

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PREFERRED HAMPSHIRE HOUSE	:	DETERMINATION
CONDOMINIUM CORPORATION	:	DTA NO. 815163
	:	
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.	:	

Petitioner, Preferred Hampshire House Condominium Corporation, 26 Cornflower Lane, East Northport, New York 11731-4718, 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 February 18, 1997 and February 26, 1997, respectively, petitioner by its representative, Alan Haberman, Esq., and the Division of Taxation by Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by October 1, 1997, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation in calculating consideration properly included the unpaid principal amount due on a mortgage at the time petitioner conveyed certain condominium units to the Union Chelsea National Bank.

FINDINGS OF FACT

1. Petitioner, Preferred Hampshire House Condominium Corporation, and the Division of Taxation (“Division”) entered into a stipulation of facts and an amended stipulation of facts. The stipulation and amended stipulation have been incorporated into the following findings of fact.

All references to specific exhibits have been omitted.

2. On March 23, 1984, Aaron Ziegelman (“Ziegelman”) and William K. Langfan (“Langfan”) sold to petitioner, Preferred Hampshire House Condominium Corporation (“Preferred”), 92 units of a condominium located at 63-60 102nd Street, Rego Park, New York for a total consideration of \$3,477,999.91. Of this total amount, \$32,118.46 was paid in cash and the balance of \$3,445,881.54 was delivered to Ziegelman and Langfan in the form of a Purchase Money Note and Mortgage (“note” and “mortgage”).¹

3. Payment of the indebtedness was guaranteed by Preferred Equities Corporation, the parent of petitioner. According to the provisions of the “Guaranty of Payment”, petitioner’s parent was obligated to pay only if the note was in default.

4. By assignment recorded on October 30, 1987, Langfan transferred and assigned all of his right, title and interest in and to the note and mortgage to Ziegelman.

¹It is noted that the cash and the purchase money note and mortgage total \$3,478,000.00. The record does not contain any explanation for the nine-cent difference.

5. From 1984 through 1989, petitioner sold some of the condominium units to bona fide purchasers for value and paid gains tax on those transactions.

6. In October 1987, Ziegelman borrowed \$2,000,000.00 from Union Chelsea National Bank (“Bank”). As collateral security for his indebtedness to the Bank, Ziegelman assigned the note and mortgage to the Bank.

7. In 1989, petitioner defaulted in its obligations to make payments to Ziegelman under the note and mortgage.

8. Preferred’s sales of individual condominium units up until 1990 totaled \$2,359,500.00.

9. Ziegelman, in or around 1991, defaulted in payment of the indebtedness he owed to the Bank.

10. On June 13, 1991, petitioner, Ziegelman and the Bank executed a settlement agreement whereby petitioner agreed to sell the remaining units owned by petitioner to the Bank subject to the lien of the unpaid principal balance of the mortgage and the Bank agreed to deliver the mortgage note back to Ziegelman. Pursuant to the settlement agreement, petitioner conveyed the remaining units to the Bank subject to the unpaid principal balance of the mortgage (\$3,445,882.00) and the Bank delivered the note back to Ziegelman.

11. According to paragraph 2 of the settlement agreement,

“[t]he purchase price for the Mortgage and Mortgage Note shall be \$1,713,502.41 and shall be payable by the Bank or its nominee by an off-set to the liability of the Debtors to the Bank in respect of the Indebtedness. The purchase price for the Premises, the Leases and the Contracts shall be payable by the Bank or its nominee by an off-set to the liability of the Corporation under the Mortgage and Mortgage Note.”

12. By refund claim dated June 10, 1993, petitioner applied to the Division for a refund of \$70,667.00, plus interest. The refund sought represents a portion of the gains tax previously

paid, based upon petitioner's purchase price and the total consideration received by it on the sale of all of the condominium units. In the refund claim, petitioner listed the consideration it received on the sale of all units as \$4,073,002.00, which included \$1,713,502.00 as the amount of the consideration received for the transfer of the units to the Bank.² In the calculation summary, petitioner claimed: a purchase price of \$3,440,000.00; capital improvements of \$67,767.00; legal fees of \$37,000.00 and commissions of \$119,715.00.

13. After a field audit, the Division issued a Statement of Proposed Audit Adjustment dated April 21, 1994 against petitioner asserting real property transfer gains tax due of \$125,880.00 plus penalty and interest. This amount of gains tax asserted due was based upon the Division's calculation of a total gains tax due of \$232,738.00, less prior payments made by petitioner of \$108,858.00, for a balance due of \$125,880.00. Attached to the Statement of Proposed Audit Adjustment is the auditor's computation of the gains tax due. The total consideration for the transfer of the condominium units by petitioner was determined by the Division to be \$5,805,382.00. According to the audit work papers, the total consideration arrived at by the Division consists of actual sales of \$2,359,500.00 plus the original mortgage of \$3,445,882.00. The auditor determined the original purchase price to be \$3,478,000.00, but did not allow any other costs or expenses.

14. On May 20, 1994, petitioner's representative returned the Statement of Proposed Audit Adjustment to the Division stating that petitioner disagreed with the proposed audit adjustment and requested a conference.

²On the detailed schedule of unit sales the transferee of all units transferred to the Bank is listed as UCB Hampshire Corp.

15. After several conferences with petitioner's representative and a member of Mr. Ziegelman's organization, the Division issued a revised Statement of Proposed Audit Adjustment, dated October 19, 1994, against petitioner asserting real property transfer gains tax due of \$123,280.00 plus penalty and interest. This amount of gains tax asserted due was based upon the Division's calculation of a total gains tax due of \$230,138.00, less prior payments of \$106,858.00, for a balance due of \$123,280.00. Attached to the revised Statement of Proposed Audit Adjustment is the auditor's computation of the gains tax due. The auditor used \$5,805,382.00 as the total consideration for the transfer of the condominium units by petitioner, an original purchase price of \$3,478,000.00, and she allowed selling expenses of \$26,000.00 (legal fees).

16. Petitioner's representative, by letter dated October 31, 1994, informed the Division that petitioner did not agree to the adjustment and the Division's findings inasmuch as the Division incorrectly calculated the net consideration because it "failed to exclude from the consideration that portion of the mortgage given by the taxpayer" to Ziegelman and Langfan which is still due and owing.

17. The Division issued a Notice of Determination (Notice Number L-009850765) dated November 21, 1994 to petitioner for real property transfer gains tax determined to be due in the amount of \$123,280.00, plus penalty and interest. In the notice, petitioner was informed that its refund claim was denied in full.

18. After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 144812), dated April 5, 1996, sustaining the Notice of Determination.

19. Petitioner is challenging the Notice of Determination, as well as the Division's disallowance of its refund claim. In its petition, petitioner asserts that the Division "erred by

including the mortgage in the consideration when, in fact, upon the final sale of the units, the debt remained due and owing.” Petitioner contends that the facts show that upon its sale of the units to the Bank, its remaining indebtedness to Ziegelman was not satisfied and forgiven. Petitioner requests that the Division recompute the consideration without including the outstanding mortgage indebtedness and issue it a refund.

20. Petitioner has submitted documentation to the Division to substantiate claimed brokerage fees in the amount of \$70,525.00. Based upon this information, the Division has redetermined petitioner’s gain subject to tax to be \$2,230,857.00. This amount was determined as follows:

Consideration	\$5,805,382.00
Less: Acquisition	(3,478,000.00)
Selling expenses	(26,000.00)
Brokerage fees	<u>(70,525.00)</u>
Gain subject to tax	<u>\$2,230,857.00</u>
Tax due @ 10%	\$ 223,086.00
Less: Previous payments	<u>\$ 106,858.00</u>
Balance due (tax)	\$ 116,228.00

21. The parties do not dispute the amount of the original purchase price for the real property. The only dispute is with respect to the amount of consideration for the transfer.

22. Ziegelman was awarded damages in an action against petitioner’s parent Preferred Equities Corporation.

SUMMARY OF THE PARTIES’ POSITIONS

23. Petitioner contends that the Division incorrectly determined the consideration for the units transferred to the Bank by using the unpaid principal balance of the mortgage as the value

for the transfer. It asserts that the only consideration for the transfer of the units is the purchase price of \$1,713,502.41 set forth in paragraph 2 of the settlement agreement, not the unpaid principal balance of the mortgage which survived the transfer. Petitioner argues that inasmuch as the indebtedness was not canceled or discharged, and it remained liable on the mortgage, it did not derive an economic benefit from the transfer. Therefore, since petitioner did not derive any economic benefit from the transfer of the remaining units to the Bank, the consideration for that transfer should not include the unpaid principal balance of the mortgage. It contends that, notwithstanding the words of Tax Law former § 1440(1)(a), the intent of the statute is to include a mortgage taken subject to in the computation of consideration “only if the transferor derives an economic benefit from such transfer.”

24. The Division argues that it correctly determined the consideration for petitioner’s transfer of the units to the Bank. It contends that, since the plain language of Tax Law former § 1440(1)(a) provides that consideration includes “the amount of any encumbrances, whether the underlying indebtedness is assumed or taken subject to,” petitioner’s position must be rejected.

25. In its reply brief, petitioner asserts that the case at bar presents a unique fact pattern which the Division has never before confronted. Petitioner argues that the Division “should consider as a whole all of the transactions” involved in the transfer of the units to the Bank. It maintains that the record clearly establishes that the Bank’s ultimate goal was to acquire the units unencumbered and that to achieve that goal, the Bank agreed to preserve Ziegelman’s rights against petitioner by acquiring the units subject to the lien of the mortgage. Petitioner maintains that had the Bank not agreed to preserve Ziegelman’s rights “as against Petitioner,” there would have been no settlement and the Bank would not have received the units. Petitioner asserts that since the Bank never intended to hold the mortgage and assigned it back to Ziegelman, the

consideration vis a vis petitioner and the Bank should not include the unpaid principal balance of the mortgage. Rather, \$1,713,502.41, the amount agreed to in paragraph 2 of the settlement agreement, should be included in the computation of “consideration”.

CONCLUSIONS OF LAW

A. Tax Law former § 1441,³ which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State.

B. Tax Law former § 1440(1)(a), as in effect during 1991 when the transfer at issue took place, defined “consideration” to mean:

“the price paid or required to be paid for real property 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*. Consideration includes the cancellation or discharge of an indebtedness or obligation” (emphasis supplied).

C. Tax Law former § 1440(3) defined “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.”

D. The Division’s interpretation of Tax Law former § 1440(1)(a) is in issue here.

Interpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute (*Matter of Trump Equitable Fifth Ave. Co. v. Gliedman*, 62 NY2d 539, 478 NYS2d 846, 849).

³The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996. (*See*, sections 171 through 180 of chapter 309 of the Laws of 1996.)

In construction of statutes, the intention of the Legislature is first to be sought from a literal reading of the act itself or of all statutes relating to the same general subject matter. The legislative intent is to be ascertained from the words and language used in the statute, and if language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation (McKinney's Cons Laws of NY, Book 1, Statutes § 92[b]; *see, DiMarco v. Hudson Valley Blood Services*, 147 AD2d 156, 542 NYS2d 521, 522-523).

E. The language of Tax Law former § 1440(1) is unambiguous and the words plain and clear. Consideration for gains tax purposes includes the amount of any mortgage on the real property which was "assumed or taken subject to." Under the terms of the settlement agreement, petitioner transferred the remaining units to the Bank, Ziegelman's assignee, subject to the mortgage. At the time of the transfer, the remaining units were encumbered by a mortgage to Ziegelman and Langfan in the amount of \$3,445,882.00 (*see*, Finding of Fact "10"). This is the amount of the mortgage which was taken subject to by the Bank as transferee and as such constitutes consideration for gains tax purposes (*see*, Conclusion of Law "B"; *Matter of Shed Developers*, Tax Appeals Tribunal, October 25, 1995).

As for petitioner's contention that it did not derive any economic benefit from the transfer because it remained liable to Ziegelman for the unpaid mortgage after the transfer of the condominium units, gains tax has been imposed in situations where there is, in fact, no actual economic gain (*see, Matter of Brockman*, Tax Appeals Tribunal, April 4, 1996, *confirmed* __ AD2d __, 656 NYS2d 429; *Matter of Chandru Jagwani*, Tax Appeals Tribunal, April 17, 1997).

The Division properly included the amount of the mortgage taken subject to in the computation of "consideration".

F. As noted in Finding of Fact “20”, petitioner has submitted documentation to substantiate brokerage fees in the amount of \$70,525.00, and the Division has redetermined petitioner’s gain subject to tax to be \$2,230,857.00. The parties have stipulated that the gains tax due in this matter is \$223,086.00, less prior payments of \$106,858.00 for an amount of tax currently due of \$116,228.00.

G. The petition of Preferred Hampshire House Condominium Corporation is granted to the extent of Conclusion of Law “F” and in all other respects is denied. Notice of Determination (Notice Number L-009850765) is to be modified in accordance with Conclusion of Law “F” and in all other respects is sustained. The Division of Taxation’s denial of petitioner’s claim for refund is sustained.

DATED: Troy, New York
March 19, 1998

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE