No. 99-1563

In the Supreme Court of the United States

S & M ENTERPRISES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
HAROLD D. LESTER, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether New York's former "Tax On Gains Derived From Certain Real Property Transfers," N.Y. Tax Law § 1441 (McKinney 1987) (repealed 1996), was a capital gains tax, rather than a transfer tax, and therefore not reimbursable under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4653(1), when the property was acquired by the United States by eminent domain.

2. Whether the Fifth Amendment requirement of just compensation for the taking of private property obligates the government to reimburse a property owner for a state tax assessed on the owner's gain on the transfer of the property.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 99-1563

S & M ENTERPRISES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 199 F.3d 1317. The opinion and order of the Court of Federal Claims (Pet. App. 9a-35a) is reported at 43 Fed. Cl. 210.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1999. The petition for a writ of certiorari was filed on March 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Acting on behalf of the Postal Service, the United States acquired petitioner's interest in certain real property through eminent domain by filing a Declara-

tion of Taking in the United States District Court for the Southern District of New York. Pet. App. 1a-2a, 15a. Petitioner and the United States stipulated that just compensation for the taking was $22,373,051, inclusive of interest. The district court entered a decree which adopted that amount as the just compensation for the property, and the United States paid that amount in its entirety to petitioner. *Id.* at 15a.

In contemplation of the payment of the amount awarded, the New York State Department of Taxation and Finance assessed a tax on petitioner of $958,627.30 under former Article 31-B of the New York State Tax Law, entitled "New York State Tax on Gains Derived from Certain Real Property Transfers." Pet. App. 9a, 15a. That Article provided:

> A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

N.Y. Tax Law § 1441 (McKinney 1987) (repealed 1996) (Pet. App. 44a).[1] The New York statute defined the term "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." N.Y. Tax Law § 1440(3) (McKinney 1987) (repealed 1996) (Pet. App. 42a). Based upon the payment of the final award in the condemnation proceeding, and following further administrative proceedings, the NYS Department of Taxation and Finance assessed an additional Article 31-

---

[1] The New York statute exempted property from the gains tax "[i]f the consideration [paid] is less than one million dollars." N.Y. Tax Law § 1443(1) (McKinney 1987) (repealed 1996) (Pet. App. 44a).

B tax of $96,350, with interest of $147,636.34 from the date of the taking. Pet. App. 15a-16a.

Petitioner submitted a claim to the Postal Service demanding reimbursement for the Article 31-B tax under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), 42 U.S.C. 4653(1). That statute authorizes reimbursement to the owner of property acquired through condemnation for "recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States." *Ibid.* When the Postal Service denied that claim, petitioner filed this suit in the Court of Federal Claims to obtain reimbursement of the Article 31-B tax. Pet. App. 16a.

2. The Court of Federal Claims granted summary judgment for the government. Pet. App. 9a-35a. The court held that a transfer tax, by definition, is a "tax imposed by states on each deed conveying real estate." *Id.* at 31a (quoting *Black's Law Dictionary* 1498 (6th ed. 1990)). The court further held that an income tax is "a tax on a person's income, * * * profits and the like, or the excess thereof over a certain amount." *Ibid.* (quoting *Black's Law Dictionary* 764 (6th ed. 1990)). The court concluded that, because the Article 31-B tax was imposed upon the gains realized upon the sale of the property, rather than upon the State's cost of the transfer transaction, the Article 31-B tax resembled an income tax, not a transfer tax, and was therefore not reimbursable under the URA. *Id.* at 32a-33a. The court further concluded that the Article 31-B tax was not encompassed within the URA as a "similar expense" to a transfer tax that was "incidental" to the transfer. *Id.* at 33a-34a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court rejected petitioner's argument that the

Article 31-B tax more closely resembled a reimbursable transfer tax than a non-reimbursable gains tax. The court of appeals determined that, "if the tax is based solely on the *gain*, if any, and not on the *size* of the transfer, it is never a 'transfer tax, or similar expense' and, therefore, never reimbursable under the [URA]." *Id.* at 7a. The court recognized that, "[i]n a case, such as this one, where if there had been a loss incurred in the transfer no New York transfer gains tax would have been due, the tax is solely against the gain, and not against the conveyance, [and] the tax cannot be a 'transfer tax, or similar expense.'" *Ibid.* The court concluded that "[i]t is, instead, merely a tax on the gain, and therefore, not reimbursable." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. When the government takes property by eminent domain, the URA requires reimbursement of "recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States." 42 U.S.C. 4653. The URA is not designed to reimburse an owner for every conceivable expense that might be incurred through the sale of his real property. *Collins* v. *United States*, 946 F.2d 864, 868 (Fed. Cir. 1991); 116 Cong. Rec. 40,168-40,169, 40,171 (1970). In particular, Congress did not intend through the URA to require the government to compensate property owners for taxes on capital gains that may be realized through the condemnation. *Collins* v. *United States*, 946 F.2d at 868; 42 U.S.C. 4653; 116 Cong. Rec. at 40,168-40,169, 40,171.

Petitioner nonetheless claims that the New York Article 31-B tax is reimbursable under the URA on the theory that it constituted a "transfer tax" or "similar expense," rather than a capital gains tax. Because the Article 31-B tax was repealed by New York in 1996, this issue has limited prospective importance. Moreover, all of the courts that have considered the Article 31-B tax have consistently concluded that it was a gains or income tax, not a transfer tax or similar expense. See, *e.g.*, *In re: 995 Fifth Avenue Assocs., L.P.*, 963 F.2d 503, 512, 513 (2d Cir.), cert. denied, 506 U.S. 947 (1992); *National R.R. Passenger Corp.* v. *10,178 Square Feet of Land*, 789 F. Supp. 142, 143 (S.D.N.Y. 1992); *Heller* v. *State*, 611 N.E.2d 770, 771 (N.Y. 1993); *In re Williams*, 188 B.R. 331, 336-337 (E.D.N.Y. 1995); *In re Jacoby-Bender, Inc.*, 40 B.R. 10, 15 (Bankr. E.D.N.Y. 1984), aff'd, 758 F.2d 840 (2d Cir. 1985). And, every court that has considered whether the Article 31-B tax was reimbursable under the URA, or under a similar New York State statute providing for reimbursement of transfer taxes, has concluded that it is not. Pet. App. 7a-8a; *National R.R.*, 789 F. Supp. at 143; *Heller* v. *State*, 611 N.E.2d at 771. These uniform decisions are based on the plain language of the applicable statutes: the state tax was "imposed on *gains* derived from the transfer of real property," not upon the transfer itself. N.Y. Tax Law § 1441 (McKinney 1987) (repealed 1996) (emphasis added); see Pet. App. 5a-8a.

Petitioner asserts that the Article 31-B tax was a transfer tax because the State ordinarily required the tax to be paid before permitting a deed to be recorded. As the New York courts have held, however, the timing of the payment served merely as a mechanism to ensure collection; it did not convert the Article 31-B tax on capital "gains" into a "transfer tax." *Heller* v. *State*,

585 N.Y.S.2d 579, 581 (1992), aff'd, 611 N.E.2d 770 (1993). Moreover, the state law did not actually require the transferor to "pay" the tax before recording the deed. Instead, the transferor was required only to make a deposit of a "tentative assessment of the amount of tax" that was anticipated ultimately to be due. N.Y. Tax Law § 1447(f)(1)(i) (McKinney 1987) (Pet. App. 46a); *Heller* v. *State*, 611 N.E.2d at 772.[2]

Because the state tax is imposed on the "gain" derived from the transfer of the property, the courts below correctly held that it does not fall within the scope of reimbursable expenses under the URA. There is no conflict among the courts nor other reason warranting further review of that holding in this case.

2. Petitioner also asserts that, assuming that the URA does not provide reimbursement for the Article 31-B tax, petitioner "has been denied just compensation to the extent that its net recovery as a result of the condemnation has been reduced by the amount of the transfer gains tax it is out-of-pocket." Pet. 22. It does not appear that petitioner properly preserved this argument before the trial court. The contention was not raised or discussed in any of the briefing prior to entry of judgment in the trial court. Because the court of appeals also did not address petitioner's new con-

---

[2] In any event, no deed is involved in a federal condemnation under the Declaration of Taking Act, 40 U.S.C. 258a. Since recording is not necessary to perfect the government's right of title to the real property, the Article 31-B tax can not represent a "transfer tax" incidental to "conveying such real property to the United States." *Collins* v. *United States*, 946 F.2d at 869. New York has an actual transfer tax, entitled the "Real Estate Transfer Tax Law," which is separate and distinct from the Article 31-B tax. See N.Y. Tax Law §§ 1400-1410 (McKinney 1987). This further confirms that the Article 31-B tax is a gains tax, not a transfer tax.

tention in its published decision in this case, this case creates no binding precedent on the issue that petitioner now seeks to raise.

It is, in any event, settled that the proper measure of just compensation for the taking of private property is "the fair market value of [the] property at the time of the taking." *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973). "And this value is normally to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" *Ibid.* (quoting *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961)). In the district court proceedings that preceded the filing of this case, petitioner stipulated to an amount of just compensation for the taking of its property that did not include the amount that petitioner now seeks. Pet. App. 15a.

Petitioner argues that, despite its binding stipulation, it is entitled to receive an amount *greater* than the fair market value of its real property. That contention is frivolous, however, for the Court of Federal Claims lacks jurisdiction to award judgment for just compensation, or to increase a just-compensation award, when the property was taken pursuant to a final award entered in a district court condemnation proceeding. *Dominion Smelting & Refining Corp.* v. *United States*, 102 Ct. Cl. 281, 284 (1944); 28 U.S.C. 1345, 1358, 1403. Moreover, the Article 31-B tax was imposed solely by New York, without any involvement by the federal government, and no recovery could be required from the United States for that alleged "taking." See, *e.g.*, *Lenoir* v. *United States*, 222 Ct. Cl. 499, 500 (1979); *Edison Sault Elec. Co.* v. *United States*, 552 F.2d 326, 333 (Ct. Cl. 1977).

It is, in any event, well established that "compensation under the Fifth Amendment may be recovered

only for property taken and not for incidental or consequential losses." *R.J. Widen Co.* v. *United States*, 357 F.2d 988, 994 (Ct. Cl. 1966); see *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-778 (1946). The gains tax imposed by New York upon the transferor in a federal condemnation is precisely such an unintended incident of the taking. *Ibid.* Petitioner's entitlement to just compensation for the taking of its property means payment for the "fair market value" of that property, not reimbursement for the state capital gains taxes that any transferor of the property must pay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
HAROLD D. LESTER, JR.
Attorneys

MAY 2000