

STATE TAX COMMISSION

of

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, Sea Crest Motel, Inc., P.O. Box 500, Amagansett, New York 11930, 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. 65816).

A hearing was held before Dennis X. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1987 at 1:30 P.M., with all briefs to be submitted by March 4, 1987. Petitioner appeared by Laventhol & Horwath (Laurence Karst, CPA). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether legal fees incurred by petitioner on the sale of certain real property are properly allowable as part of petitioner's original purchase price for such property thereby reducing the gain subject to tax under Tax Law

Article 31-B.

FINDINGS OF FACT

1. In January 1984, petitioner, Sea Crest Motel, Inc., transferred certain real property located in New York State. It is undisputed that this transfer was subject to tax under Tax Law Article 31-B ("gains tax").

2. On May 2, 1985, petitioner filed a Claim for Refund of Real Property Transfer Gains Tax in the amount of \$7,200.00. This claim was premised upon petitioner's assertion that brokerage fees of \$2,000.00 and legal expenses of \$70,000.00 were mistakenly omitted from petitioner's claimed original purchase price for the property.

3. By letter dated October 16, 1985, the Audit Division allowed the brokerage fees as claimed by petitioner, but denied the allowance of legal fees. Accordingly, the refund claim was allowed to the extent of \$200.00, but was otherwise denied. The denial of inclusion of the \$70,000.00 in legal fees is what remains at issue in this proceeding.

4. There *is* no dispute as to the actual expenditure of the above-noted \$70,000.00 amount for legal fees. Petitioner asserts that the legal fees are a customary expense in the sale of property, that such fees reduce the economic gain on the sale and thus should be allowed.

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 § 1440.5, as in effect on the January 1984 date of the transfer in question, provided, in part, as follows:

"'Original purchase price' means the consideration (i) paid by the transferor to acquire the interest in the real property or (ii) in the case of property acquired through gift or inheritance, the

acquire the interest in the real property; plus in both cases the consideration by the transferor for any capital improvements made to such real property (including in the case of clause (ii) above, those by the last transferor who paid consideration) prior to the date of transfer.

C. That Tax Law § 1440.5 as above was repealed by Laws of 1984 (ch 900, § 3) with new subdivision § added in its place and providing, in relevant part, 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 the property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission." (Emphasis added.)

D. That as the above-quoted sections reveal, it was the amendment to subdivision § of Tax Law § 1440 by which the meaning of original purchase price was expanded to allow inclusion therein of customary, reasonable and necessary expenses relating to:

- a.) the construction of capital improvements;
- b.) legal, architectural and engineering fees incurred to sell the property; and
- c.) expenses incurred to create ownership interests in cooperative or condominium form.

This new subdivision 5 was made effective as of September 4, 1984 and was not, unlike certain other portions of Laws of 1984 (ch 900), made retroactive to prior periods.

E. That the legal fees at issue were not properly includible as part of

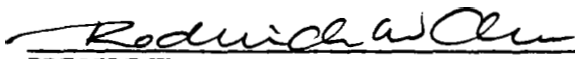
that the legislature acts with a purpose, and here that purpose was to allow, inter alia, legal fees incurred on a sale as part of the original purchase price. As the memorandum accompanying passage of Chapter 900 indicates, the change to allow, inter alia, legal fees was a non-retroactive substantive change (see McKinney's 1984 Session Laws of New York, pp. 3458, 3461).

F. That the petition of Sea Crest Motel, Inc. is hereby denied and the Audit Division's denial of petitioner's claim for refund in the reduced amount of \$7,000.00 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER