STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

149 KING STREET CORPORATION:
DETERMINATION

DTA NO. 808214

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, 149 King Street Corporation, R.R. 1, Box 299, Wingdale, New York 12594-9745, 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.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 23, 1994 at 1:15 P.M. Petitioner submitted a brief on July 7, 1994. The Division of Taxation submitted a brief on August 1, 1994. Petitioner submitted a reply brief on August 18, 1994. Petitioner appeared by Thomas J. Del Mastro, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth Schultz, Esq., of counsel).

ISSUE

Whether petitioner has shown that audit adjustments made by the Division of Taxation with respect to amounts claimed by petitioner as its purchase price paid to acquire certain real property and brokerage fees paid in connection with the transfer of such real property were in error.

FINDINGS OF FACT

By letter dated November 29, 1988, the Division of Taxation ("Division") advised petitioner, 149 King Street Corporation, as follows:
"Our records indicate that you are the sponsor of Townhouses located at 149 King Street. Our

records also reveal that parcels have been transfered [sic] to individuals not for residential purposes . . . .

* * *

"In order for our office to determine any potential tax liability, please fill out the enclosed forms and include any necessary documentation."

Responding through its attorney, Robert E. Pease, Esq., by letter dated December 12, 1988, petitioner indicated that parcels had not been transferred "not for residential purposes."

In response, the Division transmitted a letter to petitioner dated December 29, 1988 which stated, in relevant part:

"Our records indicate that 149 King Street Corporation has transferred several lots to The Edwards Group Limited. The Edwards Group Limited then transferred these lots to a third party. It has been determined that these units were not used for residential purposes by The Edwards Group Limited.

"Pursuant to section 1440-7 of article 31-B of the New York State Tax Law states that 'transfers of real property shall also include partial or successive transfers'.

"In order for our office to determine any potential tax liability, please fill out the enclosed forms and include any necessary documentation."

On April 20, 1989, the Division transmitted a letter to petitioner indicating that it had received no response to its December 29, 1988 letter.

On May 30, 1989, petitioner filed with the Division a Form DTF-700 ("Real Property Transfer Gains Tax Schedule of Original Purchase Price for Cooperatives and Condominiums") and a Form DTF-701 ("Real Property Transfer Gains Tax Questionnaire for Cooperatives and Condominiums: Transferor").

The transferor questionnaire indicated that it was an initial filing and that it was being filed in respect of the transfer of five units of a condominium project located in Chappaqua, New York. The date of this transfer is not contained in the record. The transferor questionnaire indicates that the condominium plan became effective July 4, 1987.

Among other costs and fees, petitioner's gains tax filings listed a purchase price to acquire the subject property of $250,000.00 and brokerage fees of $97,845.00. The gains tax

filings indicated no gain subject to tax on the transfer and, in fact, indicated an actual loss "to date" of $12,755.00 and a total anticipated loss of $28,270.00.

By letters dated June 1, 1989 and July 13, 1989, the Division requested that petitioner provide certain documents in order to verify the amounts claimed on petitioner's gains tax filings.

In response to these requests as related to petitioner's cost to acquire the subject property, petitioner provided the Division with a copy of the deed dated December 24, 1986 by which "149 King Street Corporation c/o Thomas F. Flood" took title to the subject property from Thomas F. Flood and Charles W. Hatcher. A copy of this deed was entered into the record herein. A document attached to the deed encaptioned "Westchester County Clerk Recording Page" indicates that no real estate transfer tax was received in respect of the deed transfer. The recording page also lists a zero in a space headed "Consid".

On November 24, 1989, following a review of certain documentation provided by petitioner, the Division issued a Statement of Proposed Audit Adjustment which proposed a tax deficiency of $31,524.70, plus penalty and interest, in respect of the subject transfer.

Petitioner indicated its disagreement with this statement by letter of Charles Hatcher dated December 1, 1989.

On March 23, 1990, the Division issued to petitioner a Notice of Determination which assessed $31,524.70 in gains tax due, plus penalty and interest, in respect of the subject transfers.

In its calculation of the gains tax deficiency as set forth in the Notice of Determination, the Division started with gross consideration of $1,297,000.00, as reported on petitioner's gains tax filings. The Division disallowed several claimed expenses including petitioner's claimed brokerage fees of $97,845.00. In addition, the Division allowed $25,263.00 of petitioner's claimed $250,000.00 purchase price to acquire the subject property. The bottom line of the Division's adjustments to petitioner's filed Forms DTF-700 and 701 was the Division's

determination that petitioner had gain subject to tax of $315,247.00 in respect of the subject transfers and a gains tax liability of $31,524.70.

Subsequent to the issuance of the Notice of Determination, the Division modified its assessment slightly. Specifically, the Division increased the allowable amount of the purchase price to acquire the subject property to $30,381.00. This adjustment was premised on the $115,448.00 reported as the "cost or other basis" of the subject property on Schedule D of the 1986 Federal partnership return of King Street Associates. Since the subject transfers involved 5 units of a 19-unit project, the Division multiplied this $115,448.00 reported cost figure by 5/19 to reach the allowable purchase price for gains tax purposes of $30,381.00. These computations resulted in a revised calculation of gain subject to tax of $310,134.00 and a revised gains tax deficiency of $31,013.40, plus penalty and interest.

A copy of the 1986 U.S. partnership return of King Street Associates referred to above was entered into evidence herein. Schedule D of said return ("Capital Gains and Losses") indicated that the partnership had acquired land located at 149 King Street, Chappaqua, New York on March 15, 1981. As previously noted, the return listed a "cost or other basis" for this property of $115,448.00. In addition, the return indicated that the property was sold on December 24, 1986 at a sales price of $892,413.00, with a gain on the sale of $776,965.00. The partnership return listed $776,965.00 in long-term capital gain as a distributive share item on the return's Schedule K ("Partners' Shares of Income, Credits, Deductions, etc."). Petitioner also introduced into the record copies of 1986 Schedule K-1's for Thomas Flood and Charles Hatcher with respect to King Street Associates. These K-1's indicated that Flood and Hatcher were each 50% partners in King Street Associates and that each received a distributive share of long-term capital gain of $388,482.00.

The record herein contains a deed dated March 5, 1981 pursuant to which property was conveyed from B.C.D. Realty Company to Charles W. Hatcher and Thomas F. Flood, III, as tenants-in-common. A closing statement with respect to this transaction indicates that the

purchase price for the property was $300,000.00 and that deed transfer tax was paid with respect to this transfer at a rate of $1.10 per $1,000.00 of the purchase price, or $330.00.[1]

The closing statement indicates that, following the acquisition by Hatcher and Flood on March 5, 1981, title to this property was conveyed to King Street Associates by deed, also dated March 5, 1981.

The record also contains a closing statement with respect to the December 24, 1986 transfer from Flood and Hatcher to petitioner. This closing statement makes no reference whatever to any purchase price for the subject property in respect of the December 24, 1986 transfer.

Petitioner presented neither testimony nor affidavits in support of its position.

With its reply brief petitioner submitted to the Administrative Law Judge several documents "for your information and to facilitate going through all the exhibits." Such documents consisted of a copy of a facsimile transmission dated June 21, 1991 from petitioner's representative to the Division's representative; a photocopy of a Peoples Westchester Savings Bank check dated December 24, 1986 payable to a William Berens in the amount of $107,182.06; a photocopy of a Peoples Westchester Savings Bank check dated December 24, 1986 payable to a George P. Pavanivi, as attorney, in the amount of $26,088.83; and a photocopy of two checks each dated December 29, 1986 and drawn on a Bank of New York account of King Street Associates signed by C. W. Hatcher and payable, each in the amount of $250,000.00, to Thomas F. Flood III and C. W. Hatcher, respectively. None of the documents submitted with petitioner's reply brief was included among the exhibits submitted into evidence at the hearing. By letter dated October 17, 1994, the Division objected to the receipt of the documents into evidence in this matter since such documents were submitted after the record had been closed. By letter dated December 14, 1994, the Administrative Law Judge noted that

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[1]It is noted that the March 5, 1981 deed itself also indicates that $330.00 in deed transfer tax was paid upon the recording of the deed on March 23, 1981.

petitioner had not requested an opportunity to submit such documents post-hearing and therefore excluded from the record herein the documents submitted with the reply brief.

SUMMARY OF PETITIONER'S POSITION

In its petition, petitioner took issue with several of the adjustments made by the Division on audit herein. At hearing, petitioner conceded all but two of these adjustments. Specifically, petitioner contended that the Division's disallowance of $97,845.00 in claimed brokerage fees was improper. Petitioner contended that the claimed amount represented salary and commissions for a salesperson. Additionally, petitioner contended that the Division's calculation of its purchase price paid to acquire the subject property was in error (see, Finding of Fact "14"). Petitioner contended that its purchase price paid to acquire the property on December 24, 1986 was $892,413.00, as reflected on the 1986 partnership return (see, Finding of Fact "15") and that an allocation of that purchase price to the 5 units (out of a total of 19 units) which are involved in the subject transfer results in a purchase price for gains tax purposes of $234,846.00 (i.e., 5/19 x $892,413.00).

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property within New York State ("gains tax"). Tax Law § 1444(1) authorizes the Division to determine the amount of gains tax due "from such records or information as may be obtainable" where a form or return filed under Article 31-B is incorrect or insufficient. Tax Law § 1448(3) requires that all transferors subject to gains tax keep complete records with respect to such transfers.

B. Although the record is bereft of detail regarding the various real property transfers noted herein, there is no dispute in the instant matter that the transfers at issue were subject to gains tax and that the Division's issuance of the Notice of Determination herein was proper. As noted, petitioner takes issue with two audit adjustments made by the Division, i.e., petitioner's claimed purchase price paid to acquire the subject property and the claimed brokerage fees. Petitioner had the burden of proving that such adjustments were in error (20 NYCRR

3000.10[d][4]).

C. Petitioner has failed to establish that its purchase price to acquire the property was $892,413.00 and that the allocated purchase price with respect to the five units at issue was therefore $234,845.00. Accordingly, the Division's determination of petitioner's purchase price to acquire the subject property is sustained.

The evidence presented to establish the $892,413.00 purchase price consists of the 1986 Federal partnership return of King Street Associates and the copies of Schedule K-1's of Hatcher and Flood. In contrast, the deed by which the property was transferred to petitioner was recorded without payment of real estate transfer tax. This is, of course, strong evidence against petitioner's claim, for such recordation is prohibited under Tax Law § 1403(d) unless the real estate transfer tax has been paid or the deed is exempt pursuant to Tax Law § 1405(b). Moreover, Tax Law § 1404(b) provides that all deeds are presumed taxable until the contrary is proven by the grantor, i.e., Flood and Hatcher. In this case, therefore, under the Real Estate Transfer Tax Law, Flood and Hatcher had to prove to the recording officer that the transfer to petitioner was for no consideration and that the deed was thus exempt from tax.

Also weighing against petitioner's contention is the absence from the record of any contract of sale with respect to the December 24, 1986 transfer. Furthermore, the closing statement submitted with respect to the December 24, 1986 transfer contains no indication whatever regarding the consideration paid for the transfer. Also notably absent from the record is any testimony or affidavits from the principals, Flood and Hatcher, to explain these palpable inconsistencies and gaps in the record.

D. Petitioner contends that the partnership return and the partners' K-1's constitute strong evidence that $892,413.00 was paid as consideration for the December 24, 1986 transfer. Petitioner notes that by reporting the transaction as indicated by these documents, Flood and Hatcher would have incurred an income tax liability. Petitioner reasons that Flood and Hatcher would report the transaction in this manner only if they actually realized a gain. Petitioner's

point is logical, but its strength is diminished by the absence from the record of the complete 1986 personal income tax returns of Flood and Hatcher (as opposed to copies of K-1's only). Complete returns could establish petitioner's contention that Flood and Hatcher incurred an income tax liability with respect to the December 24, 1986 transaction. Absent such complete returns and absent any testimony to establish that the K-1's in evidence were in fact filed with the individual returns of Flood and Hatcher, it must be concluded that the K-1's and the partnership return do not prove that Flood and Hatcher reported the December 24, 1986 transfer as asserted by petitioner. Moreover, even if petitioner had established this contention, the fact that Flood and Hatcher reported the transaction in this manner for income tax purposes is insufficient to establish that the consideration for the December 24, 1986 transfer was, in fact, $892,413.00 in light of the totality of the facts and circumstances herein as discussed above in Conclusion of Law "C".

It is further noted that even if the copies of checks which petitioner attempted to submit post-hearing were accepted into the record, the result herein would be unchanged. The record contains no evidence to establish that the source of these checks, which were drawn on two separate dates and from accounts at two banks, was the consideration paid by petitioner in respect of the December 24, 1986 transaction.

E. As to petitioner's claimed brokerage fees of $97,845.00, the record herein contains no source documentation for this claimed amount, nor does the record contain any testimony with respect to this figure. The Division's disallowance of such brokerage fees is therefore sustained.

F. The petition of 149 King Street Corporation is in all respects denied and the Notice of Determination dated March 23, 1990, as modified (see, Finding of Fact "14"), is sustained.

DATED: Troy, New York
February 2, 1995

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE