

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

52 FULTON ST, DISTRIBUTORS, LTD.

DECISION

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, 52 Fulton Street Distributors, Ltd., c/o Nackamie, Kirschner, Levine, Spizz & Goldberg, P.C., 342 Madison Avenue, New York, New York 10173, 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. 65223).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices **of** the State Tax Commission, Two World Trade Center, New York, New York, on August 8, 1986 at 10:30 A.M., with all briefs to be submitted by October 15, 1986. Petitioner appeared by Nackamie, Kirschner, Levine, Spizz & Goldberg, Esqs. (Kenneth Kirschner, **Esq.**, of counsel). The Audit Division appeared by John P. Dugan, **Esq.** (Paul A. Lefebvre, Esq., of counsel).

**ISSUE**

Whether the repurchase and termination **of** a lease held by petitioner **was** properly subjected to tax by the Audit Division under Tax Law Article 31-B.

**FINDINGS OF FACT**

1. On June 3, 1985, certain premises located at 52 Fulton Street, New York, New York, consisting of real property and a building situated thereon,

were conveyed by 52 Fulton Street Associates (the seller) at a selling price of \$2,800,000.00.<sup>1</sup> Until the time of this transfer, the premises were subject to an existing twenty year lease held by petitioner, 52 Fulton Street Distributors, Ltd., as lessee.

2. In order to complete the above sale of the premises, it was required that the building be delivered vacant and not subject to any such lease. Accordingly, the seller (52 Fulton Street Associates) and petitioner entered into an agreement whereby petitioner agreed to surrender the lease to the seller. The seller paid petitioner \$970,000.00 in cash for the repurchase and termination of the lease. At the time of such repurchase and termination, the lease had a remaining term of fifteen years, at an annual rental of \$81,600.00.

3. Requisite transferor and transferee questionnaires were filed with respect to both the sale of the premises and the repurchase and termination of the lease. In calculating the gain on the sale of the premises, a credit was taken by the seller in the amount of \$970,000.00 against the total price of \$2,800,000.00 for the premises. With respect to the lease repurchase and termination, petitioner took the position that the transfer was for a consideration of \$970,000.00, thus being not subject to tax as falling below the one million dollar gains tax exemption threshold.

4. Upon review of petitioner's filings with respect to the lease repurchase and termination, the Audit Division determined that gains tax was due in the amount of \$97,000.00, and issued to petitioner a Tentative Assessment and Return indicating such amount.

---

1 The premises were conveyed as two parcels; one for \$1,710,000.00 and one for \$1,090,000.00.

5. Petitioner has paid the tax as determined by the Audit Division, and timely filed a Claim for Refund thereof. By a letter dated September 30, 1985, the Audit Division denied petitioner's claim for refund.

6. Petitioner maintains that the transfer was for a consideration less than the million dollar gains tax threshold. Further, petitioner asserts that the transaction was entered into for a valid business purpose, to wit, petitioner needed cash to pay off large debts incurred in its business which had at the time experienced a strong downturn. In this context, petitioner asserts the cash price of \$970,000.00 was a negotiated and fair price to receive for surrendering the lease.

#### CONCLUSIONS OF LAW

A. That Tax Law § 1441, 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. However, Tax Law § 1443.1 provides that **no** tax shall be imposed if the consideration **is** less than one million dollars.

B. That Tax Law § 1440.7 provides, in part, as follows:

" 'Transfer of real property' means the transfer **or** transfers of any interest in real property by any method, including **but not limited to sale, exchange, assignment, surrender,...** " (emphasis added).

C. That Tax Law § 1440.4 defines an "interest" in real property to include, inter alia, a leasehold interest.

D. That Tax Law § 1440.1(a) defines "consideration" as follows:

" 'Consideration' means the price paid **or** required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option **or** contract to purchase **or** use 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).

E. That petitioner received \$970,000.00 in cash for its agreement to surrender its leasehold interest. In addition, petitioner was, at the same time, discharged of its obligation to make the remaining fifteen annual rental payments of \$81,600.00 as required under the lease. Such discharge, (even using present-value dollar computations) is far in excess of the \$30,000.00 additional amount herein required to meet the million dollar gains tax threshold.


Accordingly, the transfer was properly subject to gains tax.

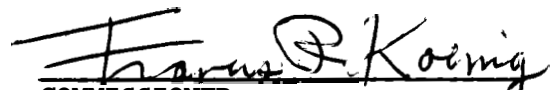
F. That the petition of 52 Fulton St. Distributors, Ltd., is hereby denied and the Audit Division's denial of petitioner's claim for refund is sustained.

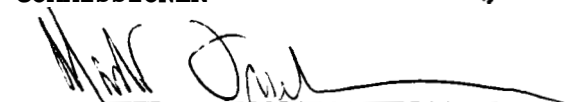
DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER