

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ARBOR HILL ASSOCIATES : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 812825
of Real Estate Transfer Tax under Article 31 :
of the Tax Law. :

Petitioner, Arbor Hill Associates, 270 River Street, Troy, New York 12180-3216, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law.

On February 9, 1995 and February 16, 1995, respectively, petitioner, by its representative, Seeley, Segel, Goldman & Mazzotta, P.C. (Jeffrey A. Siegel, Esq., of counsel), and the Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel), consented to have the controversy determined on submission without hearing, with all briefs to be submitted by July 7, 1995, which date began the six-month period for the issuance of this determination. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the transfer of 27 commercial parcels, pursuant to a single deed, for an aggregate consideration equal to the mortgage indebtedness allocable to each parcel, constitutes a

single conveyance for purposes of the real estate transfer tax imposed pursuant to Article 31 of the Tax Law.

II. If the transaction is taxable pursuant to Article 31 of the Tax Law, whether petitioner has established reasonable cause for failure to pay the tax thereby warranting abatement of penalties and interest penalties.

FINDINGS OF FACT

On March 16, 1995 and March 22, 1995, respectively, Arbor Hill Associates ("petitioner") and the Division of Taxation ("Division") entered into a written stipulation of facts, the contents of which have been substantially incorporated into the following Findings of Fact.

On December 30, 1992, petitioner conveyed to AHFA Properties, Inc., 27 parcels of real property located in the City of Albany, New York (hereinafter "the conveyance").

The conveyance was made by one deed dated December 30, 1992 and recorded on December 31, 1992 in the Albany County Clerk's Office in Book 2475 of Deeds at page 184 thereof.

Each of the 27 parcels is either a four-unit residence, five-unit residence or commercial property; none of the 27 parcels is a one, two or three-family house, an individual residential condominium unit or an interest therein.

The 27 parcels of real property are separate, distinct, individual and different parcels, some of which are located at Hall Place, some at Ten Broeck Street and some on Clinton Avenue, all in the City of Albany, New York.

Each of the 27 separate and distinct parcels is separately assessed for real property tax purposes, each having a separate and distinct ward, page, line and parcel number.

A separate certificate of occupancy has been issued for each individual parcel of property.

The sole consideration paid by AHFA Properties, Inc. to petitioner for the transfer of the 27 individual parcels of real property was the assumption of the indebtedness encumbering the 27 parcels, consisting of a first mortgage then held by Chemical Bank, having an outstanding principal balance of \$2,604,000.00 and a second mortgage then held by the Albany Local Development Corporation, having an outstanding principal balance of \$1,385,142.00.

The combined total consideration received by petitioner for the 27 individual parcels was \$3,989,142.00.

The allocation of the first and second mortgage principal amounts to each of the 27 individual parcels (annexed as a schedule to Form TP-584, New York State Combined Real Property Transfer Gains Tax Affidavit, Real Estate Transfer Tax Return, Credit Line Mortgage Certificate) by petitioner was acceptable to the Division. Such allocation was as follows:

<u>Address</u>	<u>1st Mortgage</u>	<u>2nd Mortgage</u>	<u>Totals</u>
4 Hall Place	\$ 121,000	\$ 59,576	\$ 180,576
20 Ten Broeck St.	116,000	59,576	175,576
47 Ten Broeck St.	159,000	74,470	233,470
59 Ten Broeck St.	118,000	59,576	177,576
75 Ten Broeck St.	116,000	59,576	175,576
83 Ten Broeck St.	156,000	74,470	230,470
85 Ten Broeck St.	116,000	59,576	175,576
99 Clinton Ave.	103,000	44,682	147,682

101 Clinton Ave.	115,000	59,576	174,576
151 Clinton Ave.	103,000	44,682	147,682
179 Clinton Ave.	105,000	59,576	164,576
189 Clinton Ave.	96,000	59,576	155,576
197 Clinton Ave.	96,000	59,576	155,576
212 Clinton Ave.	108,000	59,576	167,576
241 Clinton Ave.	88,000	44,682	132,682
257 Clinton Ave.	73,000	44,682	117,682
259 Clinton Ave.	76,000	44,682	120,682
261 Clinton Ave.	79,000	44,682	123,682
269 Clinton Ave.	79,000	44,682	123,682
271 Clinton Ave.	51,000	29,788	80,788

273 Clinton Ave.	51,000	14,894	65,894
275 Clinton Ave.	73,000	44,682	117,682
277 Clinton Ave.	102,000	59,576	161,576
287 Clinton Ave.	88,000	59,576	147,576
289 Clinton Ave.	92,000	59,576	157,576
310 Clinton Ave.	51,000	14,894	65,894
317 Clinton Ave.	73,000	44,682	117,682
Totals	\$2,604,000	\$1,385,142	\$3,989,142

Mark J. Simmons, President of Vulcan Arbor Hill Corp., the general partner of petitioner, was responsible for the above allocations. According to his affidavit (see, Division's Exhibit "F"), the method of allocation of the amount of the first mortgage to each parcel varied by a number of factors including the size and location of the parcel. The allocation of the second mortgage to each of the parcels was based upon the number of units in each residential parcel and the size of each commercial parcel, without considering differences in value attributable to location. The affidavit of Mr. Simmons stated that the combined consideration allocable to each individual parcel was less than \$500,000.00 and, in fact, the largest consideration for any parcel was \$233,470.00.

If each of the 27 individual parcels was conveyed by separate deed, the consideration for each would be less than \$500,000.00 and would, in fact, be the amounts set forth on the schedule to Form TP-584 (see, Finding of Fact "9").

Subsequent to the conveyance, the liens of the first and second mortgages continued to encumber the property. The value of the lien of the first and second mortgages is \$3,989,142.00 in the aggregate. The value of the lien allocated to each of the

27 parcels is the amount allocated to each parcel on the schedule to the Form TP-584.

The individual parcels were acquired by petitioner from the Albany Urban Renewal Agency and from Vulcan Development and Management Corporation (Vulcan had acquired title from the County of Albany in September 1985).

The deed from petitioner to AFHA Properties, Inc. (see, Division's Exhibit "E") provides a separate legal description for each parcel included therein.

If the conveyance of the 27 individual parcels by one deed is determined to be 27 conveyances for purposes of Article 31 of the Tax Law, it is agreed by the parties that the continuing lien deduction would be available to petitioner resulting in taxable consideration of zero and, therefore, no real estate transfer tax would be imposed on the transfer.

If the conveyance of the 27 individual parcels by one deed is determined to be one conveyance, the consideration for the conveyance is \$3,989,142.00 and the continuing lien deduction is, therefore, not available to petitioner solely because the consideration is not less than \$500,000.00.

Form TP-584 was filed on December 31, 1992. On schedule C thereof (the real estate transfer tax return), petitioner claimed (on line 2) a continuing lien deduction of \$3,989,142.00, thereby resulting in taxable consideration of zero with no tax due.

A Statement of Proposed Audit Changes, dated June 25, 1993, was issued to petitioner asserting real estate

transfer tax due in the amount of \$15,958.00, plus penalty and interest, for a total amount due of \$19,653.12.

On September 13, 1993, a Notice of Determination was issued by the Division to petitioner in the amount of \$15,958.00, plus penalty and interest, for a total amount due of \$20,545.92.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner maintains that the transfer of 27 separate, distinct and individual parcels, pursuant to a single deed, for an aggregate consideration equal to the mortgage indebtedness allocable to each parcel, is not a single conveyance but is, in fact, 27 separate and distinct conveyances. Neither the statute nor the regulations make any distinction based upon the number of deeds used to accomplish any transfer.

Petitioner contends that the transfer of the 27 parcels by one deed was done in order to save significant and substantial recording fees and legal fees. In its brief, petitioner sets forth the recording costs incurred using one deed (\$104.00) versus the recording costs which would have been incurred if 27 deeds had been used (\$1,350.00). In addition, petitioner asserts that the preparation of 26 additional deeds and required forms (TP-584's and EA-5217's) would have resulted in substantially increased legal fees. Petitioner further states that, contrary to the Division's position (as set forth in its brief), this is not a matter of substance over form since it has not been established that the form used by petitioner (27 conveyances utilizing a single deed) is, in fact, taxable.

Regarding the issue of penalty and interest penalty, petitioner contends that it reasonably relied on the instructions to Form TP-584 (which, it maintains, provides an analogous situation relating to the additional tax imposed pursuant to Tax Law § 1402-a). Furthermore, in light of the fact that the statute, regulations and case law are silent on this issue, petitioner contends that its position was reasonable.

It is the Division's position that the transfer of 27 parcels, conveyed by one deed, for one consideration and reported on one return for purposes of the real estate transfer tax is one conveyance for purposes of Article 31 of the Tax Law. The Division states that petitioner chose its form (one deed) in order to save significant recording and legal fees. Now, for purposes of the real estate transfer tax, it must bear the consequences of the form it has selected, i.e., it may not now avail itself of the continuing lien deduction as provided in Tax Law § 1402.

As to penalty and interest penalty, the Division states that the example in the instructions relied upon by petitioner is not analogous to the matter at issue. Furthermore, the Division contends that petitioner has failed to show that it attempted to ascertain the proper tax treatment for this conveyance from the Division.

CONCLUSIONS OF LAW

A. Tax Law § 1402(a), provides as follows:

"A tax is hereby imposed on each conveyance of real property or interest therein when the

consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) a conveyance of a one, two, or three-family house and an individual residential condominium unit, or interests therein; and (B) conveyances where the consideration is less than five hundred thousand dollars, the consideration for the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of conveyance."

B. Tax Law § 1401(e) defines "conveyance", as pertains to the matter at issue, as follows:

"'Conveyance' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property."

C. Tax Law § 1401(c) defines "real property" as follows:

"'Real property' means every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon, which are located in whole or in part within the state of New York, It shall not include rights to sepulture."

D. Tax Law § 1401(f) provides:

"'Interest in the real property' includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air 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. It shall also include an option or contract to purchase real property. It shall not include a right of first refusal to purchase real property."

E. Prior to May 1, 1983, Tax Law § 1402 read as follows:

"A tax is hereby imposed on each deed at the time it is delivered by a grantor to a grantee when the consideration or value of the interest conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds one hundred dollars, at the rate of fifty-five cents for

each five hundred dollars or fractional part thereof."

From a reading of this statute, it is clear that the real estate transfer tax was imposed "on each deed"; however, the consideration was "exclusive of the value of any lien or encumbrance remaining thereon at the time of sale".

Effective May 1, 1983, chapter 15 of the Laws of 1983, amended Tax Law § 1402 to read as follows:

"A tax is hereby imposed on each deed at the time it is delivered by a grantor to a grantee when the consideration or value of the interest conveyed exceeds one hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) conveyances or transfers of one, two or three-family houses and individual residential condominium units, or interests therein; and (B) conveyances or transfers where the consideration or value is less than five hundred thousand dollars, the consideration or value of the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of sale."

In addition to certain rate changes not relevant herein, this amendment to Tax Law § 1402, while it continued to impose the tax "on each deed", restricted the lien exclusion to what has herein been referred to as the continuing lien deduction, i.e., the value of any lien or encumbrance would be excluded from consideration only in "conveyances or transfers where the consideration or value is less than five hundred thousand dollars."

Chapter 61 of the Laws of 1989 contained the next (and most recent substantive) amendments to Tax Law § 1402.¹ In addition to certain technical amendments and rate changes not applicable

¹Chapter 170 of the Laws of 1994 relettered, as subdivision (a), what had previously been Tax Law § 1402 and added a new subdivision (b), the contents of which are not relevant herein.

to this matter, this amendment, effective July 1, 1989, changed the imposition of the tax from "each deed" to "each conveyance of real property or interest therein." Chapter 61 of the Laws of 1989 also amended Tax Law § 1401 by adding a new subdivision (e) which, for the first time, defined "conveyance" (see, Conclusion of Law "B")

F. As noted by the parties, this is a case of first impression since there are no cases which have specifically addressed this issue. Therefore, it is necessary to examine the language of the statute in order to determine whether the transfer of the 27 separate, distinct and individual parcels, by a single deed, was a single conveyance or was 27 separate and distinct conveyances. As indicated in Findings of Fact "12" and "13", the parties have heretofore agreed that if it is determined that it was a single conveyance, the consideration therefor is \$3,989,142.00 and the continuing lien deduction is not available to petitioner; if determined to be 27 conveyances, the continuing lien deduction would be available which would result in taxable consideration of zero with no real estate transfer tax due.

As indicated in Conclusion of Law "E", prior to 1989, the tax was imposed on "each deed." If the present matter had arisen after May 1, 1983

(after the continuing lien deduction had been restricted to conveyances or transfers where the consideration or value was less than \$500,000.00) but before July 1, 1989 (the effective

date of the amendments which imposed the tax upon "each conveyance" rather than "each deed"), there is little doubt that the Division would prevail, since the consideration for the deed would be the sum of the consideration of all 27 parcels included in the deed. In December 1992 (the period at issue herein), the same is no longer true.

It is clear from a reading of chapter 61 of the Laws of 1989, that it was the intention of the Legislature to replace the term "deed" with "conveyance" in nearly all sections of the real estate transfer tax law (see, L 1989, ch 61, §§ 180-183). While the reason for the change cannot, with certainty, be determined, an example set forth by petitioner in its reply brief could explain the necessity for this change.

Petitioner's example relates to a parcel of commercial property worth \$1.9 million which is encumbered by a \$1.9 million mortgage. Petitioner states that, if the Division's position that a conveyance is defined on a per deed basis is valid, the \$500,000.00 limitation of the continuing lien deduction in Tax Law § 1402 can be avoided simply by using 4 deeds, each of which would convey an undivided 25% interest (a consideration of \$475,000.00 per deed) in the property. Petitioner's point (and illustration) is well taken.

While the statutory language provides no clue as to intent, it would seem logical that the amendments to Tax Law § 1402, the first of which (L 1993, ch 15) restricted the lien exclusion to consideration or value of less than \$500,000.00 and the subsequent amendment (L 1989, ch 61) which changed the

imposition of the real estate transfer tax from "each deed" to "each conveyance", were designed to permit a lien exclusion for properties with a consideration of less than \$500,000.00. The fact that petitioner conveyed 27 separate and distinct properties in one deed does not, for purposes of this lien exclusion, result in a conclusion that it was one, single conveyance. The parties have agreed (see, Finding of Fact "10") that if each of the 27 individual parcels had been conveyed by separate deed, the consideration for each would be less than \$500,000.00. As petitioner correctly notes, there is no aggregation provision in Article 31 of the Tax Law. To aggregate the consideration for purposes of the continuing lien exclusion would be to do so with neither statutory authority nor common sense. This assessment must, therefore, be cancelled.

G. By virtue of the holding in Conclusion of Law "F", penalties and interest penalties are, also cancelled. However, even assuming, arguendo, that it had been determined that the transfer of the 27 parcels constituted a single conveyance and, therefore, that the continuing lien exclusion was not available to petitioner, such penalties and interest penalties should still be cancelled. While the example in the instructions to Form TP-584 which petitioner, in its brief, states that it used for guidance cannot be found to be analogous to the present matter (as the Division correctly asserts), petitioner justifiably maintains that the statute, regulations and cases do not provide direction with respect to the proper disposition of this matter. The Division states that petitioner should have

sought a written opinion from Division personnel and that the failure to do so must result in a finding that reasonable cause for abatement of such penalties does not exist. This contention must be rejected.

Both parties, in their briefs, cite to LT&B Realty Corp. v. New York State Tax Commn. (141 AD2d 185, 535 NYS2d 121) wherein the court stated that the particular facts of each case should be considered to determine whether the Division's determination of reasonable cause is supported. That is exactly what must be done in this matter. Petitioner's interpretation of Tax Law § 1402 (and other statutes contained in Article 31 of the Tax Law), in order to determine whether it was entitled to the continuing lien exclusion, was a reasonable interpretation and accordingly, penalties and interest penalties imposed by the Division must be cancelled.

H. The petition of Arbor Hill Associates is granted and the Notice of Determination issued on September 13, 1993 is hereby cancelled.

DATED: Troy, New York

December 14, 1995

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE