

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
K.R.K. CAPITAL, INC.	:	DETERMINATION DTA NO. 812226
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, K.R.K. Capital, Inc., c/o Rosenfeld et al, P.O. Box 10, New York, New York 10150-0010, 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 June 28, 1994 and July 11, 1994, respectively, petitioner, by its representative, Meyer M. Lieber, C.P.A., and the Division of Taxation by William F. Collins, Esq. (David C. Gannon, Esq., of counsel) consented to have the matter determined on submission without a hearing based upon documents and briefs to be submitted by November 25, 1994.

Documentary evidence was submitted by the Division of Taxation on August 19, 1994. The Division of Taxation submitted a letter brief on October 27, 1994. Petitioner submitted no documents nor did it submit a brief or reply brief. After a review of the entire record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined that the purchaser paid the gains tax due on the transaction at issue herein and, therefore, that this constituted additional consideration to petitioner.

II. Whether petitioner should be allowed to include in original purchase price certain acquisition costs in the amount of \$50,000.00.

FINDINGS OF FACT

Pursuant to an undated contract of sale (except for the year 1988, the space for insertion

of the date was blank) between K.R.K. Capital, Inc. ("petitioner"), as seller, and David Winer and Ehud Cafri, as purchasers, premises located at 420 East 92nd Street in New York City were sold for the purchase price of \$950,000.00.<sup>1</sup>

By an Assignment of Contract dated February 20, 1989, the purchasers assigned their interest in the aforementioned contract of sale to Wincaf Properties, Inc. for no consideration.

A rider (in paragraph 14) to the contract of sale stated that the "[p]urchaser does hereby indemnify and hold Seller harmless from any gains tax liability with respect to this contract."

Paragraph 15 of the rider stated, in part, as follows:

"The Purchaser agrees that, on or before the closing date, it shall obtain a certification from the New York State Department of Taxation and Finance fixing the real property transfer gains tax resulting from such assignment and shall, at the closing, pay such tax, if any, by certified check to the order of the Department and deliver the check and certification to the title company."

A Tentative Assessment and Return dated May 22, 1989 was issued to petitioner by the Division of Taxation ("Division") which determined tax due to be \$105,555.56 based upon a gain subject to tax in the amount of \$1,055,555.55.

A Schedule of Adjustments, also dated May 22, 1989, stated as follows:

"THE FOLLOWING ADJUSTMENT TO CONSIDERATION AS SET FORTH IN SCHEDULE B OF FORM TP 580 HAS BEEN MADE:

1. PURSUANT TO THE TERMS OF THE CONTRACT, THE PURCHASER HAS AGREED TO PAY THE NEW YORK STATE GAINS TAX. THE ASSUMPTION OF THIS OBLIGATION BY THE PURCHASER CONSTITUTES ADDITIONAL CONSIDERATION TO THE SELLER.

105,555.55

950,000 X .10 = 95,000

95,000 / 9 = 105,555.55 ADDITIONAL CONSIDERATION

REGULATIONS PROVIDE THAT THE SEPARATE DEED TRANSFERS OF CONTIGUOUS OR ADJACENT PROPERTIES IS [SIC] FOR THE PURPOSES OF THE GAINS TAX A SINGLE TRANSFER OF REAL PROPERTY.

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<sup>1</sup>An Assignment of Contract attached to the Transferor Questionnaire and a letter which was deemed to be a part of the agreement by the parties indicated that the contract of sale was dated December 7, 1988.

WHEN THE CONSIDERATION RECEIVED FROM [SIC] EACH TRANSFER IS AGGREGATED THE TOTAL CONSIDERATION EXCEEDS ONE MILLION DOLLARS, AND THEREFORE, THE GAIN FROM EACH TRANSFER IS SUBJECT TO GAINS TAX."

On July 5, 1991, the Division received a Claim for Refund of Real Property Transfer Gains Tax from petitioner on which petitioner contended:

- a. That the sales price for the subject property was \$950,000.00 and, therefore, no tax was due;
- b. The Division improperly aggregated the sale of the subject property with that of an adjacent property which was owned by a partnership in which petitioner's shareholders owned less than a 50% interest; and
- c. The transferor, not the transferee paid all gains tax due on the transfer.<sup>2</sup>

Subsequent to the receipt of petitioner's claim for refund, the Division sent a letter dated July 19, 1991 requesting the following additional information:

"1. A list of the shareholders of K.R.K. Capitol [sic] and partners of Westfield 92nd Associates Limited Partnership and their perspective [sic] ownership interests in each entity. Also, provide independent documentation to support these percentages."

"2. Documentation to support claimants [sic] payment of the Gains Tax."

By letter dated October 15, 1991, the Division stated that because petitioner had failed to acknowledge the July 19, 1991 letter, a second letter was sent on September 10, 1991. This letter further stated that, since the audit could not be concluded without the requested information, the refund claim of petitioner was being denied in its entirety.

In its brief received by the Division of Tax Appeals on October 27, 1994, the Division

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<sup>2</sup>Based upon the content of the Schedule of Adjustments, the claim for refund and the Request for Conciliation Conference and upon the fact that the selling price of the subject property was \$950,000.00 (below the \$1,000,000.00 threshold for imposition of the gains tax), it is clear that the Division aggregated the consideration received from the sale of this property with the consideration received from the sale of a contiguous or adjacent parcel. In its petition filed with the Division of Tax Appeals, it appears that petitioner was no longer contesting this aggregation. Moreover, petitioner submitted no evidence relating to aggregation. Therefore, based upon the content of the petition and the failure of petitioner to address this issue, it will be assumed herein that the Division's aggregation of the consideration with the adjacent or contiguous parcels was proper.

indicated that, while petitioner failed to offer any evidence to substantiate its claimed entitlement to \$50,000.00 in acquisition costs (thereby reducing its consideration received from the sale of the 420 East 92nd Street property), based upon the Division's unilateral research, it determined that petitioner was, in fact, entitled to acquisition costs in the amount of \$50,000.00. Accordingly, the Division concedes that tax due on the present transfer should be reduced from \$105,555.56 to \$100,000.00 pursuant to the following calculation as set forth in the Division's brief:

"purchase price	\$ 950,000.00	\$ 950,000.00
add'l consideration	<u>105,555.56*</u>	<u>100,000.00**</u>
gross consideration	1,055,555.56	1,050,000.00
Less: cost to acquire	<u>-0-</u>	<u>50,000.00</u>
taxable gain	1,055,555.56	1,000,000.00
Multiplied by: 10%	<u>.10</u>	<u>.10</u>
tax due	<u>105,555.56</u>	<u>100,000.00</u>

\*  $\$950,000.00 \times .10 = 95,000.00$   
 $95,000.00/9 = 105,555.56$  add'l consideration (20 NYCRR 590.9)

\*\*  $\$950,000.00 - 50,000.00 = 900,000.00$   
 $900,000.00 \times .10 = 90,000.00$   
 $90,000.00/9 = 100,000.00$  add'l consideration (20 NYCRR 590.9)<sup>3</sup>

#### CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a 10% tax upon gains derived from the transfer of real property located within New York State. Tax Law § 1443(1) provides for an exemption from gains tax when the consideration for the transfer is less than \$1,000,000.00.

Since a property owner could avoid the gains tax by subdividing and selling off portions of the property for less than \$1,000,000.00 each, article 31-B includes a provision for the aggregation of the consideration received on such multiple transfers, commonly referred to as the "aggregation clause" (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, 356, appeal dismissed 75 NY2d 946, 555 NYS2d 692). Tax Law § 1440(former [7]),

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<sup>3</sup>The Division's calculation which determines additional consideration contains an error, i.e., the denominator should be .9, not 9 as was set forth in both the brief and in the Schedule of Adjustments (see, Finding of Fact "3").

stated, as pertinent here:

"Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive

transfers a transfer which would otherwise be included in the coverage of this article . . ." (emphasis added).

As previously noted in Finding of Fact "5" (footnote 2), petitioner offered no evidence with respect to aggregation and since, in its petition to the Division of Tax Appeals it apparently conceded that the Division's aggregation of the consideration received from the transfer of the 420 East 92nd Street property with that received from the transfer of another parcel was proper, it must be found herein that gains tax was due and owing upon the transfer by petitioner of the 420 East 92nd Street property. What remains at issue is the proper amount of tax due and whether, therefore, petitioner is entitled to a refund of any or all of the gains tax paid on this transfer:

B. 20 NYCRR 590.9 provides as follows:

"Question: If an agreement is negotiated between a transferor and transferee whereby the transferee agrees to pay the gains tax for the transferor, does such payment constitute additional consideration to the transferor?

Answer: Yes. The consideration for the transfer is the price paid or required to be paid for the real property or any interest therein, and includes the cancellation or discharge of an indebtedness or obligation. Since the transferor is personally liable for payment of the gains tax, payment of the tax by the transferee constitutes additional consideration to the transferor. The following equation is used to determine the gains tax to be paid:

$$.10 (\text{Selling price} - \text{Original Purchase Price}) = .9X.$$

X in the equation is the amount of gains tax due when the transferee pays on behalf of the transferor.

Example: A contracts with B to sell real property to B for \$1 million and B is required to pay the gains tax. A's original purchase price for the property is \$900,000.

.10 (1,000,000-900,000)	=	.9X	
.10 (100,000)	=	.9X	
10,000	=	.9X	
10,000 divided by .9	=	X	
11,111	=	X	
Consideration received:			\$1,011,111
Less original purchase			

price:	<u>-900,000</u>
Gain subject to tax:	111,111
Gains tax rate:	x .10
Gains tax due:	\$ 11,111"

C. As indicated in Finding of Fact "7", the Division, on its own initiative, determined that petitioner was entitled to \$50,000.00 in acquisition costs. Utilizing the above equation, gains tax due is computed as follows:

$$\begin{aligned}
 .10 (\text{Selling Price} - \text{Original Purchase Price}) &= .9X \\
 .10 (\$950,000 - \$50,000) &= .9X \\
 .10 (\$900,000) &= .9X \\
 \$90,000 &= .9X \\
 X &= \frac{\$90,000}{.9} \\
 X &= \$100,000 \text{ gains tax due}
 \end{aligned}$$

Petitioner's claim for refund received by the Division on July 5, 1991 (see, Finding of Fact "5") indicates that tax in the amount of \$105,555.56 was previously paid. Based upon the computation of tax due pursuant to the provisions of 20 NYCRR 590.9, it is apparent that an overpayment of gains tax in the amount of \$5,555.56 was made. While petitioner contends that it (not the transferee) paid the tax, it has not provided any proof to support that contention. Accordingly, while an overpayment of tax was made, petitioner has not sustained its burden of proving that it is the party properly entitled to receive the refund thereof.

D. The petition of K.R.K. Capital, Inc. is denied.

DATED: Troy, New York  
 May 4, 1995

/s/ Brian L. Friedman  
 ADMINISTRATIVE LAW JUDGE