petitioner's representative regarding the Town's purchase of the subject property on a negotiated basis.

In or about April 1991, a detailed appraisal of the subject property was prepared at petitioner's request. Said appraisal valued the subject property at \$1,550,000.00.

Further negotiations between petitioner and the Town of Oyster Bay resulted in an agreed-upon selling price of \$1,350,000.00. The Town purchased the subject property at this price on August 23, 1991.

In connection with its transfer of the subject property to the Town, petitioner filed a Real

Property Transfer Gains Tax Transferor Questionnaire (Form TP-580) on July 16, 1991. As part of its original purchase price, petitioner listed on the questionnaire \$489,485.00 in capital improvements to the subject property.

The Division of Taxation ("Division") subsequently issued to petitioner a Schedule of Adjustments (Form TP-582.1) which indicated the Division's disallowance of \$481,797.00 in claimed capital improvements to the subject property. Petitioner paid gains tax as asserted by the Division in the amount of \$76,202.90 on or about the date of the transfer. The gains tax paid reflected the Division's disallowance of petitioner's claimed capital improvements.

On or about January 31, 1992, petitioner filed a claim for refund of real property transfer gains tax in the amount of \$21,216.00.

By its refund claim, petitioner asserted that the following costs were properly includible in its original purchase price:

Architectural Fees	\$145,166.00
Engineering Fees	29,520.00
Legal and Accounting	31,430.00
Surveyor	4,543.00
Permits and Fees	<u>1,500.00</u>
	\$212,159.00

By letter dated July 17, 1992, the Division denied in full petitioner's claim for refund.

The expenditures in dispute, listed above, were incurred in connection with petitioner's application to the Town Board for a special use permit. Most of the expenditures were thus made prior to the imposition of the moratorium declared in August 1988. The Division does not dispute that such expenditures were made.

Petitioner made no capital improvements to the subject property.

Petitioner contended that the zoning expenditures, listed above, enhanced the value of the property. In support of this contention, petitioner presented as a witness the testimony of Anthony J. Cincotta, Esq., an attorney experienced in real estate, zoning and land development matters and who represented petitioner before the Town Board of the Town of Oyster Bay in connection with the zoning matters referred to herein. Mr. Cincotta testified that, in his opinion, petitioner would likely have prevailed in its special use application before the Town

Board and that the expenditures in question were necessary to present the Town Board with as strong a case as possible and to thereby impress upon the Board the seriousness of petitioner's intentions. Mr. Cincotta further testified that, in his opinion, had petitioner "done nothing and left the land vacant and didn't come in with any zoning application we would have gotten substantially less than the price that was agreed upon" (tr., p. 20). Mr. Cincotta characterized the expenditures at issue as not directly related to a sale, but more related to "developing the potential for sale" (tr., p. 22).

#### SUMMARY OF PETITIONER'S POSITION

Petitioner argued that the subject expenditures substantially enhanced the value of the subject property and that, therefore, the denial of deductibility would produce a gross distortion or inequity. Petitioner further argued that such a denial would run afoul of the economic reality and net profit requirements of Article 31-B of the Tax Law. Petitioner likened the instant matter to two acquisitions, i.e., a purchase of raw real property and a purchase of zoning/developmental approval, and that both such acquisitions should qualify as "acquisition" costs under Tax Law § 1440(5)(d)(i).

#### CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from certain real property transfers ("gains tax"). Tax Law § 1440(3) defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price of the property."

B. Tax Law § 1440(5) defines "original purchase price" for purposes of the gains tax as follows:

"'Original purchase price' means the 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 and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission."

C. With respect to petitioner's contention that the subject expenditures enhanced the selling price of the property, it is noted that Tax Law § 1440(5) does not appear to require that an expenditure add to the value of property in order to be included in "original purchase price". Nevertheless, it is concluded that petitioner has failed to establish that the expenditures at issue resulted in an increase in the value of the property from petitioner's purchase price of \$575,000.00 to petitioner's selling price of \$1,350,000.00. Indeed, petitioner's witness, Mr. Cincotta, merely testified that, in his opinion, petitioner "would have gotten substantially less" than the selling price of \$1,350,000.00. Petitioner offered no further evidence as to the precise amount of value added by the subject expenditures. While clearly the development potential of the subject property was one among a myriad of factors impacting upon the property's value, such development potential existed irrespective of petitioner's expenditures. Further, it is noted that petitioner's expenditures did not result in any special use permits. The Town Board did not act upon petitioner's application. Accordingly, it is concluded that petitioner has failed to show that the subject expenditures had any direct impact upon the value of the subject property.

D. Petitioner conceded that the subject expenditures were not made for any capital improvements and also that the expenditures did not constitute selling expenses. The record is consistent with these concessions (see, Findings of Fact "15" and "16"). Petitioner contends, however, that the subject expenditures are properly includible in its original purchase price as acquisition costs. Even assuming that petitioner has proven that the subject expenditures enhanced the value of the property, this contention is rejected. With respect to acquisition costs, the statute defines original purchase price as the consideration paid or required to be paid "to acquire the interest in real property." The expenditures at issue were made subsequent to petitioner's acquisition of the subject property. Furthermore, petitioner did not acquire any interest in real property as a result of these expenditures.<sup>1</sup> Accordingly, the expenditures at

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<sup>1</sup>Tax Law § 1440(4) defines "interest", for gains tax purposes, as follows:

"Interest' when used in connection with real property includes, but is not

issue were not properly includible in petitioner's original purchase price of the subject property.

This conclusion is consistent with the Division's regulations which allow for certain preacquisition costs to be included in original purchase price, but do not include post-acquisition expenditures such as those at issue herein (see, 20 NYCRR 590.15).

Case law provides further support for the conclusion reached herein. Petitioner's situation is similar to that of the taxpayer in Matter of Mattone (State Tax Commn., November 20, 1986). In that case, the taxpayer claimed, as part of his original purchase price, certain carrying charges (i.e., interest and real estate taxes) incurred while he was attempting, unsuccessfully, to obtain the necessary permission to develop the property

as planned. The State Tax Commission disallowed the claimed expenses for real estate taxes and interest, stating:

"That petitioner's intent to develop the premises, and his efforts to secure necessary authorizations therefor, does not make the disallowed items of disbursement at issue, incurred while waiting for such permission, capital improvements or costs incurred to make capital improvements . . . . [S]ince capital improvements were neither made to the premises nor commenced, it follows that the expenses at issue may not be included as part of the petitioner's original purchase price pursuant to Tax Law section 1440.5."

The State Tax Commission's decision was subsequently confirmed by the Appellate Division (see, 144 AD2d 150, 534 NYS2d 478).

Similarly, petitioner herein intended to develop the subject property, and made the expenditures at issue for the purpose of securing the necessary zoning changes for such development. Such expenditures are not, however, includible in petitioner's original purchase

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limited to, title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. Interest shall also include an option or contract to purchase real property."

Based upon this statutory definition, it would appear that petitioner's contention that the acquisition of zoning approval constitutes the acquisition of an interest in real property is without merit.

price since, as noted previously, they were not incurred to acquire the interest in the property or for capital improvements to the property. Nor do they constitute allowable selling expenses. Furthermore, as noted, even if such expenditures enhanced the value of the property, the result is the same. Indeed, "the courts have recognized that not every cost incurred by a transferor is allowable for gains tax purposes to reduce the taxable gain" (Matter of V & V Properties, Tax Appeals Tribunal, July 16, 1992; see also, 20 NYCRR 590.17).

E. Additionally, petitioner's contention that the subject expenditures must be included in original purchase price since the denial of deductibility results in "gross distortion or inequity" is also rejected. As noted, not all costs are allowable to reduce the taxable gain (id.). Inasmuch as the subject expenditures are not properly includible in petitioner's original purchase price under Tax Law § 1440(5), there is no authority under which the subject expenditures may properly reduce petitioner's gains tax liability.

F. With respect to petitioner's economic reality/net profit argument, petitioner has cited no authority for what is, in essence, the proposition that the statutory definition of original purchase price should be expanded under certain circumstances. This argument is therefore rejected.

G. The petition of Rial Realty Corp. is denied and the Division's denial of petitioner's claim for refund, dated July 17, 1992, is sustained.

DATED: Troy, New York  
August 18, 1994

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE