STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS IVELI AND ROBERT SIGMUND	:	DECISION DTA NO. 803098
for Revision of a Determination or for Refund of Tax on Gains from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners, Thomas Iveli and Robert Sigmund, filed an exception to an Administrative Law Judge determination issued on September 17, 1987 with respect to their petition for a refund of gains tax under Article 31-B of the Tax Law (File No. 803098). Petitioner appeared by Joseph Gaier, P.C., Esqs. (Joseph Gaier, Esq. of Counsel). The Division of Taxation appeared by William Collins, Esq. (Paul A. Lefebvre, Esq. of Counsel).

Neither the petitioners nor the Division of Taxation requested oral argument nor filed briefs on this exception. After reviewing the hearing record and the petitioners' exception, we render the following decision.

ISSUE

The issue raised on this appeal is whether the Division of Taxation properly treated as a single transfer of real property, under section 1440(7) of the Tax Law, the transfer of two contiguous properties sold by the petitioners to one transferee for purposes of applying the one million dollar exemption provided for by section 1443(l) of the Tax Law.

STATEMENT OF FACTS

Petitioners were the joint owners of two properties known as 370 ("370") and 372 ("372") West 1lth Street, New York City. These properties were previously owned by Lucia Realty, Inc. and were acquired by the petitioners by separate deeds on March 30, 1982. As part consideration of petitioners' purchase price, separate purchase money mortgages, held by Lucia Realty Inc., were executed covering each property individually. Property 372 was subsequently refinanced so that it was subject to two mortgages totaling $181,000. Each property was an independent zoning lot and separate tax lot. Separate New York City Real Property Transfer tax returns were filed on the parcels when transferred by the petitioners.

The properties are physically contiguous, but each property was otherwise separate from the other, totally independent and self-contained. Each property had its own separate entrance, water and sewer line and was separately taxed by New York City for water and sewer charges. Further, each building had its own independent electric, plumbing and heating systems with separate service from the street. The buildings had different physical configurations with no intercourse between them. The properties could be freely transferred independent of the other to the same or different transferees without the requirement of any subdivision or other action on the part of the petitioners.

Each property was rental income property; 370 had a storefront on the ground floor and three apartments; the property known as 372 had commercial space on the ground floor and two apartments. At the time the petitioners sold the two properties, 370 was partially vacant and 372 was totally vacant.

Elyon Holding Corp. ("Elyon") approached the petitioners to purchase the two properties.

Elyon had an interest in adjoining properties and wished to acquire 370 and 372 in order to develop the adjoining properties. Elyon was interested only in acquiring both of the properties. Petitioners entered into a single contract., dated July 31, 1985, to sell the two properties to Elyon. The contract provided for a total consideration of $1,250,000 for the two properties, allocating $700,000 to 372 and $550,000 to 370. Elyon subsequently assigned the contract to Arizona Associates, an affiliate of Elyon, which actually took title to the properties from petitioners.

The parties filed gains tax questionnaires for each property, claiming each to be a transfer for less than $1 million consideration, and thus exempt from gains tax, pursuant to section 1443(l) of the Tax Law. The Division of Taxation denied the exemption on the basis that the total consideration ($1,250,000) for the two properties determined the applicability of the exemption. Petitioners paid the tax and applied for a refund, which was denied bv the Division of Taxation. Petitioners protested this denial and with their petition submitted affidavits stating that the Division erroneously aggregated the consideration from the properties. The Administrative Law Judge held that the Division properly denied petitioners' refund basing his determination on section 1440(7) of the Tax Law, section 590.42 of the gains tax regulations (20 NYCRR 590.42) and case authorities (Matter of Bombart v. State Tax Commn., 132 AD2d 745 and Matter of Sanjayln Co., State Tax Commn., December 23, 1986).

OPINION

Petitioners argue that section 590.42 of the regulations is in excess of the authority granted to the Division by section 1440(7) of the Tax Law. Basically, petitioners argue that section 1440(7) of the Tax Law allows the aggregation of consideration from transfers of separately

deeded parcels of real property *only* where the transferor has created the parcels by subdivision and made successive transfers of the subdivided parcels with the intent to evade the tax. Petitioners argue that since they did not subdivide the two properties, the consideration cannot be aggregated. In addition, petitioners argue that the Legislature specifically denied the Division the power expressed in section 590.42 of the regulations in the amendments the Legislature made to the gains tax in 1984.

The petitioners' challenge requires a careful examination of the pertinent provisions of section 1440(7) of the Tax Law which are the first and third sentences of such section. The first sentence of this definitional provision states:

> 7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including, but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property. (Tax Law §1440[7] [emphasis added].)

The third sentence of this section provides:

> Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property. For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property. (Tax Law §1440[7].)

The Division's gains tax regulations set forth separate interpretations of these two separate sentences of section 1440(7) of the Tax Law. At section 590.42 of the regulations (20 NYCRR 590.42), the Division has interpreted the first sentence to mean that separate deed transfers of

contiguous or adjacent property by one transferor to one transferee are generally a single transfer. At section 590.43 of the regulations (20 NYCRR 590.43), the Division has construed the third sentence of section 1440(7), the so-called "aggregation clause," to require aggregation of consideration in certain instances where one transferor transfers contiguous or adjacent parcels to several transferees. So under the Division's analysis, only the interpretation of the first sentence of section 1440(7) is at issue here, the language of the aggregation clause is not involved. The immediate issue is then whether the first sentence of section 1440(7) supports the interpretation given to it by the Division at section 590.42 of the gains tax regulations.

As set forth above, the first sentence of section 1440(7) states, in pertinent part, that a transfer of real property means the transfer or transfers of any interest in real property by any method. "Real property" is defined to mean "every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings. . ." (Tax Law § 1440[6]). In combination, these two definitions result in a definition of "transfer of real property" that includes transfers of any interest in lands. This is obviously very broad language, without limitation as to the number of transferors, transferees or deeds or the physical location of the property and, contrary to the petitioners' arguments, the concept of "parcel" is not included in this definition. The Division's interpretation that the transfer to one transferee of contiguous properties used for common or related purposes is a "transfer of real property" certainly appears to be well within the broad range of this statutory language. This is particularly so on the instant facts where the properties are conveyed simultaneously pursuant to a single contract.

Our analysis is in accord with that of the Appellate Division in the decision of Matter of

Bombart v. State Tax Commission (132 AD2d 745) and the petitioners have not attempted to distinguish their case from Bombart. Noting, among other points, the expansive definition of transfer of real property, the court in Bombart held that the originally contemplated transaction at issue before it, "to sell three parcels under one contract to a single purchaser for a unitary purchase price, fell well within a reasonable construction of the statute." (Matter of Bombart v. State Tax Commission, supra, at 747.) The facts considered by the court in Bombart to be relevant were, "The parcels were contiguous; they were acquired by a single deed from a common grantor; petitioner operated them through a single management company for the same income-producing purpose, i.e., rental of residential apartment units. The parcels were to be conveyed to one grantee for a single, unapportioned price." (Matter of Bombart v. State Tax Commission, supra, at 747.) The only differences between these facts and the facts of the petitioners' transaction are that the petitioners acquired the properties by two deeds from a common grantor and the petitioners' contract to sell the two properties did apportion the total consideration between the two properties. We do not believe that these facts are sufficient to take the petitioners' transaction outside the scope of the broad definition of "transfer of real property."

As summarized earlier, the petitioners' arguments focus on the application of the aggregation clause contained in the third sentence of section 1440(7) and do not address the meaning of the first sentence of section 1440(7). It must be noted that the aggregation clause is not written as a limitation on the first sentence of section 1440(7), but instead as an expansion, for the aggregation clause begins "Transfer of real property shall also include . . ." (Tax Law §1440[7] [emphasis added]). Since our analysis indicates that the instant transaction is well

within the first sentence of section 1440(7) of the Tax Law, the petitioners' arguments with respect to the meaning of the aggregation clause, which expands the meaning of transfer of real property, do not logically determine the issue. However, the Division of Taxation denied petitioners' claim for a refund on alternative bases, so we will deal with petitioners' arguments on the aggregation clause.

The petitioners argue that the aggregation clause allows partial or successive transfers to be aggregated only when the parcels have been created by the transferor through subdivision and when successive transfers of the subdivided parcels are made with the intent to evade the tax. We do not find either of these conditions in the aggregation clause.

First, the term "subdivision" does not appear in the aggregation clause except as an exception to aggregation for subdivided parcels improved with residences. As the Bombart decision states "The existence of parceled subdivisions of real property only affects the imposition of the tax under the statute in one respect, i.e., it prevents aggregation of the consideration for the transfer thereof in connection with the sale of 'parcels improved with residences to transferees for use as their residences.'" (Matter of Bombart v. State Tax Commission, supra, at 747.) The petitioners' attempt to define the scope of the aggregation clause by the subdivision exception is simply not in accord with the statutory language (see, Executive Land Corp. v. Chu, Sup. Ct., Special Term, Part III, Suffolk County June 30, 1987, Cannavo, J.).

Similarly the petitioners' second condition, that the successive transfer must be made with intent to evade the tax, also does not appear in the words of the aggregation clause. The statute does not make an intent to avoid, or evade, the gains tax a prerequisite for the aggregation rule

to apply (Matter of Cove Hollow Farm, Inc. v. State Tax Commn., Sup. Ct., Special Term, Albany County, October 1, 1987, McDermott, J.).

Finally, petitioners seek to limit the Division's authority to apply the aggregation clause to the instant transaction, based on amendments that were not made to the aggregation clause and that were not made to the $1 million exemption at section 1443(l) of the Tax Law, by Chapter 900 of the Laws of 1984. Chapter 900 amended the aggregation clause by adding the words "unless the transferor or transferors provide a sworn statement that such transfers are not" pursuant to an agreement or plan (L 1984, ch 900, § 4). Chapter 900 did not enact the words proposed in a Governor's Program Bill that would have required aggregation "unless the Tax Commission finds that such transfers were not" pursuant to an agreement or plan (1984 Governor's Program Bill 195, § 6).

Petitioners argue that the Legislature's enactment of the former language, rather than the latter, evidences an intent to deny the Division of Taxation any authority to make a factual determination that transfers are properly aggregated, where the transferor has made a sworn statement that the transfers are not pursuant to a plan or agreement. We reject petitioners, argument on two grounds. First, we do not find a clear expression of legislative intent in the fact that language of the Governor's Program Bill was not enacted (see, Clark v. Cuomo, 66 NY2d 185). Without a clear statement of legislative intent, we cannot agree that the Legislature intended the transferor's sworn statement to create, in effect, an irrebuttable presumption, precluding the Division of Taxation from examining the facts to determine if such facts agree with the transferor's statement. Carried to the extreme, petitioners' interpretation would mean that a transferor making transfers pursuant to a cooperative conversion plan could swear that

such transfers were not pursuant to a plan and thus preclude the Division from aggregating the transfers. We cannot find that the Legislature intended such an incongruous result.

A more reasonable interpretation. which harmonizes all of the parts of the aggregation clause, is that the Legislature intended the sworn statement to be a requirement that the transferor must satisfy in order to establish, in effect, a rebuttable presumption that properties are not to be aggregated. The Division of Taxation must then find other facts of the transaction inconsistent with the sworn statement to overcome its effect and to properly aggregate the partial or successive transfers. On the facts involved here, the evidence that the transferor executed a single contract to sell the two properties is certainly sufficient evidence of an agreement to sell the properties to justify aggregation of the properties, notwithstanding the contents of any affidavit of the transferors. Therefore, even if we were to accept the petitioners' focus and analyze the transaction under the aggregation clause, we would find that the Division properly aggregated the sale of the two properties because the transferors had a plan or agreement to sell the two properties.

With respect to the $1 million exemption, petitioners point out that Chapter 900 made several amendments to section 1443(l) of the Tax Law to provide for boosting the consideration in the case of assignments of options, contracts and leases for purposes of applying the exemption (L 1984, ch 900, § 7). In these cases, the amount to be paid for the underlying real property interest is added to the consideration for the assignment of the option, contract or lease to determine if the assignment is exempt under the $1 million exemption. Petitioners argue that the Legislature’s failure to include a provision requiring that the consideration for separate parcels be added together to apply the $1 million exemption indicates that the Legislature did

not intend such a result.

The Legislature's failure to so amend section 1443(l) of the Tax Law does not necessarily support the inference petitioners would draw. At least as valid is the contrary inference, that the failure to so amend section 1443(l) is evidence that the Legislature felt that such an amendment was unnecessary, given the broad definition of "transfer of real property" at section 1440(7) of the Tax Law. Where such contrary inferences from legislative inaction are possible, it is better to refrain from making an inference of legislative intent either way from the failure to act (Metropolitan Life Insurance Co. v. Office of State Comptroller, 120 AD2d 140, appeal dismissed 69 NY2d 1037, lv denied 70 NY2d 607).

The only argument that petitioners have made with respect to the actual application of section 590.42 of the regulations to their transaction is to state that the two properties were not used for a common or related purpose and thus, under the regulation, should not be treated as a single transfer. To avoid aggregation, the regulation requires the transferor to establish "that the only correlation between the properties is the contiguity or adjacency itself and that the properties were not used for a common or related purpose." (20 NYCRR 590.42.) The record indicates that each of the properties at issue was rental income property, although not all occupied, and that the purchaser desired to purchase only both properties. We find that this evidence justifies the conclusion that the transferor did not show that the only correlation between the properties was their contiguity or adjacency.

Since we find the regulation at section 590.42 a reasonable interpretation of the provisions of section 1440(7) of the Tax Law and that this regulation was reasonably applied to the facts of this transaction, we affirm the Administrative Law Judge's determination that the petitioners

were properly denied a refund of gains tax.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of the petitioners, Thomas Iveli and Robert Sigmund is in all respects overruled.

2. The determination of the Administrative Law Judge is affirmed.

3. The petition of Thomas Iveli and Robert Sigmund is denied and the denial of the refund is sustained.

DATED: Albany, New York
February 25, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner