ILLINOIS INDEPENDENT

TAX TRIBUNAL

B & G REALTY, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	RECEIVED
ILLINOIS DEPARTMENT OF REVENUE,	)	NOV 03 2015
	)	
	)	BY:_________
Respondent.	)	

15 TT 227

PETITION

The Petitioner, B & G Realty, Inc., by and through its attorneys, Foley & Lardner LLP, hereby petitions the Illinois Independent Tax Tribunal to review and reverse a Notice of Denial dated September 4, 2015 ("Notice") issued by the Illinois Department of Revenue for the reasons stated below:

THE PARTIES

1. Petitioner, B & G Realty, Inc. ("B&G"), is a corporation duly organized and existing under the laws of Wisconsin.
2. Petitioner maintains its principal place of business at 100 East Wisconsin Avenue, Suite 1900, Milwaukee, Wisconsin 53202-4125.
3. Petitioner's tax identification number is 39-1047119.

4. Petitioner is represented by Foley & Lardner LLP attorney John B. Palmer, who is located at 321 North Clark Street, Suite 2800, Chicago, Illinois 60654-5313 and can be reached at (312) 832-4575.

5. The Marcus Corporation ("Marcus Corporation") is a corporation duly organized and existing under the laws of Wisconsin.

6. Marcus Corporation owns 100% of B&G.

7. B&G is a member of Marcus Corporation's unitary group.

8. Respondent, Illinois Department of Revenue ("Department"), is an agency of the state of Illinois responsible for administering and enforcing the revenue laws of the state of Illinois. 20 Ill. Comp. Stat. 5/5-15.

JURISDICTION

9. The Department issued the Notice to B&G denying B&G's claim for refund of income tax overpayment in the amount of $102,486 for the taxable year ended May 26, 2005. A copy of the Notice is attached as Exhibit A.

10. This Tribunal has original jurisdiction over all Department determinations reflected on a Notice of Denial where the amount at issue in the Notice exceeds $15,000, exclusive of penalties and interest. 35 Ill. Comp. Stat. 1010/1-45.

11. B&G is hereby timely filing this Petition within 60 days of the date of the Notice. 35 Ill. Comp. Stat. 5/910(a).

PROCEDURAL HISTORY

12. B&G filed an amended Illinois income tax return on April 1, 2010 for its fiscal year ended May 26, 2005, correcting its error that it made on its originally filed income tax

return (it erroneously included an Illinois add back for deferred gains on exchanges that qualified under section 1031 of the federal Internal Revenue Code), which results in a $102,486 refund.

13. The Department on audit agrees that this add back was in error.

14. However, the Department made other adjustments, all of which are agreed to except the adjustment excluding incidental or occasional sales from the sales factor receipts.

15. As a result of this adjustment, the Department issued the Notice to B&G denying the $102,486 refund.

16. B&G is part of the Marcus Corporation unitary group, which conducts numerous businesses throughout the United States.

17. Marcus Corporation's business activities include lodging, movie theatres, restaurants, and significant real estate development and sales.

18. During the fiscal year ended May 26, 2005, B&G sold the assets of its Baymont Inn & Suites division for approximately $350 million, recognizing approximately $178 million of gain.

19. Marcus Corporation included the Baymont Inn & Suites sales proceeds in its sales factor (both the numerator and denominator) for its fiscal year ended May 26, 2005.

20. The Department views the sale of the Baymont Inn & Suites as an occasional sale and excluded the sales proceeds from the sales factor (both the numerator and denominator) for the fiscal year ended May 26, 2005, pursuant to Ill. Admin. Code 100.3380(c)(2).

21. As a result, the Department increased Marcus Corporation's Illinois apportionment factor from approximately 8.4% to approximately 10.8%.

22. Applying the higher sales factor increases the income apportioned to Illinois from approximately $15.3 million to approximately $19.8 million and gain from the sale of the Baymont Inn & Suites from approximately $14.9 million to approximately $19.3 million, whereas the actual gain from the sale of Baymont Inn & Suites assets located in Illinois is only approximately $3.7 million.

RELEVANT FACTS AND BACKGROUND

23. Since the early 1990s, Marcus Corporation has engaged in numerous real estate transactions as part of its regular ongoing business operations.

24. Marcus Corporation regularly purchases, develops, and sells real estate related to each of its business units. Each year, such activity is a specific focus of Marcus Corporation's management team and contributes to the profitability of Marcus Corporation.

25. Marcus Corporation developed and operated 18 Applebee's within Wisconsin and northern Illinois. After years of growing the investment, Marcus Corporation sold the Applebee's properties in 1996.

26. Similarly, Marcus Corporation developed and operated a chain of 31 Kentucky Fried Chicken restaurants in Wisconsin and subsequently sold the properties in 2001.

27. Marcus Corporation remained in the restaurant real estate business by developing and expanding new dining concepts in a growing number of hotels and movie theatre megaplexes it manages. These dining concepts include the Mason Street Grill, the Chop House restaurants, Miller Time Pub & Grill restaurants, Zaffiro's Pizzarias, and numerous Take 5 cocktail lounges.

28. In addition to restaurant related real estate transactions, Marcus Corporation regularly purchases large parcels of land for constructing movie theatre megaplexes.

29. In conjunction with developing megaplexes, Marcus Corporation sells out lots to third parties to develop complimentary retail developments.

30. After constructing a replacement movie theatre, Marcus Corporation customarily sells the old properties for redevelopment by its purchasers.

31. Throughout the early 2000s, Marcus Corporation expanded numerous existing movie theatre locations and purchased several others in nearby states.

32. The lodging and hotel business line follows a similar pattern of real estate investment. Since the year 2000, Marcus Corporation has purchased ownership positions in several hotels to expand its business holdings.

33. In 2005, this included the opening of a newly constructed Four Points by Sheraton developed by Marcus Corporation in downtown Chicago as well as the purchase of the Wyndham Milwaukee Center (subsequently converted into the InterContinental Milwaukee).

34. In 2006, Marcus Corporation acquired the Westin Columbus hotel, undertaking significant renovations, selling the appreciated property in 2007, and retaining a 15% joint venture interest after the sale.

35. From 2004 to 2006, Marcus Corporation developed the Platinum Hotel & Spa, valued at over $100 million, in Las Vegas, Nevada. Marcus Corporation sold all but 16 units in the high-rise condominium hotel and currently manages the rental pool of 255 condominium units.

36. In early 2007, Marcus Corporation re-opened the Skirvin Hilton following a more than $50 million renovation of the historic hotel. The property was acquired as a 99% equity partner after the hotel remained vacant for nearly 20 years.

37. Other renovations include a $30 million redesign of the Milwaukee Hilton City Center Hotel.

38. This consistent pattern of activity in the real estate market by Marcus Corporation shows that it does not simply engage in incidental or occasional sales of capital assets. Rather, the investment, development, and sales of real estate is an integral part of Marcus Corporation's unitary business, grossing an average of $18 million per year from its fiscal year ended May 1996 through its fiscal year ended May 2007 (excluding the B&G sale of Baymont Inn & Suites).

39. Since the fiscal year ended May, 2003, the last year that tax records are readily available, Marcus Corporation has included the sale proceeds from the sales described in paragraphs 34, 35, and 38 in its unitary group's sales factor reported on IL-1120.

APPLICABLE LAW

40. Petitioner relies on the general rule in 35 Ill. Comp. Stat. 5/304 and Ill. Admin. Code 100.3370(a)(1) that requires a taxpayer to include all gross receipts derived from transactions and activity in the regular course of its trade or business as sales when calculating the taxpayer's Illinois sales factor.

41. The Department, however, relies upon the special rules in Ill. Admin. Code 100.3380(c)(2) and Ill. Admin. Code 100.3380(a) for the position that the proceeds from the sale of the Baymont Inn & Suites assets constitute an "incidental or occasional sale" to be excluded from the sales factor.

ERROR 1

The Department incorrectly excluded the Baymont Inn & Suites sale from Marcus Corporation's Illinois Sales Factor.

42. Petitioner hereby restates and realleges the allegations contained in paragraphs 1 through 41 as if set forth fully herein.

43. The sales factor is a fraction, the numerator of which is the total sales in Illinois during the taxable year, and the denominator of which is the total sales everywhere during the taxable year. 35 Ill. Comp. Stat. 5/304(a)(3).

44. Illinois tax law requires a taxpayer to include all gross receipts derived from transactions and activity in the regular course of its trade or business as sales when calculating the taxpayer's Illinois sales factor. 35 Ill. Comp. Stat. 5/304(a)(3); Ill. Admin. Code 100.3370(a)(1).

45. Gross receipts deemed to arise from an incidental or occasional sale of assets are excluded when calculating the sales factor. Ill. Admin. Code 100.3380(c)(2). The incidental or occasional sale exception is meant to apply in limited circumstances, such as the one-time sale of a factory. *Id.*

46. Proceeds from the sale, rental, leasing, licensing, or other use of real property are supposed to be included in the sales factor of a business. Ill. Admin. Code 100.3370(c)(3)(A)(ii).

47. Additionally, if a taxpayer derives receipts from the sale of equipment used in its trade or business, such receipts constitute "sales". Ill. Admin. Code 100.3370(a)(1)(F). The administrative code uses the example of a truck company that owns a fleet of trucks and sells them under a regular replacement program. The gross receipts from the sale of the equipment are required to be included in the sales factor.

48. In 2005, when B&G sold the Baymont Inn & Suites assets, it was acting consistently with Marcus Corporation's regular business practices of investing in, developing, and ultimately selling property. Accordingly, Marcus Corporation included the sales in its Illinois sales factor.

49. As set forth in paragraphs 23 through 38, Marcus Corporation regularly purchases, develops, and sells real property as part of its unitary business. Marcus Corporation's real estate business is not the equivalent of a manufacturing business selling a factory. Marcus Corporation does not sell real estate without any real business plan.

50. Rather, Marcus Corporation identifies potential investments, purchases real property, develops the property into a successful business, and sells the property at a profit. If not for profit, the sale takes place after Marcus Corporation established a replacement. In either case, the sales are not isolated or occasional, but an integral part of Marcus Corporation's business.

51. This understanding is consistent with the Illinois Administrative Code's discussion of the isolated or occasional sale relied upon by the Department. When discussing the occasional sale exclusion, the administrative code uses an example that excludes the sale of a factory or plant after years of operation. Ill. Admin. Code 100.3380(c)(2).

52. Marcus Corporation's regular sale of real estate and other property is not occasional or isolated in nature like the sale of a plant or factory. The regular sale of real estate and other property by Marcus Corporation in its trade or business is more akin to a business selling equipment in Ill. Admin. Code 100.3370(a)(1)(F).

53. Inclusion of the Baymont Inn & Suites proceeds in Marcus Corporation's Illinois sales factor also does not cause a gross distortion of Marcus Corporation's Illinois

apportionment, but rather prevents further distortions. Including the Baymont Inn & Suites proceeds results in an 8.4% Illinois apportionment factor for fiscal year ended May 26, 2005, and results in approximately $15.3 million of Illinois income.

54. Excluding the Baymont Inn & Suites proceeds from Marcus Corporation's Illinois sales factor leads to an inequitable result. Excluding the Baymont Inn & Suites proceeds results in a 10.8% apportionment to Illinois for fiscal year ended May 26, 2005, and results in approximately $19.8 million of Illinois income, or approximately $4.5 million more income.

55. Importantly, actual gain from the sale of Baymont Inn & Suites assets located in Illinois is only approximately $3.7 million.

56. If the total Baymont Inn and Suites approximate $178 million gain is excluded from apportionable income, only $5.0 million of apportionable income remains, resulting in approximately $0.5 million apportioned to Illinois (using the Department's 10.8% apportionment factor).

57. The gain from Baymont Inn & Suites assets located in Illinois was only $3.7 million, which if added to the $0.5 million of apportioned income (in paragraph 56), results in Illinois taxable income in total of approximately $4.2 million, or approximately $11 million less than reported by Marcus Corporation. Adopting the Department's apportionment factor exacerbates this disparity. Thus, excluding the proceeds from the sales factor increases an already distortive apportionment.

58. The occasional sale exclusion is meant to apply in situations in which an asset sale grossly distorts Illinois income. Here, no such distortion exists.

59. Including the Baymont Inn & Suites assets will more closely reflect B&G's (as part of Marcus Corporation's unitary group) Illinois income both inside and outside of Illinois.

CONCLUSION AND RELIEF REQUESTED

Baymont Inn & Suites sales proceeds must be included in the Illinois Sales Factor.

60. Petitioner requests that this Tribunal nullify the Notice and include B&G's (as part of Marcus Corporation's unitary group) sales proceeds in the Illinois sales factor for the fiscal year ended May 26, 2005, and grant its $102,486 refund.

Respectfully Submitted,

B & G Realty, Inc.

By: John B Palmer

John B. Palmer, one of the Attorneys
Representing Petitioner

FOLEY & LARDNER LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60654-5313
(312) 832-4575
jpalmer@foley.com
ARDC #: 2137704

<u>EXHIBIT A</u>

NOTICE OF DENIAL

See attached.

Illinois Department of Revenue
101 W. Jefferson St.
Springfield, IL 62702

NOTICE OF DENIAL

9/4/2015

FORM: IL-1120

FEIN: 39-1047119

B & G REALTY INC
100 E WISCONSIN AVE STE 1900
MILWAUKEE WI 53202-4132

TAXABLE YEAR ENDING
5/2005

AMOUNT DENIED
$102,486

Pursuant to Section 909(e) of the Illinois Income Tax Act, notice is hereby given that your claim for refund of income tax overpayment in the amount of $102,486 for the taxable year ending 5/31/2005 is denied in full.

IF YOU DO NOT AGREE, Section 910(a) of the Act provides that the Department shall reconsider the denial if within 60 days of the date of this notice, the claimant or his authorized representative files a written protest setting forth the grounds upon which the protest is based and, if requested, shall grant the taxpayer or his authorized representative a hearing (under Section 914). Thus, if you disagree with the proposed denial of your claim, you may file a protest and, if desired, request a hearing. If an adequate and timely protest is not received, the denial of your claim in the amount shown above will become final as of the expiration of the aforementioned 60-day period pursuant to Section 909(f). A protest, if filed, should be forwarded to the address shown below.

Sincerely,

Constance Beard

Constance Beard 134
Director

Enclosures: EAR-14
IDR-867
Return Envelope

NOTICE SECTION
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19012
SPRINGFIELD, IL 62794-9012
PHONE: 217 785-6711
ATTENTION: JN A1116787712

STATEMENT

DATE: 9/4/2015
FORM: IL-1120
FEIN: 39-1047119
NAME: B & G Realty Inc

TAXABLE YEAR ENDING: 5/26/2005

Track no.: A1116787712

We adjusted your addition modifications to include Illinois Income Tax, Illinois Replacement Tax, or both to the extent deducted in the computation of federal taxable income.
[35 ILCS 5/203(b)(2)(B), (c)(2)(C), (d)(2)(B)]

We adjusted your addition modifications to reflect the correct addback of the federal bonus depreciation, or the correct reversal of the Illinois depreciation for bonus depreciation assets in the last year you are allowed a federal depreciation deduction, as required to be shown on the Form IL-4562.
[35 ILCS 5/203(b)(2)(E-10), (b)(2)(E-11), (c)(2)(G-10), (c)(2)(G-11), (d)(2)(D-5), (d)(2)(D-6)]

We adjusted your subtraction modifications for contributions to certain job training projects to reflect the correct amount as allowed by Illinois law.
[35 ILCS 5/203(b)(2)(P), 203(c)(2)(N)]

We adjusted your subtraction modifications to reflect the correct amount of Illinois depreciation related to bonus depreciation, assets, and the reversal of the bonus depreciation addback for an asset in the last year you are allowed a federal depreciation deduction for that asset, as required to be shown on Form IL-4562.
[35 ILCS 5/203(b)(2)(T), (c)(2)(R), (d)(2)(O)]

We excluded from your sales factor receipts from incidental or occasional sales.
[86 IL Adm. Code 100.3380(c)(2)]

We adjusted your sales factor to exclude royalties since the gross receipts from license, sale, ect., from patents did not exceed 50% of the total receipts.
[35 ILCS 5/304(a)(3)(B-2)]

We adjusted your sales factor to include your share of the gross receipts of partnerships that are unitary with your business operations. [86 IL Adm. Code 100.3380(d)]