

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DANIEL J. HIRSCH AND CO., INC.

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, Daniel J. Hirsch and Co., Inc., 50 West 57th Street, New York, New York 10036, 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. 65814).

On October 14, 1986, petitioner, by its duly authorized representative, Snow, Becker, Kroll, Klaris & Krauss, P.C., Esqs. (Edward S. Feldman, Esq., of counsel), waived a hearing and submitted its case for decision based **on** the entire file. After due consideration, the Commission renders the following decision.

ISSUE

Whether petitioner's payment to repurchase a contract for the sale of real property from the contract vendee should, upon petitioner's subsequent sale of the property, be allowed as a selling expense or, alternatively, included as part **of** petitioner's original purchase price for the property.

FINDINGS OF FACT

1. On November 14, 1983, petitioner, Daniel J. Hirsch and Co., Inc., entered into a contract to purchase property located at 1262-70 Lexington Avenue, New York, New York ("the property"). The property consists of real

estate upon which is situated a nineteen apartment residential building with a bank tenant on the ground floor. The contract purchase price was \$1,625,000.00, plus petitioner assumed the obligation to pay brokerage fees totalling \$80,000.00. On January 27, 1984, this transaction was consummated with the closing of title on the property.

2. On December 18, 1984, a memorandum of contract for the sale of the property by petitioner to Dromin Realty, Inc. ("Dromin") was recorded in the office of the Register of the City of New York in Reel 857 at page 777. The contract itself had been dated October 1984.¹

3. On April 23, 1985, petitioner and Dromin entered into an agreement whereby petitioner, because of its inability to convey title to the property to Dromin in accordance with the October 1984 contract, paid Dromin \$100,000.00 to terminate the October 1984 contract and cancel all obligations thereunder.

4. On or about June 14, 1985, the Audit Division received transferor and transferee questionnaires pertaining to a transfer of the property from petitioner to 1270 Lexington Associates for a gross consideration of \$3,025,000.00. This transfer was completed, at which time petitioner paid a gains tax (Tax Law Article 31-B) in the amount of \$7,364.22.

5. On August 13, 1985, the Audit Division received from petitioner a Claim for Refund of the \$7,364.22 gains tax previously paid. This refund claim was premised upon petitioner's assertion that the Audit Division improperly disallowed a number of items claimed by petitioner as selling costs, capital

1 The record herein does not include a copy of the contract between petitioner and Dromin; there is thus no evidence of either the purchase price to be paid for the property under such contract or the specific date of execution of said contract.

improvement construction costs and original purchase price components relating to the property.

6. By a letter dated December 3, 1985, the Audit Division agreed to a portion of the items claimed and granted a partial refund of \$3,418.03 to petitioner. However, the balance of the refund claim (\$3,946.19) was denied. The items claimed by petitioner, but disallowed per the December 3, 1985 letter, were the following:

(1) Disallowed Cost of Acquisition		
Adjustment rec'd for Assumption of		
Real Estate Taxes		\$ 27,035.00
(2) Disallowed Capital Improvements:		
Petty Cash (April 1984 to 1985)	\$9,277.81	
Petty Cash (1985)	4,037.78	
Appliances	<u>3,135.00</u>	
Total Capital Improvements Disallowed		16,450.59
(3) Disallowed Selling Expense:		
Fee to release prior contract of sale		100,000.00
Error in addition of capital improvements		<u>50.00</u>

7. Petitioner filed a timely petition contesting only the disallowance of the \$100,000.00 paid in connection with the contract with Dromin. There appears to be no issue raised concerning the balance of the disallowed items. With respect to the \$100,000.00 at issue, it is petitioner's position that such amount should be allowed under Tax Law § 1440.5 as either: (a) an expense incurred in connection with selling the property or (b) as part of petitioner's original purchase price for acquisition of the property.

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.

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 § 1440.5, as in effect at the time of the transfer in question, defined "original purchase price" as follows:

"(a) 'Original purchase price' means the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) 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 tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative **or** condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission."

C. That the \$100,000.00 paid by petitioner in connection with terminating the contract of sale with Dromin was clearly not a legal, engineering or architectural fee incurred to sell the property within the meaning and intent of Tax Law § 1440.5.

D. That a contract to purchase real property represents, and is to the contract vendee, an interest **in** real property the transfer of which is a taxable event under Article 31-B (Tax Law § 1440.4; Matter of Robert and Richard Arnold, State Tax Commn., January 17, 1986). Here, via the contract between petitioner and Dromin, an interest in real property was created in and held by

Dromin. In turn, petitioner paid \$100,000.00 to acquire this interest from Dromin.²


E. That, pursuant to Tax Law § 1440.5, petitioner's original purchase price includes the "consideration paid or required to be paid...to acquire the interest in real property," Under the facts presented, petitioner paid \$100,000.00 to acquire the interest in the property held by Dromin. Accordingly, upon transferring its interest in the property to 1270 Lexington Associates, petitioner was properly entitled to include the \$100,000.00 paid to Dromin as a part of its original purchase price for the property. Accordingly, petitioner's adjusted original purchase price, as shown on the Audit Division's December 3, 1985 letter (refer Finding of Fact "6"), is to be increased by \$100,000.00, and such refund as results therefrom is to be granted.

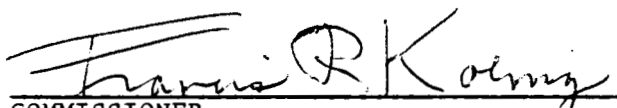
F. That the petition of Daniel J. Hirsch and Co., Inc. is hereby granted.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 0 1 1987


PRESIDENT


COMMISSIONER


COMMISSIONER

2 It could be argued, assuming the consideration which was to be paid by Dromin under the contract equalled or exceeded \$900,000.00, that the surrender and cancellation of the contract in exchange for \$100,000.00 paid by petitioner would be a transfer taxable under Article 31-B (Matter of Harvey Auerbach, State Tax Commn., September 15, 1986). However, that issue is not presented in this proceeding and no decision is rendered thereon.