

NEW YORK CITY TAX APPEALS TRIBUNAL

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In the Matter of :  
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1018 MORRIS PARK AVENUE REALTY INC. : DECISION  
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Petitioner. : TAT (E) 14-4 (GC)  
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1018 Morris Park Avenue Realty Inc. (Petitioner) filed an exception (Exception) to a Determination of an Administrative Law Judge (ALJ) dated December 5, 2016 (ALJ Determination) which sustained a Notice of Determination dated November 29, 2012 (Notice) issued by the New York City Department of Finance (Department) to Petitioner in the principal amount of \$537,573.06. The Notice asserted a New York City General Corporation Tax (GCT) deficiency for the fiscal year beginning December 1, 2008 and ending November 30, 2009 (Tax Year).

The Commissioner of Finance of the City of New York (Respondent or Commissioner) is represented by Amy H. Bassett, Esq., Senior Counsel, New York City Law Department. Petitioner is represented by Victor J. Molina, Esq. and Benjamin Sharav, Esq. of the Law Office of Victor J. Molina. Pursuant to the Rules of Practice and Procedure of the New York City Tax Appeals Tribunal, 20 RCNY §1-09(f), the Parties agreed to have this matter determined by the ALJ on submission without the need for appearance at a hearing. The Parties filed a Stipulation with exhibits (Stipulation). Neither Party requested oral argument; nor did the Tribunal Commissioners.

Petitioner was formed on December 21, 1993 as a New York business corporation.<sup>1</sup> The Parties stipulated that on December 21, 1993, Petitioner purchased two

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<sup>1</sup> Except as otherwise noted, the ALJ's Findings of Fact, although paraphrased and amplified herein, generally are adopted for purposes of this Decision. Certain Findings of Fact not necessary to this Decision have not been restated and can be found in the ALJ Determination.

parcels of property in New York City (City) identified as Bronx, Block 4102, Lots 1 and 8 (Property).<sup>2</sup> The Parties stipulated that on November 17, 2009, Petitioner sold the Property to MPGretty Realty LLC.<sup>3</sup>

Petitioner filed a GCT return for the Tax Year on January 27, 2010, checking the box indicating that the filer had ceased operations and that it was a final return (Original GCT Return).<sup>4</sup> Attached to the Original GCT Return was a federal corporate income tax return, Form 1120, for the Tax Year that was marked as a final return (Original Federal Return).<sup>5</sup> On both returns Petitioner reported the net gain from the sale of the Property under the installment method in accordance with Internal Revenue Code (IRC) §453, reporting a net gain for the Tax Year of \$199,457 out of a gross profit of \$6,273,730.

The deficiency asserted in the Notice was based on the Department's inclusion in Petitioner's income for the Tax Year the balance of the gain on the sale of the Property not reported by Petitioner of \$6,074,273 (\$6,273,730 gross profit minus the \$199,457 reported net gain). The stated reason for the asserted deficiency in the Notice was that a corporation that sells its assets on an installment basis and files a final GCT return is required to report on its final return the entire gain on the sale.<sup>6</sup>

Petitioner filed an amended GCT return for the Tax Year on August 15, 2013, which was not marked as a final return (Amended GCT Return) and which included an amended federal Form 1120 also not marked as final (Amended Federal Return).<sup>7</sup>

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<sup>2</sup> Stipulation ¶6.

<sup>3</sup> Stipulation ¶7. Although the Parties stipulated that Petitioner sold the Property consisting of two lots, the recorded deed identifies two grantors, Petitioner as to lot 1 and 1018 Morris Park Realty Inc. as to lot 8. Stipulation Exhibit F. The same individual, Manuel Vidal, signed for both entities. 1018 Morris Park Realty Inc. was dissolved November 4, 2010.

<sup>4</sup> Stipulation Exhibit G.

<sup>5</sup> Stipulation Exhibit H.

<sup>6</sup> Stipulation Exhibit A.

<sup>7</sup> Stipulation ¶¶ 11, 12, Exhibits J, K.

Petitioner also submitted copies of cancelled checks indicating that Petitioner paid the amounts shown to be due on the Original GCT Return and the Original Federal Return.<sup>8</sup>

Although the Amended Petition filed September 16, 2014<sup>9</sup> stated that returns for the periods ending November 30, 2010 through November 30, 2013 were being prepared, the Parties stipulated that Petitioner did not file any GCT returns for any periods subsequent to the Tax Year.<sup>10</sup>

Petitioner also submitted a Transaction Journal and other bank records from its Citibank account, which Petitioner maintained at a branch in the Bronx.<sup>11</sup> Those bank records show that Petitioner maintained a cash balance in that Citibank account during the years 2014 and 2015 and that Petitioner made a recurring monthly deposit of \$53,624.23. The bank records do not identify the source of these recurrent deposits. However, Petitioner stated in its brief filed with the ALJ and in its Exception that these bank deposits represented installment payments Petitioner collected under its agreement to sell the Property.

Petitioner argues in its brief filed with the ALJ and in its Exception that it continues to do business in the City. Petitioner argues that the records from its Citibank account demonstrate that it remains an active corporation and that its bank accounts show activity in 2015.<sup>12</sup> On the basis of these facts and on the fact that Petitioner has not been dissolved, Petitioner argues that it did not cease doing business in the City and thus the Department improperly disregarded the installment sale by taxing the full amount of the gain in the Tax Year.<sup>13</sup>

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<sup>8</sup> Stipulation Exhibit L.

<sup>9</sup> The Petition filed September 16, 2014 (Stipulation Exhibit C) amended an earlier Petition received on April 29, 2014 containing the same statement.

<sup>10</sup> Stipulation ¶17. The Record is silent as to whether any federal returns were filed for periods after the Tax Year.

<sup>11</sup> Stipulation Exhibits S, T and L.

<sup>12</sup> The Record is silent as to whether there was any activity in the bank account after 2015.

<sup>13</sup> Petitioner's Exception further asserts that the New York State Department of Taxation and Finance (State DTF) "revised its Notice of Deficiency in response to" the amended returns. The Parties stipulated that the State DTF issued a proposed modification of a notice of deficiency for the Tax Year reducing the tax due (Stipulation ¶13,

Respondent argues that he properly exercised his discretionary authority pursuant to §11-602.8(d) of the Administrative Code of the City of New York (Administrative Code) to disregard Petitioner's use of the installment method of accounting to ensure that Petitioner's deferred gain from the sale did not escape taxation under the GCT after Petitioner ceased to do business in the City.

The ALJ sustained the Notice, concluding that Petitioner had failed to establish that it was doing business in the City after the Tax Year. The ALJ ruled that Respondent properly exercised his discretion under Administrative Code §11-602.8(d) to disregard the installment method of accounting for Petitioner's sale of the Property and include the entire gain from the sale of the Property in Petitioner's income for the Tax Year. We agree.

IRC §1001(c) provides that: "Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized." IRC §1001(d) provides that in the case of an installment sale, the portion of an installment payment representing gain is taxable in the year the installment payment is received. IRC §453(a) provides generally that "income from an installment sale shall be taken into account for purposes of this title under the installment method."

IRC §453(c) defines the installment method as "a method under which the income recognized for any taxable year from a disposition is that proportion of the payments received in that year which the gross profit (realized or to be realized when payment is completed) bears to the total contract price." Therefore, the installment method is an exception to the general rule under IRC §1001 requiring that the entire gain on a sale of property be recognized in the year of the sale. Under the installment method, recognition

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Stipulation Exhibit U) and further stipulated that the State DTF issued a satisfaction of judgment vacating a warrant filed February 17, 2015. Stipulation ¶16, Stipulation Exhibit M. However, nothing in the Record indicates that either the deficiency asserted by the State DTF for the Tax Year or the satisfaction was related to the installment sale of the Property.

of the gain realized on the sale is deferred and spread out over the contractual installment payments, and only a portion of each annual payment, representing a percentage of gross profit on the sale, is recognized and included in income each year.

Administrative Code §11-603.1 imposes the GCT on corporations:

“For the privilege of doing business, or of employing capital, or of owning or leasing property in the city in a corporate or organized capacity, or of maintaining an office in the city, for all or any part of each of its fiscal or calendar years. . . .”

Under this provision, the gain from the sale of the Property was properly subject to the GCT. However, if Petitioner were permitted to report the gain on the sale using the installment method, Petitioner would avoid paying GCT on the deferred gain reflected in the payments due under the installment sale of the Property after it ceased to do business in the City. With the exception of the gain reflected in the first installment payment, the entire gain on the sale of the Property would permanently escape GCT.

Administrative Code §11-602.8(d) allows the Commissioner to disregard Petitioner’s method of accounting where it results in the understatement of income subject to the GCT:

“The commissioner of finance may, whenever necessary in order properly to 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. . . .”

Title 20 NYCRR §3-2.8 contains the following example interpreting the corresponding provision under New York Tax Law §208.9(d):

“Example 2: A foreign corporation sells its New York State real estate on an installment basis, and terminates its taxable status in New York State in the year of the sale. The full profit on the sale must be included in entire net income in the year of the sale.”

Long-standing published statements of Department policy also provide that the installment method of accounting should be disregarded when a corporation files a final

return and ceases to do business in the City after selling its assets in an installment sale.<sup>14</sup> Unless Petitioner can establish that it continued to do business in the City after the Tax Year, the Commissioner is authorized under Administrative Code §11-602.8(d) to disregard Petitioner's use of the installment method and tax the entire gain from the sale of the Property in the Tax Year.

Title 19 RCNY §11-04(c)(1), provides in relevant part that:

“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. . . .”

Thus, the maintenance of accounts at a bank branch in the City alone is insufficient to establish that Petitioner was doing business in the City after the Tax Year. Petitioner's bank records for 2014 and 2015 do not identify the source of the deposits or the identities of the persons to whom any checks were written. They provide no proof that Petitioner was “doing business” in the City.

The only recurring item of any substance in Petitioner's bank records is a monthly deposit of \$53,624.23. By asserting that these recurring receipts were the installment payments for the sale of the Property, Petitioner has brought itself squarely within two published Finance Letter Rulings: FLR 91-33 and FLR 143-GC-12/88.<sup>15</sup> In each ruling, the taxpayer sold all of its assets under the installment method and its only activity was to collect the payments under the installment obligation. Each ruling concluded that the taxpayer had ceased doing business in the City and that Respondent properly exercised

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<sup>14</sup> Finance Letter Ruling 92-130 (November 19, 1992), 1992 WL 404541; Finance Letter Ruling 91-33 (September 25, 1991), 1991 WL 253627; Finance Letter Ruling 143-GC-12/88 (December 12, 1988), 1988 WL 252260. *See also*, Department of Finance Information Bulletin 2-A, August 1973, §7, Example (A corporation that has discontinued business activities in the City and has disposed of all its assets in the City is not considered doing business in the City).

<sup>15</sup> Finance Letter Ruling 91-33 (September 25, 1991), 1991 WL 253627; Finance Letter Ruling 143-GC-12/88 (December 12, 1988), 1988 WL 252260.

authority under Administrative Code §11-602.8(d) to disregard the installment method and tax the entire gain in the year of the sale.

*Matter of Delmhorst v State Tax Commn*, 92 AD2d 981 (3d Dept 1983), *affd* 60 NY2d 628 (1983) presents the identical issue under the New York State Personal Income Tax. In 1967 Mr. Delmhorst, a New York State resident, sold his seat on the New York Stock Exchange on an installment basis. On January 1, 1968, he and his wife became residents of Connecticut and filed no further New York State income tax returns. During the years 1968, 1969 and 1970, Mr. Delmhorst collected interest, but not principal, under the installment note. Because Mr. Delmhorst collected no principal on the installment note in the year of the sale, he did not report any gain on the sale in 1967. In 1972 the State DTF issued a notice of deficiency against Mr. Delmhorst asserting that the entire gain on the sale of the stock exchange seat was taxable in 1967 and a second notice of deficiency against Mr. Delmhorst and his wife asserting that the interest collected on the installment note was taxable in 1968, 1969 and 1970 as New York source income.

The court held that former Tax Law §654(c)(1),<sup>16</sup> a provision analogous to Administrative Code §11-602.8(d):

“requires an individual, who changes his status from resident to nonresident, as here, to accrue and include on his New York State income tax return, for the taxable year prior to the change, any net gain which accrues prior to residency change. This accrual is required regardless of the taxpayer’s method of accounting and he is required to report the entire amount of the gain remaining unpaid. . . .” (Citation omitted.)<sup>17</sup>

The full amount of the gain on the sale of the stock exchange seat, therefore, was taxable in the year of the sale because Mr. Delmhorst changed his residency the following year and was no longer subject to tax as a resident.

However, the court further held that the interest collected on the installment note was not New York source income. The court reasoned that “[t]he income producing

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<sup>16</sup> Tax Law §654 was repealed by Laws of 1987 ch. 28. The same provision appears in current Tax Law §639(a).

<sup>17</sup> *Delmhorst*, at 982.

intangible personal property is the installment note, upon which the interest was paid, and not the stock exchange seat covered by the note. The installment note was never used in a business, trade, profession or occupation carried on in New York State. . . .”<sup>18</sup> Thus, *Delmhorst* not only stands for the proposition that the entire amount of gain on an installment sale is taxable in the year of sale when the seller leaves the taxing jurisdiction, but also supports the argument that merely holding and collecting on an installment obligation received from the sale of property in the City does not constitute engaging in a trade or business in the City.

We note that, although Petitioner asserted in its Petition that GCT returns for the periods subsequent to the Tax Year were being prepared, the Parties later stipulated that Petitioner has not filed any GCT returns since the Tax Year. Thus, Petitioner’s own actions serve to confirm that it ceased doing business in the City when it sold the Property in the Tax Year.

Therefore, the ALJ Determination is affirmed.<sup>19</sup> Commissioner Frances J. Henn did not participate in this decision.

Dated: August 7, 2017  
New York, NY

/s/  
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Ellen E. Hoffman  
President and Commissioner

/s/  
\_\_\_\_\_  
Robert J. Firestone  
Commissioner

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<sup>18</sup> *Id.*

<sup>19</sup> We have considered all of the other arguments of the Parties and find them unpersuasive.