

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Joseph M. Mattone : AFFIDAVIT OF MAILING
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. :
:

State of New York :

ss.:

County of Albany :

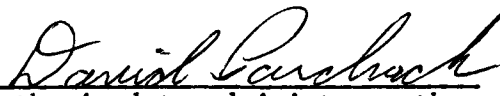
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of November, 1986, he/she served the within notice of Decision by certified mail upon Joseph M. Mattone the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

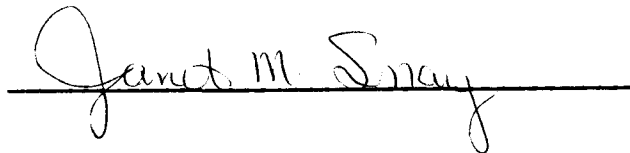
Joseph M. Mattone
159-18 Northern Blvd.
Flushing, NY 11358

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
20th day of November, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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of :
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_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of November, 1986, he served the within notice of Decision by certified mail upon Philip W. Megna, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip W. Megna
Mattone, Mattone, Megna & Modena
159-18 Northern Blvd.
Flushing, NY 11358

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
20th day of November, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 20, 1986

Joseph M. Mattone
159-18 Northern Blvd.
Flushing, NY 11358

Dear Mr. Mattone:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1444 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Philip W. Megna
Mattone, Mattone, Megna & Modena
159-18 Northern Blvd.
Flushing, NY 11358

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JOSEPH M. MATTONE
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.

DECISION

Petitioner, Joseph M. Mattone, 159-18 Northern Boulevard, Flushing, New York 11358, 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. 62137).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on March 17, 1986 at 9:30 A.M., with all briefs to be submitted by July 18, 1986. Petitioner appeared by Mattone, Mattone, Megna & Modena, Esqs. (Philip W. Megna, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed certain items of expense claimed by petitioner as development/construction period expenses disbursed in connection with capital improvements to real property.

FINDINGS OF FACT

1. On August 14, 1981, petitioner, Joseph M. Mattone, purchased premises located at 9, 11 and 13 East 63rd Street, New York, New York. The contract price for these premises was \$2,100,000.00. These premises consisted of three

physically contiguous parcels of real property upon which were situated three, four-story apartment buildings housing, in total, 30 small apartment units. It is undisputed that petitioner's intent with respect to these premises at the time of acquisition was to have the buildings vacated so that they could be demolished to make way for a planned eleven-story building containing, in total, twenty-four two-bedroom luxury apartment units.¹

2. Subsequent to petitioner's execution of the contract to purchase the premises but prior to the actual closing of title thereon, the entire district in which the premises are located was designated an historic landmark district by the City of New York. In order to proceed with the proposed demolition and reconstruction, petitioner required approval in the form of a Certificate of Appropriateness from the New York City Landmark Preservation Commission.

3. Petitioner engaged architects, engineers and attorneys and commenced the process of drawing and submitting to the Landmark Commission plans for the proposed development and also commenced efforts to convince the tenants then living in the premises to relocate.

4. Petitioner's efforts to convince the tenants to vacate the premises, and his efforts to secure the necessary authorizations to develop, continued into 1983. Two of the buildings, namely numbers 11 and 13, were determined by the Landmark Commission as having no historical architectural significance, while the third building, number 9, was designated as having some limited significance. Petitioner then submitted an amended development plan calling for

1 At the time of acquisition, building 13 was completely vacant, while buildings 9 and 11 housed a combined total of 19 tenants.

demolition and replacement of building numbers 11 and 13, with preservation and renovation of building number 9.

5. On January 10, 1983, prior to the effective date of Tax Law Article 31-B, petitioner sold the premises located at 9 East 63rd Street. Thereafter, petitioner continued to attempt to convince the tenants to vacate the premises at 11 and 13 East 63rd Street, and to acquire permission necessary to commence development. At no time during the period of ownership did petitioner add any tenants to the rent rolls of any of the premises. Finally, petitioner determined that due to the expenses incurred over the passage of time in trying to proceed with development, it had become economically infeasible to develop the premises as planned.

6. On or about March 4, 1985, petitioner sold numbers 11 and 13 East 63rd Street to one Rudi Neumayr for a consideration of \$2,500,000.00. Prior to transfer, necessary transferor and transferee questionnaires required by Tax Law Article 31-B ("Gains Tax") were filed, with petitioner calculating an anticipated tax due in the amount of \$8,201.40.

7. In response to the above-noted filings, the Audit Division issued a Tentative Assessment and Return indicating gains tax due in the amount of \$68,940.89. The Audit Division's calculation differs from petitioner's calculation of tax due in that \$607,294.87 out of \$913,505.22 in capital improvements claimed by petitioner as part of the original purchase price were disallowed by the Audit Division. The amount disallowed consists of two items, as follows:

a) \$465,439.80 representing interest paid to European American Bank

on petitioner's acquisition and pre-construction loan²;

b) \$141,855.07 representing real estate taxes paid on the premises while owned by petitioner.

8. The accuracy of the aforementioned figures (dollar amounts), representing amounts allocated to building numbers 11 and 13 East 63rd Street, are not in dispute. Rather, the issue is whether such amounts are properly allowable as capital improvement costs forming a part of petitioner's original purchase price for purposes of calculating gain on the sale of the premises. The premises at number 9 East 63rd Street, having been purchased and sold prior to the effective date of Tax Law Article 31-B, are not at issue in this proceeding.

9. Petitioner paid, upon transfer, the Audit Division's asserted tax due of \$68,940.89, and thereafter timely filed a claim for refund in the amount of \$60,739.49, premised upon the assertion that the Audit Division's disallowance of interest and real estate taxes was improper.

10. The interest expense at issue represents interest on the initial disbursement of funds used to acquire the premises as well as interest on subsequent disbursements used primarily to: a.) pay interest accruing and coming due on the initial loan disbursement and b.) pay relocation inducements to the tenants inhabiting the premises. According to petitioner's representative, the loan herein, as is customary in the industry, was negotiated in contemplation of an initial disbursement which, together with petitioner's funds, would be

2 A February 8, 1985 letter to petitioner from the European American Bank termed the loan an "acquisition and pre-construction loan".

used to acquire the premises, with subsequent disbursements to be made to finance the development as certain stages of construction were reached.

CONCLUSIONS OF LAW

A. That Tax Law Article 31-B, 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 wherein the consideration equals or exceeds one million dollars. Tax Law section 1440.3 defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price."

B. That Tax Law section 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 petitioner's intent to demolish the existing building and develop the subject premises, as described, is not disputed. However, there remains the fact that no capital improvements were made to the premises, nor was there even commencement of the construction of such improvements. In fact, notwithstanding his ongoing efforts, petitioner was unable to obtain requisite permission to commence development as planned within such time frame as would, in petitioner's view, have allowed for a reasonable rate of return on the project. Accordingly, after holding the premises pending such permission and then determining that

development was no longer economically viable, petitioner chose to sell the premises.

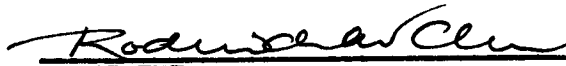

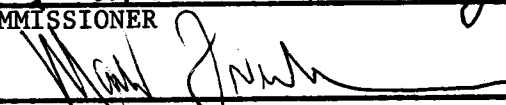
D. That petitioner's intent to develop the premises, and his efforts to secure necessary authorizations therefor, does not make the disallowed items of disbursement at issue, incurred while waiting for such permission, capital improvements or costs incurred to make capital improvements. The interest expense at issue was incurred on funds actually disbursed and used to purchase the premises, to offer relocation payments to tenants and to pay interest on such previously disbursed funds, rather than to construct capital improvements to the premises. Accordingly, the Audit Division's determination that such interest expense was not includible as part of petitioner's original purchase price for the premises under section 1440.5 of the Tax Law was proper. Furthermore, the remaining disallowed item of disbursement, real estate taxes, did not constitute a capital improvement or the cost of making a capital improvement to the property under the facts presented, but rather was one of the ongoing expenses of property ownership. Accordingly, since capital improvements were neither made to the premises nor commenced, it follows that the expenses at issue may not be included as part of petitioner's original purchase price pursuant to Tax Law section 1440.5 (Matter of 15 East 81st Associates, State Tax Commn., April 15, 1986).

D. That the petition of Joseph M. Mattone is hereby denied and the denial of petitioner's claim for refund is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT

COMMISSIONER

COMMISSIONER