STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
BENACQUISTA, POLSINELLI & SERAFINI MANAGEMENT CORP.	:	DECISION
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Benacquista, Polsinelli & Serafini Management Corp., 2465 McGovern Drive, Schenectady, New York 12309, filed an exception to the determination of the Administrative Law Judge issued on January 4, 1990 with respect to its petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File Nos. 804475, 804476 and 805785). Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris and Mealey (James H. Tully, Jr., Esq., of counsel), Dennis & Co. (John H. Dennis, Esq., of counsel) and Rutnik & Rutnik, Esqs. (Polly N. Rutnik, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul Lefebvre, Esq., of counsel).

Petitioner filed a brief on exception. The Division filed a letter in lieu of a brief. Oral argument, at the request of petitioner, was heard on September 25, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether transfers of unimproved parcels of real property after the effective date of the Real Property Transfer Gains Tax Law, pursuant to a subdivision plan which was filed prior to the effective date of the Real Property Transfer Gains Tax Law, should be aggregated.

II. Whether the fair market value of the land designated as greenspace and roadbeds deeded to the City of Albany should be included in the calculation of the original purchase price.

III. Whether attorney's fees incurred for appearing in this matter should be included in the calculation of the original purchase price.

IV. Whether petitioner has established that the penalties and interest penalty which were imposed by the Division of Taxation for failure to file certain returns and failure to remit tax when due should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "14" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

KARNER ROAD INDUSTRIAL PARK

On July 23, 1978 petitioner, Benacquista, Polsinelli & Serafini Management Corp., filed a subdivision plan known as the Karner Road Industrial Park ("Industrial Park"). At the time the plan for the Industrial Park was prepared, petitioner and its attorney were required to work with engineers and various governmental agencies in order to develop the conditions which would be placed on the development. Among other things, it was necessary for petitioner to show where the roads would be placed and the amount of acreage needed for services. Petitioner was also required to set aside a particular area for the protection of the Karner Blue butterfly and certain flora. In another area, known as the Kaikout Kill Preservation, all development was prohibited. The plan of the Industrial Park contained the following site data:

Total area - 86.60 acres (includes pump station)
Proposed development parcels - 13 parcels - 77.34 acres
Proposed roadways - 6.88 acres
Open space:

Dune preservation	1.49 acres
Kaikout Kill Preservation	0.85 acres
Additional open space (20% of development parcels)	15.48 acres
Total open space	17.82 acres

On or about November 21, 1986 the Division advised petitioner that the transfers arising from the Industrial Park were subject to real property gains tax. The Division also advised petitioner that it had been improperly filing Real Property Gains Tax Affidavits and that it had to "file a Gains Tax Questionnaire for each parcel of real property sold to date pursuant to the subdivision plans and file a transferors questionnaire for each subsequent transfer at least 20 days before the date of transfer of such subdivided lot."

On December 23, 1986, petitioner submitted a Real Property Transfer Gains Tax Transferor Questionnaire which described the sale of eleven parcels of real property between August 31, 1984 and October 3, 1986 and reported an anticipated tax due of $138,488.02. Two additional transferor questionnaires were submitted with respect to the transfer of additional lots in the Industrial Park. The latter questionnaires reported anticipated tax due, respectively, of $9,006.83 and $24,438.55. On the first questionnaire, petitioner submitted a chart which disclosed the date of sale, address, acreage of property, purchaser, sale price, basis, special assessment, cost per acre, property and school taxes during construction, deed stamps and recording fees, real estate commission and a net amount. In calculating the cost per acre, petitioner employed the following computation:

Accounting	$ 10,177.00
Engineering	107,762.30
Legal	203,000.00
Utilities	16,921.42
Road Construction Value of Land sold to City of Albany for $1.00 and other Good and Valuable Consideration for Road Bed Construction Corporate Circle	344,000.00
	$681,860.72

$681,860.72 divided by 77 acres = $8,855.33 cost per acre.

The foregoing valuation of $344,000.00 for land sold to the City of Albany was based on assigning a value of $50,000.00 per acre and multiplying by the 6.88 acres which had been set aside for roadways. Petitioner's attorney arrived at a value of $50,000.00 per acre on the basis

of an analysis of prior sales within the Industrial Park. The $344,000.00 amount did not include the total area which had been designated as open space.

On December 24, 1986, the Division issued two tentative assessments and returns on the basis of the latter transferor questionnaires which explained that tax was due in the amounts of, respectively, $9,006.83 and $24,438.55.

On March 27, 1987, the Division issued a Notice of Determination of Tax Due under Gains Tax Law which assessed tax, penalty and interest of $65,286.94. The notice, which took into account prior payments, was based on the Division's position that each of the parcels should be aggregated because they were transferred pursuant to the same subdivision plan and explained that the Division was disallowing the $344,000.00 for the value of the land sold to the City of Albany for $1.00 as part of the cost of capital improvements. Therefore, the Division recalculated the per acre cost of capital improvements by dividing the remaining amount by the 77 acres to calculate a per acre cost of capital improvements of $4,387.80. The Division also rejected petitioner's attempt to reduce the gain subject to tax by the amounts spent for deed stamps and recording fees.

Upon making the foregoing modifications, the Division calculated the gain on the sale of the lots as follows: the sale price was accepted as the gross consideration. This amount was reduced by the brokerage fees to find the net consideration. The gain subject to tax was determined by reducing the net consideration by the original purchase price consisting of the purchase price plus special assessments, capital improvements, and property and school taxes during construction. The amount of tax due was determined by multiplying the gain subject to tax by the tax rate of 10 percent.

In making the foregoing calculations, the amounts which the Division used for the purchase price per parcel of real estate were obtained from the values which petitioner reported as the basis of the respective parcels. The basis, in turn, was calculated by an accounting firm in 1980 for corporate income tax purposes. The amounts which the Division used for capital

improvements were obtained by multiplying the number of acres per respective parcel by the cost per acre of $4,387.80 which had previously been calculated by the Division.

On August 7, 1987, petitioner filed Real Property Transfer Gains Tax Transferor Questionnaires with respect to transfers at 28 Corporate Circle and 30 Corporate Circle which reported anticipated tax due in the amounts of, respectively, $15,146.79 and $14,114.27. On November 2, 1987, these amounts were paid to the Division under protest. Although it is not included in the record, it may be inferred from the existence of a refund claim and the denial thereof that a Real Property Transfer Gains Tax Questionnaire was filed with respect to a transfer of a parcel of property at 16 Corporate Circle and that it reported an anticipated tax due of $7,837.50. On June 21, 1988, the Division denied each of these claims for a refund.

In 1979, petitioner requested an appraisal of the undeveloped land at the Industrial Park. In September 1980, the appraisers submitted a report which stated that the fair market value of a portion of the undeveloped land was $19,610.00 per acre.

WASHINGTON AVENUE EXTENSION SUBDIVISION

On or about December 13, 1982, petitioner filed a subdivision plan for 2080 Washington Avenue Extension ("Office Park") in the Office of the County Clerk of Albany County. The subdivision consisted of approximately 41.59 acres which were subdivided into four unimproved lots. Petitioner conveyed each of the four lots between October 26, 1983 and November 26, 1986.

On March 19, 1987, in response to a letter from the Division, petitioner filed a Real Property Transfer Gains Tax Transferor Questionnaire which reported the sales of the four lots in the Washington Avenue Extension Subdivision. In this questionnaire, petitioner calculated the per acre cost of the subdivision as follows:

Accounting	$ 2,676.00
Legal	50,000.00
Engineering	100,000.00
Road Construction	
Labor Materials	

Supplies for Construction of Road Beds	294,146.00
Value of land sold for $1 and other good and valuable consideration to City of Albany for Pitch Pine Road and Executive Centre Drive	225,850.00
Black Top	17,000.00
	$689,672.00

$689,672.00 divided by 41.59 acres benefited = $16,582.64 per acre cost.

On or about March 27, 1987, the Division issued a Notice of Determination of Tax Due Under Gains Tax Law which recalculated the gain subject to tax as well as determined that penalties and interest were due. The notice, which was premised on the Division's position that each of the parcels should be aggregated because they were transferred pursuant to the same subdivision plan, explained that a portion of the asserted deficiency arose from the Division's disallowance of $225,850.00 as part of the purchase price for the value of land which petitioner had sold to the City of Albany for $1.00. The disallowance, in turn, resulted in a reduction of the cost per acre from $16,582.64, which was reported by petitioner, to $11,152.25. The balance of the asserted deficiency of tax was calculated in the same manner as the previous notice. That is, consideration was calculated by subtracting the brokerage fees from the gross consideration. The gain subject to tax was determined by reducing the consideration by the original purchase price consisting of the cost per acre of capital improvements as recalculated by the Division plus the sum of the basis, special assessment and property and school taxes during construction. The notice took into account a payment made on March 19, 1987, resulting in a balance of tax, penalty and interest due of $30,016.83.

In 1979, petitioner requested an appraisal of the undeveloped land in the office park. In September 1980, the appraisers submitted an appraisal report which stated that the value of a portion of the undeveloped land was $25,200.00 per acre.

We modify finding of fact "14" as follows:

> Petitioner relied upon its attorney's advice that the transfers were not taxable transactions. It was the opinion of petitioner's attorney that since the subdivision plans were filed in 1978, the parcels should not be aggregated. This opinion was confirmed by the attorneys for the purchaser and representatives of the title company.[1]

OPINION

In his determination below, the Administrative Law Judge found that the parcels transferred were part of a subdivision and, therefore, such transfers were treated as a single transfer and aggregated in order to determine the consideration. Secondly, the Administrative Law Judge concluded that the greenspace land donated to the City of Albany and roadbeds deeded to the City of Albany constituted a capital improvement to the remaining property but, that the value of the greenspace and the roadbeds to be allocated to the land remaining in the subdivision should be valued at cost rather than at fair market value. On the third issue, the Administrative Law Judge concluded that there was no legal basis for including legal fees for representing petitioner in this matter as part of the original purchase price. He further stated that the term "original purchase price" includes amounts paid by the transferor for any customary, reasonable and necessary legal fees incurred to sell the property which he stated was not the situation presented here by petitioner. Lastly, the Administrative Law Judge determined that penalties and additional interest arising as a result of the penalties should not be abated. He found that petitioner did not establish that it acted with reasonable cause in failing to pay the taxes due.

In its exception, petitioner contends that the subdivided parcels transferred subsequent to the enactment of the real property transfer gains tax (hereinafter "gains tax") should only be aggregated if they are contiguous and adjacent to one another. Because its subdivision plan had been in effect prior to the enactment of the gains tax, petitioner argues that only those parcels

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[1] Finding of fact "14" previously read:

> "Petitioner relied upon its attorney and did not intend to evade taxes. It was the opinion of petitioner's attorney that since the subdivision plans were filed in 1978, the parcels should not be aggregated. This opinion was confirmed by the attorneys for the purchaser and representatives of the title company."

This fact was modified to omit a conclusion reached by the Administrative Law Judge that was improperly included in the finding of fact.

that were contiguous or adjacent as of the date when the gains tax became effective should be subject to the aggregation rules. Secondly, petitioner argues that the greenspace required to be donated to the City of Albany and the roadbeds deeded to the City in order to effectuate its subdivision plan should be valued at fair market value. On the third issue, petitioner argues that it should be allowed to include its attorney's fees incurred in this proceeding as part of its original purchase price of the land. It asserts that such fees are part of its acquisition cost of the land. Lastly, petitioner argues that the penalties and additional interest penalties for failure to pay the gains tax should be abated since its reliance on its attorney's advice constitutes reasonable cause for failure to pay the tax.

In response, the Division asserts that it is in agreement with the conclusions reached by the Administrative Law Judge below.

We affirm the determination of the Administrative Law Judge.

Section 1441 of the Tax Law, which became effective March 28, 1983, imposes a ten percent tax upon gains derived from the transfer of real property located within New York State where the consideration received for such transfer is $1 million dollars or more (Tax Law §§ 1441 and 1443[1]).

Section 1440(7) of the Tax Law defines "transfer of real property" to 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 . . . ."

This is the "aggregation clause." The aggregation clause affects the application of the $1 million exemption because the consideration from transfers that are treated as a single transfer are aggregated to apply the exemption.

Petitioner asserts that as of March 28, 1983, its subdivision no longer contained parcels that were all contiguous and adjacent. Petitioner argues that section 590.43(e) of the gains tax regulations should be interpreted to mean that for the aggregation clause to apply to a subdivision, the parcels transferred must be adjacent and contiguous. Therefore, only the

contiguous and adjacent parcels should be aggregated to determine whether the $1 million exemption applies. We disagree.

In Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127), the Appellate Division, Third Department dealt with a subdivision plan which was filed prior to the enactment of the gains tax. The property in question was subdivided into 42 lots, 27 of which were sold prior to the enactment of the gains tax. Subsequently, at various times between 1983 and 1985, the petitioner therein sold seven additional lots in five separate transfers to four unrelated purchasers. The court aggregated the consideration for the sales of the seven lots without inquiring as to the contiguity or adjacency of the lots. Its reasoning was based solely on the fact that the petitioner therein had a plan to effectuate by partial or successive transfers the transfer of the entire parcel and that such transfers were treated as a single transfer under the aggregation clause of section 1440(7) (Matter of Cove Hollow Farm v. State of New York Tax Commn., supra, 539 NYS2d 127, 129).

Although petitioner has requested that we find an additional fact that the parcels in its subdivision were not contiguous or adjacent at the time that the parcels were transferred, we conclude that such a finding of fact is not necessary in order to reach the proper conclusion in this case. Based on Cove Hollow Farm, we conclude that the only inquiry that must be made here is whether the transfers of the property were made pursuant to a plan or agreement to make partial or successive transfers of the property within the meaning and intent of section 1440(7) of the Tax Law. Since the transfers at issue here were made pursuant to a subdivision plan, we agree with the Administrative Law Judge that they were made pursuant to a plan and properly treated as a single transfer under section 1440(7) (see, Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692).

In support of its position that only the consideration for contiguous or adjacent parcels should be aggregated for purposes of determining whether the $1 million threshold has been met, petitioner relies on 20 NYCRR 590.43(e). Section 590.43(e) provides that the

consideration received by one transferor for the transfer of "related property" which are on non-contiguous or non-adjacent parcels of land is not aggregated.

However, petitioner's reliance on 20 NYCRR 590.43(e) completely ignores 20 NYCRR 590.43(g). It is 20 NYCRR 590.43(g) that addresses the question of whether aggregation applies to transfers of subdivided property:

> "Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans" (20 NYCRR 590.43[g]).

Clearly, petitioner's position that the instant transfers are not aggregated is not supported by the statute, the case law nor the regulations. Accordingly, we conclude that the transfers of property in question are subject to aggregation as partial or successive transfers pursuant to a subdivision plan.

Next, petitioner argues that it should be allowed to include in its original purchase price, the fair market value of the roadbeds and of the greenspace required to be donated to the City of Albany (hereinafter "City"). In essence, it is petitioner's argument that in order to have its specific subdivision plan approved by the City, petitioner acquired certain development rights from the City in exchange for the greenspace and the roadbeds. Therefore, petitioner asserts that the fair market value of the roadbeds and greenspace should be allowed as part of its original purchase price pursuant to section 1440(5)(a)(i) of the Tax Law. We disagree.

Section 1440(5)(a)(i) of the Tax Law provides, in pertinent part, that "original purchase price" means the consideration paid or required to be paid by the transferor to acquire the interest in real property. Therefore, in order to include the value of the greenspace and the roadbeds as part of original purchase price, petitioner would have to have transferred this property to the City in exchange for an interest in real property.

Section 1440(4) of the Tax Law defines an interest in real property to include:

> " . . . title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other

> income derived from real property. Interest shall also include an option or contract to purchase real property."

Clearly, petitioner did not acquire an interest in real property from the City within the meaning of section 1440(4) of the Tax Law. Petitioner already owned all of the interests in the real property which it subdivided. Petitioner desired authorization to transfer its interest in the property pursuant to a specific subdivision plan and the City required that a portion of the property be set aside in order for the City to give its approval of the plan. If petitioner refused to set aside the greenspace or to transfer the roadbeds, it still had full ownership rights over the property and concededly could have developed the property in another way (Oral Arg. Tr., p. 7). The fact that petitioner received approval of a specific subdivision plan did not constitute the acquisition of development rights from the City or the acquisition of another interest in real property within the meaning of the statute.

Next, we address the issue of whether petitioner can include its attorney's fees in this proceeding as part of its original purchase price.

Tax Law § 1440(5)(a) defines "original purchase price" to include "the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property." It is clear that these proceedings have no effect upon the sale of the parcels in question. These proceedings will determine the taxability of the sales in question but the sales of such parcels remain unchanged. Therefore, the attorney's fees at issue were not incurred to sell the property.

Lastly, petitioner argues that the penalties and additional interest penalties for failure to pay the gains tax should be abated. Tax Law § 1446(2)(a) provides, in part, as follows:

> "Any person failing to file a tentative assessment and return or to pay any tax within the time required by this article shall be subject to a penalty . . . If the commissioner of taxation and finance determines that such failure or delay was due to reasonable cause and not due to willful neglect, the commissioner of taxation and finance shall remit, abate or waive all of such penalty and such interest penalty."

Petitioner asserts that it reasonably relied on the advice of counsel, therefore, it did not willfully neglect to pay the taxes. Furthermore, petitioner contends that the fact that the

Administrative Law Judge below determined in favor of petitioner with regard to the issue of including the cost basis of the roadbeds and the greenspace as part of original purchase price, it necessarily follows that petitioner's failure to pay taxes was reasonable (Oral Arg. Tr., p. 11). We disagree.

Although petitioner claims that its failure to pay taxes was based on the advice of counsel, such reliance, in itself, has been held insufficient to warrant the setting aside of assessed penalties and interest because the reasonableness of the particular reliance must be evaluated (Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121). We have consistently held that the reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy (see, Matter of Birchwood Assoc., Tax Appeals Tribunal, July 27, 1989; Matter of Copley Plaza Co., Tax Appeals Tribunal, June 8, 1989; Matter of Normandy Assoc., Tax Appeals Tribunal, March 23, 1989).

In August 1983, the Division issued Publication 588 "Questions and Answers - Gains Tax on Real Property Transfers." Question and Answer number 21(G) of this publication specifically addresses aggregation in the context of the subdividing of real property and states as follows:

> "Section 1440.7 specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans" (emphasis added).

This position was repeated in November 1984, when the Division issued a revised Publication 588. As stated above, this position was also followed when the regulations were promulgated (see, 20 NYCRR 590.43[g]). None of these policy pronouncements has drawn any distinction between subdivision plans filed prior to the enactment of the gains tax and those filed afterward. We agree with the Administrative Law Judge that based on the Division's articulated policy in this area, we find that petitioner has not established that it acted with reasonable cause. Furthermore, we have decided in Matter of Copley Plaza Co. (supra) that a petitioner's

willingness to pay the tax after such petitioner is notified by the Division, does not establish reasonable cause for failure to pay the tax when due.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Benacquista, Polsinelli & Serafini Management Corp. is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petitions of Benaquista, Polsinelli & Serafini Management Corp. are granted only to the extent of conclusions of law "B" and "E" of the Administrative Law Judge's determination but such petitions are in all other respects denied; and

4. The Division of Taxation is directed to modify the notices of tax due and the claims for refund in accordance with paragraph "3" above but the notices of tax due are otherwise sustained and the claims for refund are otherwise denied.

DATED: Troy, New York
February 22, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner