

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
52nd ST. DESIGNEE CORP. :
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.¹ :

DETERMINATION
DTA NOS. 816343
AND 816561

In the Matter of the Petition :
of :
E.L.C. HOTEL CORP. :
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, 52nd St. Designee Corp., 162 West 34th Street, New York, New York 10001, and E.L.C. Hotel Corp., c/o Samuel Goldgrub, 3915 Austin Boulevard, Island Park, New York 11558, filed petitions for revision of determinations or for refunds of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

¹The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996.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).

Petitioners and the Division of Taxation executed a consent waiving a hearing in these matters and agreeing to have the consolidated controversies determined on submission.

Petitioners' reply was received on February 11, 1999, which date began the six-month period for the issuance of this determination.

After a review of the evidence and arguments presented, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

ISSUE

Whether the imposition of the tax on gains derived from certain real property transfers (former Article 31-B of the Tax Law) on the proceeds of a condemnation award is unconstitutional.

FINDINGS OF FACT

1. Petitioner 52nd St. Designee Corp. ("52nd St.") filed a petition with the Division of Tax Appeals on February 6, 1998. 52nd St. asserted that the tax at issue "was imposed on the proceeds from a condemnation award," and that the tax, and interest thereon, had been paid under protest. A refund in the amount of \$149,399.95 was requested. The basis of the refund request was that the application of the tax to the proceeds of a condemnation award was unconstitutional. A copy of a Notice of Determination (identification number L-014575351-4) dated January 12, 1998 was attached to the petition. The notice asserted a total amount due of \$149,399.95 which matched the amount of the requested refund set forth in the petition. Also, the notice identification number matched the notice identification number set forth in the petition. The notice indicates that it is for the tax period ended April 18, 1990.² There was no

²It is presumed that the real property transaction in question occurred on or before April 18, 1990 and is thereby subject to the provisions of Tax Law former Article 31-B (*see*, footnote 1).

copy of a formal request for refund or a denial of such request by the Division of Taxation (“Division”) submitted.

2. The Division submitted an answer dated April 16, 1998 asserting that 52nd St. had paid notice identification number “L014575351,” a notice for tax and interest due on the proceeds of a condemnation award, that the petition was seeking a refund of such tax and that the refund request was denied. The answer further asserted that the Division’s determination of tax in this matter was correct.

3. Petitioner E.L.C. Hotel Corp. (“E.L.C.”) filed a petition with the Division of Tax Appeals on June 4, 1998. E.L.C. asserted that the tax at issue “was imposed on the proceeds from a condemnation award,” and that the tax, and interest thereon, had been paid under protest. A refund in the amount of \$606,224.86 was requested. The basis of the refund request was that the application of the tax to the proceeds of a condemnation award was unconstitutional. Attached to the petition was a copy of a denial of E.L.C.’s refund claim in the amount of \$606,224.86, by letter dated June 3, 1998 and signed by Patrick C. Finnen of the Division.

4. The Division submitted an answer dated August 6, 1998 asserting that E.L.C. had paid tax on the proceeds of a condemnation award, had filed a claim for refund on July 14, 1997, and that the claim had been denied by the Division on June 3, 1998. The answer further asserted that the Division’s determination of tax in this matter was correct.

5. Also submitted into evidence with regard to E.L.C. was a copy of a document entitled “Claim For Refund of Real Property Transfer Gains Tax.” The assessment number listed on this document is L-011822341-7 and the amount of tax paid is listed as \$606,224.86. There is a space on the form to fill in the date of the transfer in question or the date of payment of the tax,

whichever is later. In this space appears the typewritten response of “On or about April 17, 1996,” and the handwritten notation “4-17-96.”³

6. On October 28, 1998 the Division of Tax Appeals received a stipulation executed by the parties in this matter. The stipulation provided that the matter of 52nd St. and the matter E.L.C. both involved the imposition of the gains tax (former Article 31-B of the Tax Law) on the proceeds of a condemnation award and that the sole issue in both cases was whether such imposition was constitutional. Since both cases involved the same issue the parties agreed to consolidate these cases. Finally, the stipulation provided that should the Division prevail before the Tax Appeals Tribunal, either or both petitioners would be allowed to proceed with an Article 78 proceeding and that the stipulation was not intended to restrict any party’s presentation of their case regarding the agreed upon issue.

SUMMARY OF THE PARTIES’ POSITIONS

7. In their brief in support of the petition in this matter, petitioners state that this is a case of first impression. Petitioners argue that with regard to the taxation of the proceeds of a condemnation, the real property transfer gains tax (former Article 31-B of the Tax Law) “as written,” violates the Fifth Amendment to the United States Constitution and Article 1, § 7-A of the New York State Constitution. These provisions of the United States and New York State constitutions ensure that when governments take property for public use, the owner of that property receives adequate compensation in the form of the fair market value of the property. Petitioners argue that adequate compensation means that one must be left in the same financial position after the taking of the property as he was before. Plainly stated, petitioners’ argument is

³It is presumed that the real property transaction in question occurred on or before April 17, 1996 and is thereby subject to the provisions of Tax Law former Article 31-B (*see*, footnote 1).

that it is not constitutional for a government to forcibly take property and enforce a tax on that property at the same time, since it leaves the property owner with less than the fair market value of the property (i.e., the fair market value minus the tax paid).

8. The Division argues that this is not a case of first impression in that the real property transfer gains tax has been declared constitutional by the courts, and the courts have held that a transfer of property by condemnation is not to be treated differently than any other transfer of property, the implication being that the tax as applied to condemnation proceeds is constitutional. The Division argues that petitioners are left no worse off than any other party who otherwise disposes of property and pays the real property transfer gains tax, and are therefore being treated the same as any other taxpayer.

9. In their reply petitioners argue that the constitutionality of the real property transfer gains tax as applied to the proceeds of a condemnation, has never been addressed.

CONCLUSIONS OF LAW

A. The real property transfer gains tax was a 10% tax imposed upon the transfer of real property located within New York State where the consideration received for such transfer was \$1,000,000.00 or more (Tax Law former §§ 1441, 1443[1]). Tax Law former § 1440(7), defined the term transfer to include the taking of property by eminent domain. The only argument presented by petitioners in this matter is that the real property transfer gains tax, when imposed upon the proceeds of a condemnation, is unconstitutional. This is an argument that former Article 31-B of the Tax Law is unconstitutional on its face. The enabling legislation of the Division of Tax Appeals and Tax Appeals Tribunal does not provide the requisite authority for the Division or Tribunal to declare a statute unconstitutional on its face (*Matter of Allied Grocers Cooperative*, Tax Appeals Tribunal, November 30, 1989, *confirmed* 162 AD2d 791,

557 NYS2d 707; *Matter of Fourth Day Enterprises*, Tax Appeals Tribunal, October 27, 1988).

Furthermore, at the administrative level the constitutionality of a statute must be presumed (*Matter of Allied Grocers Cooperative, supra; Matter of Fourth Day Enterprises, supra*).

Finally, petitioners have made no argument that the real property transfer gains tax is unconstitutional as applied to the facts of petitioners' case. Indeed, petitioners specifically state in their brief that former Article 31-B of the Tax Law is unconstitutional as written. That being the only argument presented and the Division of Tax Appeals being without jurisdiction to address it, the petitions must be denied.

B. The petitions of 52nd St. Designee Corp., and E.L.C. Hotel Corp. are denied and the denials of the refund requests are sustained.

DATED: Troy, New York
July 22, 1999

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE