

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CLARK DETRAGLIA AND THERESA ZENO, : DETERMINATION
EXECUTRIX OF THE ESTATE OF ANGELO ZENO : DTA NO. 815666
: :
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. :
:

Petitioners, Clark Detraglia and Theresa Zeno, executrix of the estate of Angelo Zeno, c/o Francois R. Cross, Esq., 355 Main Street, P.O. Box 550, Beacon, New York 12508-0550, 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 October 28, 1997 and November 7, 1997, respectively, petitioners, by Howard M. Koff, Esq., and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by February 17, 1998, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the cost of certain capital improvements may be included in the calculation of petitioners' original purchase price for real property transfer gains tax purposes where

petitioners' tenant paid the cost of such improvements and where the tenant abandoned such improvements at the expiration of the lease term.

FINDINGS OF FACT

1. Clark Detraglia and Angelo Zeno, as landlord, entered into a lease agreement, dated as of April 1, 1985, with International Business Machines Corporation ("IBM"), as tenant, for certain premises located in Fishkill, New York. The lease required IBM, as tenant, to pay Detraglia and Zeno, as landlord, the sum of \$1,118,320.00 for "fit-up work" performed by Detraglia and Zeno. IBM paid Detraglia and Zeno in accordance with the terms of the lease.

2. The fit-up work for which IBM reimbursed Detraglia and Zeno resulted in capital improvements to the subject property.

3. At the expiration of the lease, the fit-up capital improvements, which had been paid for by IBM, were abandoned, without consideration, to the landlord.

4. Petitioners, Clark Detraglia and Theresa Zeno, executrix of the estate of Angelo Zeno, subsequently entered into a contract for the sale of the property. Prior to such sale, petitioners filed a Real Property Transfer Gains Tax Transferor Questionnaire (Form TP-580), dated September 12, 1994. In their calculation of original purchase price on the questionnaire, petitioners included the \$1,118,320.00 for "fit-up work" paid by IBM. Petitioners' transferor questionnaire determined total gain subject to tax on the transfer of \$21,083.00 and anticipated gains tax due of \$2,108.30.

5. The Division of Taxation ("Division") issued to petitioners a Tentative Assessment and Return dated September 26, 1994, which disallowed petitioners' inclusion of IBM's fit-up work costs in the calculation of original purchase price. With this disallowance, the tentative

assessment asserted \$1,139,403.00 of gain subject to tax and \$113,940.30 in gains tax due from petitioners on the transfer.

6. Petitioners paid the tentative assessment and filed a claim for refund dated January 30, 1996. Petitioners claimed that the Division improperly disallowed the fit-up work costs as part of the original purchase price and claimed a refund of the additional gains tax paid as a result of such disallowance.

7. By letter dated July 9, 1996, the Division denied petitioners' refund claim.

CONCLUSIONS OF LAW

A. At the time of the transfer in question here, Article 31-B of the Tax Law provided for the imposition of a tax at the rate of 10 percent upon gains derived from the transfer of real property within the State of New York (Tax Law former § 1441).¹

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."

Tax Law former § 1440(5)(a)(i), as in effect at the time of the transfer at issue, provided, in pertinent part, as follows:

"Original purchase price" means the consideration paid or required to be paid by the transferor (A) to acquire the interest in real property, and (B) 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 commissioner, incurred for the construction of such improvements. (Emphasis supplied.)

¹The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

B. In this case, the costs of the fit-up work were paid by IBM. Tax Law former § 1440(5)(a)(i) allowed only those costs “paid or required to be paid by the transferor” as includable in the calculation of original purchase price (“OPP”). Petitioners thus may not include the cost of such work in their OPP because they did not pay for it (*see also*, 20 NYCRR 590.17).

C. Petitioners contended that Tax Law former § 1440(5)(a)(i) is applicable only where a taxpayer acquires real property for consideration. Petitioners asserted that where real property is transferred without consideration the carryover rule of Tax Law former § 1440(5)(b) applies. Since the subject capital improvements were transferred to petitioners without consideration at the expiration of the lease, petitioners contended that they are entitled to a carryover of IBM’s OPP pursuant to Tax Law former § 1440(5)(b).

This contention is rejected. Tax Law former § 1440(5)(b) provided for a carryover OPP for a transferee “[i]n the case of a transfer of real property by a gift, devise, bequest or inheritance.” Here, the capital improvements paid for by IBM were simply abandoned at the expiration of the lease. There was no “gift, devise, bequest or inheritance” of these improvements. Furthermore, the statute contains no language providing for a carryover OPP in the case of an abandonment of real property. Accordingly, Tax Law former § 1440(5)(b) does not apply in the instant matter and petitioners are not entitled to a carryover of IBM’s cost in calculating their OPP.

D. Petitioner also argued that the carryover OPP rule of Tax Law former § 1440(5)(b) is applicable herein because Tax Law former § 1440(7)(a) defined a “transfer of real property” as “the transfer of any interest in real property by any method.” Petitioner asserted that this broad definition encompasses an abandonment and that therefore the carryover provisions of former section 1440(5)(b) apply.

If the issue in this matter were whether IBM's abandonment of the fit-up capital improvements on petitioners' property at the expiration of the lease constituted a transfer of real property under former Article 31-B, then the definition of transfer of real property contained in Tax Law former § 1440(7)(a) would be relevant.² The issue presented, however, is whether the cost of the fit-up capital improvements may be included in petitioners' OPP for purposes of calculating the gain subject to tax on petitioners' subsequent transfer of the property. OPP is defined for gains tax purposes in Tax Law former § 1440(5). As discussed above, the cost of the fit-up capital improvements may not be included in petitioners' OPP because petitioners did not pay for such improvements.

E. The petition of Clark Detraglia and Theresa Zeno, Executrix of the Estate of Angelo Zeno, is denied.

DATED: Troy, New York
July 16, 1998

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE

²Since it is not necessary to the resolution of this matter, this determination does not address the issue of whether the abandonment of the improvements constituted a "transfer of real property" for gains tax purposes. However, any discussion of this issue would necessarily result in a determination of what interest in real property, if any, IBM had upon the expiration of its lease.