

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
RICHARD BASCIANO	:	DETERMINATION DTA NO. 813063
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, Richard Basciano, by his representative, M. David Baker, Esq., brought a motion dated November 1, 1994, requesting the Division of Tax Appeals to grant partial summary determination in favor of petitioner as a matter of law. The Division of Taxation appeared in opposition to the motion by its representative, William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Upon the affirmation of M. David Baker, Esq., in support of the motion, motion papers and exhibits contained therein, the affirmation of Donald C. DeWitt, Esq., in opposition to the motion, and a stipulation executed on February 2, 1995 by attorney DeWitt and on January 30, 1995 by attorney Baker, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether interest should accrue from the date of transfer of title by eminent domain to the date on which compensation for the taking of the subject property was actually received by petitioner, and whether, if petitioner should obtain further compensation after litigation for the taking of his property, interest should accrue from the date of transfer of title by eminent domain to the date on which such further compensation may be received.

FINDINGS OF FACT

Petitioner, Richard Basciano, of Glen Burnie, Maryland, owned real property in the Times Square area of Manhattan located at the street address of 210-212 West 42nd Street.

In October of 1984, the New York State Urban Development Corporation ("Urban Development Corporation") approved a development plan which was, in the words of Joanne Gentile, general counsel of the Urban Development Corporation, in her letter dated June 30, 1988 to Realty 42nd Street Associates<sup>1</sup> (Exhibit "1" attached to the petition):

"designed to eliminate the blighted conditions in the West 42nd Street area. Briefly, this Plan provides for the construction of new buildings for commercial and retail use and for the restoration of historic theatres."

Attorney Gentile, in this letter of June 30, 1988, also advised Realty 42nd Street Associates that it was necessary that the Urban Development Corporation acquire by eminent domain the property at 210-212 West 42nd Street.

The record on this motion describes a lengthy legal process for establishing the compensation to be paid by the Urban Development Corporation for the taking of petitioner's property, which may be summarized as follows:

(i) On April 18, 1990, Supreme Court Justice Stanley Parness issued an Order of Condemnation of petitioner's property, along with other parcels in the Times Square area;<sup>2</sup>

(ii) On July 29, 1991, the Urban Development Corporation paid to petitioner the sum

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<sup>1</sup>It appears that Richard Basciano, a partner in Realty 42nd Street Associates, acquired the 50% partnership interest of Samuel Rappaport on June 9, 1987 and apparently became the individual owner of the property at issue (according to the attachment to the Notice of Determination dated March 5, 1993 included in Exhibit "8" to the petition).

<sup>2</sup>The copy of the order included in Exhibit "2" to the petition does not list all of the parcels condemned, but it discloses that the condemnees appeared by 16 law firms, respectively, and the order noted that "the amount of the security posted by the developer to assure compensation . . . has been increased to \$241,000,000 . . . ."

of \$3,500,000.00 which was accepted as a partial payment;<sup>3</sup>

(iii) On April 2, 1992, the Urban Development Corporation paid to petitioner an additional \$3,600,000.00, making a total payment to petitioner as of that date of \$7,100,000.00 (\$3,500,000.00 + \$3,600,000.00), which was accepted by petitioner as an additional partial payment;

(iv) The parties have stipulated that "the final compensation has yet to be determined by the Court before which [the issue of just compensation for the taking of property] is being litigated" and attorney Baker has indicated in the petition dated August 18, 1994 filed on behalf of petitioner that petitioner will be seeking an additional \$3,000,000.00 "at a trial sometime in 1995" (§ 20 of petition).

#### Petitioner's Gains Tax Reports

On August 13, 1991, shortly after his receipt of the initial payment of \$3,500,000.00 from the Urban Development Corporation, petitioner reported the transfer of the Times Square property at issue by the filing of "questionnaire forms and supporting documentation", as indicated by a letter dated August 27, 1991 of a tax technician of the Division of Taxation ("Division"). It is observed that such questionnaire forms and supporting documentation were not included in the record. The tax technician advised petitioner as follows:

"Upon review of your submission, we find the total consideration for the transfer of the subject property is not determinable at this time. Therefore, it is required that you report any future additional consideration received, and remit payment of the tax due within fifteen (15) days after receipt of said additional consideration."

A tentative assessment and return dated August 27, 1991, apparently transmitted by the tax technician with his letter of the same date, shows zero tax due and was signed by petitioner on September 3, 1991 (Exhibit "4A" attached to the petition).

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<sup>3</sup>In her letter of June 30, 1988, attorney Gentile of the Urban Development Corporation had advised Realty 42nd Street Associates that it was offering "as just compensation for acquiring your property the sum of \$3,500,000.00" which was "the full amount of UDC's highest approved appraisal."

On April 2, 1992, the same day on which petitioner received the additional \$3,600,000.00 from the Urban Development Corporation (making a total payment to petitioner as of that date of \$7,100,000.00), petitioner filed a supplemental gains tax return (Exhibit "6" to the petition) reporting total gains tax due of \$118,096.42 calculated as follows:

Total received from Urban Development Corporation	\$7,100,000.00
Less original purchase price	<u>(5,919,035.78)</u>
Gain subject to tax	\$1,180,964.22
tax due at 10%	\$ 118,096.42

On April 2, 1992, the Urban Development Corporation had, according to the parties' stipulation, "simultaneously cut and issued a check payable to the NYS Department of Taxation & Finance in the sum of \$151,520.70." Consequently, on April 3, 1992, petitioner sought a refund of \$33,424.28 (\$151,520.70 - \$118,096.42 [amount shown due on supplemental return] = \$33,424.28) from the tax technician. Subsequently, on or about October 14, 1992, petitioner filed a formal claim for refund in the amount of \$33,424.28.

The Division issued a Notice of Determination dated March 5, 1993 asserting additional gains tax due of \$6,805.02, plus interest of \$37,762.47, and denying petitioner's claim for refund.

An attachment to the Notice of Determination showed the following calculation of tax due of \$6,805.02:

Total consideration		\$7,100,000.00
Less: Purchase price paid	\$4,582,500.00	
Capital improvements	600,000.00	
Selling expenses	<u>334,242.78</u>	
Original purchase price		<u>5,516,742.78</u>
Gain subject to tax		\$1,583,257.22
Tax due at 10%		\$ 158,325.72
Less: Payment received		<u>151,520.70</u>
		\$ 6,805.02

On November 22, 1994, the Division asserted an additional real property transfer gains tax (a greater deficiency) of \$20,750.00, plus interest. This additional amount of \$20,750.00 plus the amount of \$6,805.02 asserted in the Notice of Determination totals \$27,555.02, plus interest. The basis for the additional deficiency was detailed in an attachment to a letter dated November 22, 1994 from Division attorney DeWitt to attorney Baker as follows:

Total "carry-over" original purchase price	\$1,950,000.00
Consideration paid 6/87 for 50% interest acquired from former partner Rappaport	3,037,500.00
Selling expenses (legal fees)	<u>321,742.78</u>
Total allowable original purchase price	\$5,309,242.78

As noted in Finding of Fact "7", the Division had previously allowed an original purchase price of \$5,516,742.78 in calculating tax due of \$6,805.02. The attachment to attorney DeWitt's letter showed an understatement of tax of \$20,750.00 computed as follows:

Original purchase price initially allowed	\$5,516,742.78
Recalculated original purchase price	<u>5,309,242.78</u>
Overstatement of original purchase price initially allowed	\$ 207,500.00
Understatement of tax	\$ 20,750.00

The parties reached an agreement concerning the correct original purchase price to be used in this matter by their stipulation:

"[T]he original purchase price of the Petitioner for purposes of Article 31-B of the Tax Law in the property which is the subject of this proceeding is \$5,321,742.78" (\$12,500.00 more than the original purchase price recalculated above by the Division of \$5,309,242.78).

Based on this agreed-upon original purchase price of \$5,321,742.78, the parties agreed that there was additional gains tax due of \$26,305.02. Petitioner has paid this additional tax, plus interest on such tax from April 17, 1992 to January 27, 1995, the date of payment.

The parties agree that the issues remaining to be resolved in this matter concern when interest commences to run when property is taken by eminent domain and payment for the property is not made until years later. In this instance, petitioner contends that (i) interest should not accrue from April 18, 1990, the date of transfer of title by eminent domain, through April 17, 1992, 15 days<sup>4</sup> after the date (April 2, 1992) on which additional compensation of \$3,600,000.00 was received by petitioner and (ii) interest should not accrue on any additional compensation he may

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<sup>4</sup>Tax Law § 1442(a) provides that gains tax is due no later than 15 days after the date of transfer.

receive from the litigation noted in Finding of Fact "3" until after it has received such additional compensation.

### Procedural Permutation

At the suggestion of the Administrative Law Judge made by his letter of February 23, 1995 and agreed to by the parties, petitioner's motion was placed on hold pending the decision of the Tax Appeals Tribunal in Matter of E.L.C. Hotel Corp. On April 6, 1995, the Tribunal issued its decision in Matter of E.L.C. Hotel Corp., and the parties were given until May 1, 1995 to submit comments on the Tribunal's decision for review by the Administrative Law Judge. No comments were submitted.

### CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal, in Matter of E.L.C. Hotel Corp. (April 6, 1995), decided that interest was due from the date of transfer of real property taken by eminent domain:

"Although we are sympathetic to petitioners' circumstances in this case, we cannot find a basis in the law to hold that interest was not due from the date of transfer.

"The gains tax is imposed on the gain derived from the transfer of real property in the State (Tax Law § 1441). Section 1442(a) of the Tax Law provides that tax is due no later than 15 days after the date of transfer. There is no special rule in Article 31-B that establishes a different date for payment of tax when the consideration is contingent, not determinable or not determined.

"Section 1446(1) of the Tax Law provides that interest is due on any underpayment of tax. Although underpayment is not defined, we think its obvious meaning is a payment that is less than the amount of tax due. Because tax was due on these transfers 15 days after the date of each transfer and no tax was paid at this time, we conclude that there was an underpayment of tax upon which interest accrued.

"We appreciate that petitioners could not precisely calculate the amount of tax due at the time of transfer. However, for the taking of their properties, petitioners were entitled to receive the market value of their properties at the time the properties were appropriated (Matter of Town of Islip, 49 NY2d 354, 426 NYS2d 220). Given this standard, petitioners could have estimated the tax due on the transfer and paid the tax within 15 days of the transfer. If petitioners overestimated the amount of tax due, they would receive interest under section 1446(1) on this overpayment of tax.

"The conclusion that Article 31-B requires the payment of interest is consistent with petitioners' right to receive interest payments from the UDC from the date of acquisition to the date of payment under section 514 of the Eminent Domain Procedure Law. Interest on the value of the property taken is 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, appeal dismissed 474 US 935). The condemnee's right to interest reflects the fact that the transfer of the property took place at the date of the appropriation and at that date the condemnee was entitled to the market value of his property, even though that value may have not been determined at that date. Similarly, interest on the gains tax is due because the transfer occurred and tax was due on the date of transfer."

B. Consequently, petitioner's motion for partial summary judgment is denied, and summary judgment on the remaining issues is granted in favor of the Division.

C. Interest on the additional gains tax due of \$26,305.02 may be imposed for the period April 18, 1990 through April 17, 1992, and interest will be due on any additional compensation received by petitioner as a result of his pending litigation with the Urban Development Corporation from the period commencing April 18, 1990 until any additional gains tax is paid.

D. The petition of Richard Basciano is denied.

DATED: Troy, New York  
June 1, 1995

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE