

NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition

of

1018 MORRIS PARK
AVENUE REALTY INC.

DETERMINATION

TAT(H) 14-4(GC)

Chu-Fong, A.L.J:

On September 16, 2014, 1018 Morris Park Avenue Realty Inc. filed a Petition for a Hearing with the New York City (City) Tax Appeals Tribunal (Tribunal) to review a Notice of Determination (Notice) issued by the City Department of Finance (Department or Respondent), dated November 29, 2012, which asserts a liability of City General Corporation Tax (GCT), under Chapter 6 of Title 11 of the Administrative Code of the City of New York, for the tax year of December 1, 2008 through November 30, 2009.

Petitioner was represented by Benjamin Sharav, Esq, of the Law Offices of Victor J. Molina. The Commissioner of Finance of the City of New York was represented by Amy H. Basset, Esq., Assistant Corporation Counsel.

This matter was initially assigned to Administrative Law Judge (A.L.J.) Gallancy-Wininger. Upon her retirement, the matter was transferred to A.L.J. Rodriguez-Diaz, and subsequently transferred to A.L.J. Chu-Fong. At a November 1, 2016 telephone conference, the parties were offered a further opportunity to

appear and present oral arguments on this matter, which they declined.

On October 27 and 28, 2015, pursuant to Section 1-09 (f) of the Tribunal Rules of Practice and Procedure (Rules), the parties agreed to have this matter determined without the need for appearance at a hearing. On December 1, 2015, the parties filed a joint Stipulation of Facts, with exhibits. On February 23, 2016, the parties filed an Addendum to the Stipulation, with exhibits. A briefing schedule was set with the final brief due on July 8, 2016, which date began the six-month period for the issuance of this determination.

ISSUES

I. Whether Petitioner established that it was subject to GCT after its tax year of December 1, 2008 through November 30, 2009, for which it filed a final GCT return, but later amended by filing a non-final GCT return.

II. If not, whether Petitioner established that the Department erred by including all the gain from an installment sale in the last year it was subject to GCT.

FINDINGS OF FACT

1. Petitioner, 1018 Morris Park Avenue Realty, Inc., was a Domestic Business Corporation recognized by New York State (State) and formed on December 21, 1993.

2. On December 21, 1993, Petitioner purchased two parcels of property in New York City known as Bronx, Block 4102, Lot 1 and Bronx, Block 4102, Lot 8 (together, the Property).

3. On November 17, 2009, Petitioner sold the Property to MPGRETTE Realty LLC in an installment sale (Property Sale).

4. On January 27, 2010, Petitioner filed a GCT return (Original Return) for the tax year of December 1, 2008 through November 30, 2009 (2009 Tax Year). Petitioner checked the box on the Return indicating that the filing would be its final GCT Return. Petitioner reported its gains from the Property Sale as it did on its Federal Returns (i.e., on a cash basis or as received).

5. On November 29, 2012, the Department issued the Notice to Petitioner. The "Explanation of Adjustment(s)" section provides the following:

"The balance of Installment Sale Income (\$6,273,730 - \$199,457 = \$6,074,273) must be included in the NYC-4S final return. A New York City based corporation, which sells its assets on an installment basis and files a final New York City return, is required to include in its final General Corporation Tax return the entire gain realized on the sale."

As a result of the adjustment, the Department recomputed Petitioner's 2009 GCT entire net income (ENI) to include the entire gain from the Property Sale, including amounts it had not yet received.

6. On August 15, 2013, Petitioner filed an amended GCT return (Amended Return) for the 2009 Tax Year. This document did

not indicate that it would be Petitioner's final return. On January 27, 2015, Petitioner made a payment to the Department.¹

7. The record includes documents from Petitioner's bank account, including a "transaction journal" and a series of statements. As indicated on some of the pages, this bank branch was located in the Bronx. The transaction journal displays activity from January 27, 2014 through February 11, 2015. Some pages contain shorthand and marks near certain lines, but the writings either lack context (e.g., "redeposited," "replaced check," "?,") or are illegible. The statements detail deposits and withdrawals from November 23, 2014 through May 22, 2015. As with the transaction journal, certain pages of the statements contain illegible marks. Both documents lack indication as to the purpose of the various line items. Neither established any clear relationship between the banking items and any other activity in the City. The parties' stipulation includes no agreements or clauses describing either the transaction journal or the statements.

8. The last GCT return filed by petitioner was for the 2009 Tax Year, i.e., the Amended Return. Petitioner has not filed a GCT return for any subsequent years. None of the documents in the record indicates that Petitioner owned or leased property, or maintained an office, in the City after the 2009 Tax Year.

¹ The record includes Petitioner's check to the Department for \$24,393.00, which differs from the amount listed as due on the Amended Return, \$23,405.00. Although interest due may explain the discrepancy, the parties' stipulation provides no explanation for this difference. Additionally, it is unclear whether the Department provided credit towards the Notice for this payment.

POSITIONS OF THE PARTIES

Petitioner presents two arguments in favor of granting the Petition. First, it contends that the Notice relies upon a mistake in the Original Return, which indicated that it was a final filing. Petitioner submits that this was corrected by the Amended Return, and that it remains an active New York corporation subject to GCT under the Administrative Code of the City of New York (Administrative Code). It argues that it was unnecessary for the Department to utilize its discretionary authority to tax the entire gain from the Property Sale in the 2009 Tax Year. Therefore, on these grounds, Petitioner submits that the Notice be deemed erroneous.

In the alternative, Petitioner contends that Respondent erroneously accounted for the entire gain in a single year because it runs contrary to conformity in reporting. Petitioner notes that, for purposes of the GCT, the gain on the installment sale must be reported in the same manner in which it was reported for Federal tax purposes. As gains from installment sales are recognized when received (i.e., on a cash basis), it argues that Respondent cannot impose GCT on amounts not yet received. Therefore, based upon either or both of these points, Petitioner requests that the Petition be granted and the Notice cancelled.

Respondent notes that Petitioner bears the burden of proving that the subject Notice is erroneous. Respondent asserts that, on the forgoing facts, Petitioner failed to carry its burden of clearly and convincingly proving the Notice to be erroneous. It notes that Petitioner has not filed a GCT return since its 2009 Tax Year, and that Petitioner failed to introduce evidence

showing that it engaged in any activity in City since the Property Sale. Respondent submits that the 2009 Tax Year was the final period in which Petitioner was subject to GCT. It argues that, in order to impose GCT upon the gain from the Property Sale, it was necessary to disregard typical installment sale accounting, and include the entire gain, including amounts not yet received, in the 2009 Tax Year.

CONCLUSIONS OF LAW

In order to prevail, the taxpayer must establish that the challenged notice is clearly erroneous (Administrative Code § 11-680.5; *see Matter of State Ins. Fund v Boyland*, 282 App Div 516, 520 [1st Dept 1953], *aff'd* 309 NY 1009 [1956]). To meet this burden, Petitioner offers the two foregoing arguments.

The first argument raised by Petitioner is that the 2009 Tax Year was not its final period, and that it continues to be subject to the GCT. Therefore, the initial issue to be decided is whether Petitioner was subject to the GCT after the 2009 Tax Year.

As relevant herein, Administrative Code § 11-603.1 imposes the GCT upon corporations for the privilege of "doing business" in the City or "employing capital" within this jurisdiction (*see Matter of Allied-Signal, Inc. v Commissioner of Fin.*, 167 AD2d 327 [1st Dept 1991], *aff'd* 79 NY2d 73 [1991]).²

² Statutes, such as Administrative Code § 1-603.1, which impose tax, must be construed against taxation (*see Matter of Building Constrs. Assn. v Tully*, 87 AD2d 909, 910 [3rd Dept 1982]).

The Rules of the City of New York (GCT Rules) define both these concepts (19 RCNY §§ 11-03 [b], [c]). The taxpayer bears the burden of proving that the Rules are either "irrational or inconsistent" with the enabling statute (*Matter of BMW Pizza v Urbach*, 235 AD2d 146, 148 [3rd Dept 1997], citing *Matter of Noar Trucking Co. v State Tax Commn.*, 139 AD2d 869, 871 [3rd Dept 1988]). Further, an agency's interpretation of the statutes that it enforces is typically entitled to "great deference" (*Matter of Pena v New York State Gaming Commn.*, ___ AD3d ___ [3rd Dept 2016], 2016 NY Slip Op 07251; but see *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71 [1st Dept 2009] [deference may be declined when no "special competence" required]).

The determination of whether an entity is "doing business" in the City requires a case-by-case, factual inquiry (19 RCNY 11-03 [b] [2]; see *Banfi Prods. Corp. v O'Cleireacain*, 208 AD2d 479 [1st Dept 1994]). The Rules guide this analysis by providing the following:

"The term 'doing business' is used in a comprehensive sense and includes all activities that occupy the time or labor of people for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purpose of the tax" (19 RCNY 11-03 [b] [1]).

Similarly, the Rules guide the analysis of "employing capital" by stating that:

"The term 'employing capital' is used in a comprehensive sense. Any of a large variety of uses, which may overlap with other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or

activity in New York City will make the corporation subject to tax" (19 RCNY 11-03 [c]).

The Rules also constrain these concepts of "doing business" and "employing capital," and, thus, Administrative Code § 11-603.1, by providing the following:

"A corporation will not be deemed to be doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in New York City because of:

(i) the maintenance of cash balances with banks or trust companies or brokers in New York City" (19 RCNY 11-04 [c] [1]).

It is therefore appropriate to address whether the record shows that Petitioner either was "doing business" or "employing capital" in the City after the 2009 Tax Year.

Regarding post-sale activity, the record reveals a striking dearth of relevant proof. Petitioner's status as a valid State corporation does not speak to its activity in the City. The stipulation contains no agreements regarding its business or capital activity in the City. The only items related to Petitioner's post-sale activity in the City are the bank documents (Finding of Fact "8").

The transaction journal and other statements establish that, at least for the period of January 2014 through May 2015, Petitioner maintained a bank account in the Bronx. However, a thorough review of these documents reveals no clear connection between the banking and any activity in the City. The absence of relevant evidence severely hampers Petitioner's position (*see e.g. Matter of Meixsell v Commissioner of N. Y. State Dept. Of*

Taxation & Fin., 240 AD2d 860, 861 [3rd Dept 1997], *lv denied* 91 NY2d 811 [1998]). Given that the record fails to identify another activity beyond banking, it is inappropriate to consider whether the totality of Petitioner's activities sufficiently "overlap" to be deemed "employing capital" in the City (19 RCNY 11-03 [c]). Therefore, the banking activity stands as the only proof of Petitioner's post-sale City activity.

A corporation cannot be deemed to be either "doing business" or "employing capital" based solely on maintaining a bank account in the City (19 RCNY 11-04 [c] [1]). The record provides an insufficient factual basis for concluding that Petitioner was either "doing business," or "employing capital," in the City pursuant to Administrative Code § 11-603.1. It is concluded that the 2009 Tax Year was the final period in which Petitioner was either "doing business" or "employing capital" in the City and subject to the GCT.

The question remains whether the Department properly included the gain from the installment sale in Petitioner's 2009 Tax Year. Generally, State and City reporting of installment sale income follows the selected accounting method used by the taxpayer at the Federal level (*see Matter of Caprio v Department of Taxation & Fin.*, 117 AD3d 168 [1st Dept 2014], *rev'd on other grounds* 25 NY3d 744 [2015]). However, the Administrative Code permits the Department to disregard such accounting:

"The commissioner of finance may, whenever necessary in order to properly reflect the entire net income of any taxpayer, determine the year or period in which any item of income or deduction shall be included, without

regard to the method of accounting employed by the taxpayer" (Administrative Code § 11-602.8 [d]).

The language of Administrative Code § 11-602.8 (d) is clear and unambiguous, and "there is no occasion to resort to other means of interpretation" (*City of New York v Stringfellow's of N.Y.*, 253 Ad2d 110, 116 [1st Dept 1999]).³ In order to prevail, the aggrieved party must show that the agency "arbitrar[ily] and capricious[ly]" exercised its authority under this section (*see Matter of Pell v Board of Ed.*, 34 NY2d 222, 231 [1974]).

The record establishes that Petitioner sold its Property and filed a GCT return for the 2009 Tax Year, which was marked final. Petitioner reported the gain from the installment sale as it was received (i.e., on a cash basis). Petitioner did not, and has not, filed a GCT return for any subsequent period. On this basis, Respondent determined it could not assess GCT on installment payment made to Petitioner after the 2009 Tax Year, and invoked Administrative Code § 11-602.8 (d). It disregarded the general rule for installment sales, and included all the gain from the Property Sale in its 2009 Tax Year.

The facts present a rational basis for determining that, "in order to reflect the proper entire net income" of Petitioner (Administrative Code § 11-602.8 [d]), it was "necessary" to account for all gain from the Property Sale in the 2009 Tax Year (*id.*). Protecting the City's right to impose GCT upon the gain from a sale of property within its jurisdiction clearly comports with plain meaning of "necessary" as used within the statute (*Matter of Unimax*). The Department's determination and action

³ The clear language of Administrative Code § 11-602.8 (d) renders Respondent's discussion of Tax Law § 208.9 (d) moot.

were neither arbitrary, nor inconsistent with the relevant statute, and, therefore, cannot be overturned on these grounds. It is concluded that the Department properly invoked its authority under Administrative Code § 11-602.8 (d) when it included the entire gain from Petitioner's Property Sale in its 2009 Tax Year.

The remaining arguments raised by Petitioner are either moot or have been considered and are rejected.

Accordingly, the Petition of 1018 Morris Park Avenue Realty Inc. is denied and the Notice of Determination, dated November 29, 2012, is sustained.

DATED: December 5, 2016
New York, New York

_____/s/_____
Alexander F. Chu-Fong
Administrative Law Judge