

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BREDERO VAST GOED, N.V.,
VERENIGDE BEDRIJVEN BREDERO N.V.

DECISION

AND

FRIESCH-GRONINGSCH HYPOTHEEKBANK, N.V.

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 Bredero Vast Goed, N.V., Verenigde Bedrijven Bredero, N.V. and Friesch-Groningsche Hypotheekbank, N.V., c/o Bredero California, Inc., 2415 Campus Drive, Irvine, California, 92715, 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 (File No. 58097).

Petitioners, by their duly authorized representatives, Morgan, Lewis and Bockius, Esqs. (Stephen M. Breitstone, Esq., of counsel), have waived a hearing and submitted their case for decision based on the entire file, including a Stipulation of Facts, together with briefs to be submitted by October 26, 1986. After due consideration, the Commission renders the following decision.

ISSUES

I. Whether petitioners are exempt from the imposition of gains tax pursuant to the "grandfather" provision of Tax Law § 1443.6.

II. Whether, if petitioners are not so exempt, the gains tax applies to the transaction in question.

III. Whether the imposition of gains tax on the subject transaction violates petitioners' rights under either Article I-Section 8, or the Fifth and Fourteenth amendments to the United States Constitution.

FINDINGS OF FACT

On April 23, 1986, a Stipulation of Facts pertaining to the petition of Bredero Vast Goed, N.V., Verenigde Bedrijven Bredero, N.V. and Friesch-Groningsche Hypotheekbank, N.V., duly executed by authorized representatives for petitioner (Paul E. Roberts, Esq.) and for the Audit Division (Paul A. Lefebvre, Esq.), together with an appendix of exhibits pertaining thereto, was received. This Stipulation of Facts, modified herein from the original only in regard to the omission of specific references to the supporting documents included in the appendix of exhibits attached to the Stipulation (the existence, authenticity and content of which documents is not disputed), is set forth hereinafter as follows:

STIPULATED FACTS

1. On January 23, 1980 an agreement was entered into by Brefries Realty-Madison Ave. Corp., a New York corporation (the "Corporation"), to purchase an office building located in New York City at 342 Madison Avenue (the "Property").

2. At all times relevant hereto, the Corporation was a jointly owned subsidiary of Bredero Vast Goed, N.V. ("BVG"), Verenigde Bedrijven Bredero, N.V. ("VBB") and Friesch-Groningsche Hypotheekbank, N.V. ("FGH") (collectively, the "Dutch Shareholders" or the "Petitioners"), each of which are public Netherlands corporations.

3. At no time has BVG, VBB or FGH maintained an office in the United States of America. The activities that have been conducted within the United States of America by BVG, VBB and FGH have at all relevant times been limited

to investment in stock or securities of corporations that hold property or conduct business operations within the United States of America. None of BVG, VBB, or FGH has filed or been requested to file Form 1120F (U.S. income tax return of a foreign corporation).

4. Pursuant to a partnership agreement dated March 7, 1980 (the "Partnership Agreement"), Brefries Madison Associates, a New York limited partnership (the "Partnership"),¹ was formed among Algemene Vast Goed Maatschappij Alvast, BV ("Alvast"), a Dutch corporation which is owned by BVG and FGH and which is an affiliate of the Corporation, as an 85% general partner; BWBR, Inc., as a .01% general partner; and Bruce Berger Madison Associates, as a 14.99% limited partner. In December of 1980, the Corporation replaced Alvast as the 85X general partner and assumed its interest in the Partnership. There were no further changes in the partners of the Partnership.

5. On or about March 14, 1980, the Corporation assigned the January 23, 1980 purchase agreement to the Partnership, and the Partnership acquired title to the Property. At all times relevant hereto, the Partnership owned legal and equitable title to the Property. The Corporation never owned any title to the Property, and was solely a Partner in the Partnership.

6. Bruce Berger Madison Associated and BWBR, Inc., are controlled by ~~M~~ Bruce C. Berger of New York City (the "New York Partner").

1 The words "Partner", "Partnership" and "Partnership Agreement" are used herein to refer to the partners of the Brefries Madison Associates New York limited partnership, such entity, and its agreement of limited partnership. Certain of the documents referred to in Schedule 1 use the terms "Venturer", "Joint Venture" and "Venture Agreement" to refer to the same parties, entity and agreement.

7. The Partnership Agreement contained a provision allowing either the Corporation, on one hand, or the New York Partner, on the other hand, to offer to sell or to buy out the entire interest of the other. The buy-sell provision is set forth starting at page 15 of the Partnership Agreement and was in a form that had been employed by the same parties in prior investments. The buy-sell provision permitted a purchase of stock if the interest of the Corporation was to be sold. In such an event the Dutch Shareholders would not be subject to United States federal income tax pursuant to Articles V and XI of the United States-Netherlands Income Tax Treaty and United States federal income tax law then in effect.

8. The purpose of the buy-sell provision in the Partnership Agreement was to protect the parties in the event a disagreement arose on how to manage or deal with the Property. In prior partnerships among affiliates of the Dutch Shareholders and the New York Partner, the Dutch Shareholders had caused their affiliates to exercise buy-sell rights, and had purchased the New York Partner's interests.

9. On or about October 1981, Landauer Associates was retained for the purpose of determining whether and at what price the Property might be sold. After extensive economic analysis, Landauer advised that the Property could be sold for a price of \$85,000,000, and it was put on the market at that price before the end of 1981.

10. During 1982 there were a number of inquiries and efforts made to sell the Property at or close to the \$85,000,000 price, but no purchaser was forthcoming. There were, however, other offers at lower prices.

11. During 1982, a disagreement arose between the Corporation and the New York Partner as to whether to sell or to hold the Property. The Dutch Shareholders

of the Corporation wanted to sell its interest at a price that would reflect the value of the Property at that time and at prices then available, **in** order to show a profit on the investment for their public shareholders and because of the then high value of the dollar in relation to the Dutch gilder. The New York Partner wanted to hold its interests until a price closer to that which he believed to be the market value could be commanded. The debate over whether to sell or hold the property continued throughout mid and late 1982. During such period, the parties discussed the possibility of invoking the buy-sell provision in the Partnership Agreement.

12. During early 1983 there was serious discussion of whether the New York Partner should buy out the Corporation at a price reflecting what the New York Partner felt, and the Landauer report stated, the Corporation's interest was worth.

13. During early March of 1983 the parties orally agreed that a designee of the New York Partner, RPBLC Properties Corp., would acquire the stock of the Corporation from the Dutch Shareholders for \$72,250,000, which **is** 85% **of** the **\$85,000,000** value which Landauer had placed on the Property (the Corporation held an 85% interest in the Partnership). The purchase price was to be payable **in** cash, and the New York Partner would be given an opportunity to obtain financing. The closing **was** to be held during late 1983, subject to the right of the purchaser to adjourn the closing until not later than December 1984. Such agreement was reached on the basis of the buy-sell clause in the Partnership Agreement and negotiations among the parties.

14. The sale to the New York Partner or his designee for \$72,250,000 was approved by the boards of directors of all three petitioners by resolutions adopted on or prior to March 17, 1983.

15. On or prior to March 25, 1983, the New York Partner caused RPBLC Properties Corp. to be activated; he arranged for funding of a down payment on the contract and counsel was authorized and directed to prepare a written contract. Unlike the Petitioners, each of which are public corporations, the New York Partner did not observe the formality of adopting a board resolution for his wholly-owned corporation.

16. The audited financial statement for the Corporation prepared by Peat, Marwick, Mitchell & Co. for the year ending December 31, 1983, contains the statement that a "contract" was "entered into" on March 25, 1983, to sell the stock of the Corporation to the New York Partner's corporation, RPBLC Properties Corp., for a price of \$72,250,000.

17. Prior to March 17, 1983, the parties had not prepared formal documentation for the sale of the stock of the Corporation. In two prior buyouts between the parties, no prospective contract had been utilized.

18. On or before March 21, 1983, attorneys in New York advised the parties that a new law was about to be enacted imposing a 10% gains tax on the sale of real estate for a price **in** excess of \$1,000,000. Although counsel did not know whether the proposed tax would be applicable to the sale of stock of a corporation which did not own real property, but was only a partner in a partnership which did, in order to attempt to ensure that the subject transaction **came** expressly within the terms of a "grandfather" provision of the then available draft of the proposed new law, counsel advised that the parties should sign, under notarization, a formal contract of sale, and a down payment should be received from the purchaser. Accordingly, counsel were instructed by Bruce Berger and the Petitioners to prepare a formal stock purchase agreement to serve this purpose, using as a model another agreement the parties were familiar with from

a recent prior transaction and embodying the business terms contained in the agreement which the parties had reached to sell the stock for \$72,250,000, as reflected in the board resolutions of the Dutch Shareholders. The contract was prepared commencing the week of March 21, 1983.

19. On or about March 25, 1983, the contract had been prepared on behalf of the parties and was ready for execution. Mr. Berger was in Colorado and **Mr.** Hoek (the Dutch representative of the sellers) was in California. Counsel advised that the contract should be signed as **soon** as practical because of the possibly imminent passage of a new gains tax law. Several days elapsed before the parties were able to arrange for attorneys to act on their behalf and, finally, sign the stock purchase contract. At the time of the signing, the parties were not aware that the Gains Tax Law had become effective.

20. Over the weekend **of** March 26th and 27th, Mr. Hoek obtained authorization from the Netherlands for an attorney to sign on behalf of the three Dutch Shareholders. Similar authority was obtained from another attorney to sign on behalf of Mr. Berger.

21. The stock purchase agreement was signed by the attorneys acting on behalf of the parties on March 29, 1983 and those signatures were notarized and a \$250,000 down payment paid on that date.

22. On April 28, 1984, Transferor and Transferee gains tax questionnaires were filed requesting the exemption from the gains tax for this transaction. During the following months, attorneys for the Petitioners held several telephone conversations with, and sent letters to, the New York State Department of Taxation and Finance in which the merits of exempting the transaction from the tax imposed by Article 31-B of the New York State Tax Law (the "Gains Tax") were discussed.

23. On June 11, 1984, a Tentative Assessment and Return imposing a tax of \$3,907,426.80 was issued, and on June 28, 1984, the stock of the Corporation was sold to RPBLC Properties Corp. in accordance with the March 25, 1983 contract. A gains tax of \$3,907,426.80 was paid under protest.

24. On October 4, 1984 a claim for refund was filed. This was refused on October 22, 1984.

25. On January 17, 1985 a petition to the State Tax Commission was filed, leading to this proceeding.

26. The Department of Taxation and Finance served its Answer, dated August 12, 1985, to the Petition.

27. A Reply, dated September 3, 1985, to the Answer was served by the Petitioner's attorneys.

28. No prior request has been made to the Tax Commission for the relief sought herein.

CONCLUSIONS OF LAW

A. That section 1441 of the Tax Law, which became effective March 28, 1983, imposes a tax at the rate of ten percent upon gains derived from the transfer of real property within New York State.

B. That subdivision (n) of section 184 of Chapter 15 of the Laws of 1983 provides that the tax imposed on the gains derived from the transfer of real property "shall not apply to any transfer made on or before the effective date of [the act imposing the tax]."

C. That Tax Law § 1443.6 provides that a tax shall not be imposed:

"Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission. A

written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for the purposes of this subdivision."

D. That as the facts bear out, there was no written agreement executed on or before the March 28, 1983 effective date of Article 31-B as specifically required by Tax Law § 1443.6. The parties, in anticipation of the enactment of Tax Law Article 31-B and seeking to gain exemption from the tax imposed thereunder, chose to prepare a formal stock purchase agreement to serve as the written contract for the transfer. However, it *is* admitted that such agreement was not executed until March 29, 1983, which was after the effective date of Article 31-B. (See Findings of Fact "19" and "21"). Further, and contrary to petitioner's assertions, the buy-sell provisions contained in the parties' limited partnership agreement do not rise to the level of or constitute an option granted prior to the effective date of Article 31-B which would qualify for exemption pursuant to Tax Law §§ 1440.7 and 1443.6. Such provisions involve, rather, the ability to offer to sell or buy out (reciprocally) the other partners' interest at a price of the offeror's choosing, or at most, in essence, a right of first refusal. Such rights do not qualify for exemption via the "grandfather" provision of Article 31-B (Matter of Dworetz v. State Tax Comm., Supreme Ct, Albany County June 27, 1986, Connor, J.)². Finally the board resolutions adopted by petitioners' boards of directors authorized the sale of stock, but

2 Finding of Fact "13" indicates that the agreement was "based on" the buy-sell provisions and upon negotiations among the parties. It appears thus that not only did the parties not adhere to the procedures, terms and conditions specified in the buy-sell provisions, but rather in fact arrived at and effected the transfer in question pursuant to a negotiated agreement separate and independent therefrom (see Exhibit "M"). Accordingly, even assuming arguendo that the buy-sell provision constituted an option, it appears that the transfer was not made pursuant thereto and thus would not, in any event, qualify for exemption under Tax Law §§ 1440.7 and 1443.6.

did not constitute contracts with the purchaser for the actual sale and transfer thereof. In sum, since there was no written contract (including an option) executed on or before the effective date of Article 31-B, there is no basis for exempting the subject transfer under Tax Law § 1443.6.

E. That Tax Law § 1441 imposes, as noted, a tax "on gains derived from the transfer of real property within the state." Section 1440.4 of the Tax Law defines an "interest" in real property as follows:

"'Interest' when used in connection with real property includes, but is not limited to title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development 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."

F. That pursuant to Tax Law § 1440.7, the definition of a "transfer of real property," to which Article 31-B applies, includes, inter alia, the "acquisition of a controlling interest in any entity with an interest in real property." (Emphasis supplied.)³

G. That here, petitioner transferred a controlling interest in an entity (the Corporation) which, in turn, owned a controlling interest in an entity (the Partnership) whose sole asset was real property. By petitioner's transfer, the transferee effectively acquired a controlling interest in an entity (the

3 Section 1440.2 of the Gains Tax Law defines "controlling interest" as follows:

"(i) in the case of a corporation, either fifty percent of more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits, or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interests in such partnership, association, trust or other entity."

Partnership) with an interest in real property. Accordingly, the transfer was properly subject to gains tax. To determine otherwise, under the facts presented. would vitiate the meaning, intent and purpose **of** the language of Tax Law § 1440.7 as quoted above.

H. That the constitutionality of the laws **of** New York State and their application in particular Instances is presumed at the administrative level **of** the State Tax Commission.


I. That the petition **of** BrederoVast Goed, N.V. , VerenigdeBedrijven Bredero, N.V. and Friesch-GroningscheHypotheekbank, N.V. is hereby denied **and** the Audit Division's denial **of** petitioner's claim for refund is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987


PRESIDENT


COMMISSIONER


COMMISSIONER