STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LELA C. BROWN	:	DECISION DTA No. 804656
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Lela C. Brown, 9375 Shawnee Run Road, Cincinnati, Ohio 45243 filed an exception to the determination of the Administrative Law Judge issued on September 7, 1990 with respect to her petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law. Petitioner appeared by Winthrop, Stimpson, Putnam & Roberts (Michael V. Sterlacci, Esq. & Mark R. Rennie, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq. & Frank Fanshawe, of counsel).

Both parties filed briefs on exception. Petitioner filed a reply brief in further support of her exception. Oral argument was held at the request of petitioner on March 6, 1991.

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

ISSUES

I. Whether petitioner's sales of certain lots should be aggregated pursuant to the aggregation clause of Tax Law § 1440(7).

II. Whether the original purchase prices of the properties transferred by petitioner should include Federal and State estate taxes paid on those properties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are stated below.

On July 26, 1989, representatives of petitioner, Lela C. Brown, and the Division of Taxation entered into a Stipulation of Facts. To the extent that they are relevant, the facts contained therein have been incorporated into the Findings of Fact set forth below.

In January 1980, petitioner inherited from her mother, Lela Edwards Closson ("Closson"), four parcels of land, totalling 26 acres, in East Hampton, Suffolk County, New York. One parcel, originally acquired in 1932, was approximately 4.75 acres in size. On this parcel was located the family residence. A second parcel, acquired in 1934, contained approximately 7.359 acres. The third parcel was approximately 2.55 acres in size and was acquired in 1945. The fourth parcel was approximately 10.486 acres in size and was acquired in 1955.

For the sake of ease in the discussion of these facts, the following letters shall be ascribed to the parcels as follows: Parcel A is the 7.359 acre parcel; Parcel B is the 4.75 acre parcel on which the family residence is situated; Parcel C is the 2.55 acre parcel; and Parcel D is the 10.486 acre parcel.

In 1984, subsequent to Closson's death on January 30, 1980, petitioner divided the four parcels described above into nine lots. They appear on Map #7815 which was filed in the Suffolk County Clerk's Office on December 12, 1984 as prepared in July 1984 by George H. Waldrich Company, Land Surveyors and Land Planners, East Hampton, Long Island. From said subdivision map, it appears that Parcel B was divided into two lots, a northerly and southerly lot, and the northerly lot created from Parcel B was combined with Parcel C to create what is now known as Lot 2. The remaining southerly portion of Parcel B as created became Lot 7. Parcel A was subdivided into three smaller properties designated as Lots 1, 8 and 9 of which petitioner subsequently sold Lots 1 and 8. These sales are in issue herein.

Finally, Parcel D was subdivided into four smaller properties which were designated Lots 3, 4, 5 and 6, each of which was subsequently sold by petitioner herein.

Subsequent to Closson's death, her estate paid a total of $532,714.00 in Federal and New York State estate taxes on the seven properties in issue, as follows:

Property	Estate Taxes Paid
Lot 2	[sold, but no gains tax assessment]
Parcel A:	
Lot 1	$ 65,257.00
Lot 9	[not sold.]
Lot 8	$ 83,589.00
Lot 7	$ 64,297.00
Parcel D (Lots 3 through 6)	$319,571.00
Total	$532,714.00

These calculations were based on an April 1980 appraisal of the four inherited parcels as of January 30, 1980, the Internal Revenue Service's estate tax closing letter, dated July 13, 1983, and the order of the Surrogate's Court, Suffolk County, fixing New York State estate tax due, dated October 4, 1983. Beginning in December 1984, petitioner began selling certain of the inherited properties, as follows:

Parcel	Purchaser	Date Sold
Parcel A, Lot 1	Cestone/Gerschel	12/20/84
Parcel A, Lot 8	Cestone	12/20/84
Parcel D, Lot 3	Straight Arrow	1/31/85
Parcel D, Lot 4	Stone Hampton	1/31/85
Parcel D, Lot 5	Straight Arrow	1/31/85
Parcel D, Lot 6	Stone Hampton	1/31/85
Lot 7	Amerongen	10/16/86

Petitioner's sales of Lots 1 and 8 from Parcel A and Lot 7 were separate, independently bargained-for transactions between petitioner and purchasers unrelated to one another. In addition, those sales were separate, independently bargained-for transactions between petitioner and purchasers unrelated to the purchasers of Lots 3 through 6 from Parcel D. Petitioner no longer contests the aggregation of Lots 3 through 6 within Parcel D. In addition, petitioner does

not contest that Lots 1 and 8 are subject to aggregation upon the sale of Lot 9 if the consideration received from the sale of Lot 9 exceeds $275,000.00.

Petitioner filed a Transferor's Questionnaire in respect of each of the seven sales in issue.

The Division of Taxation issued tentative assessments and returns for Lot 1 dated February 28, 1985, for Lots 8 and 3 through 6 dated February 25, 1985, and for Lot 7 dated October 9, 1986. The Division aggregated all seven of petitioner's sales for gains tax purposes.

Petitioner paid gains tax of $212,429.22 on the seven sales in issue, as follows:

Parcel	Transferee's Consideration	Basis Allowed By Division	Gain	Tax Paid
Parcel A, Lot 1	$ 425,000.00	$ 37,853.00	$ 387,147.00	$ 38,714.70
Parcel A, Lot 8	300,000.00	35,588.32	264,411.68	26,441.17
Parcel D, Lots 3-6	1,125,000.00	115,413.40	1,009,586.60	100,958.68
Lot 7	500,000.00	36,853.33	463,146.67	46,314.67
Total				$212,429.22

On December 19, 1986, petitioner filed Refund Claim No. R-493, requesting a refund in the sum of $212,429.22, the aggregate gains tax paid on the seven sales. Petitioner contested the aggregation of the seven sales in issue and claimed that the original purchase prices of the seven properties should have been adjusted to include the estate taxes paid with respect to each lot since said estate taxes represented petitioner's cost of acquiring the properties.

By letter dated April 3, 1987, the Division denied petitioner's refund claim in its entirety. On July 1, 1987, petitioner filed her petition protesting the Division's denial of her refund claim, which the Division answered on June 13, 1988.

For the purposes of this proceeding, petitioner has modified her refund claim as follows:

(a) Petitioner does not dispute the aggregation of Lots 3 through 6 within Parcel D, but continues to claim that the estate taxes paid on Lots 3 through 6 should be added to the original purchase prices of those properties in calculating the gains tax due on their sale. As a result of this modification in her position, petitioner no longer claims a refund of the entire gains tax paid on Lots 3 through 6 ($100,958.68) but only the difference in the gains tax she paid and the

lesser amount she contends was actually payable ($31,957.12, the difference between $100,958.68 and $69,001.56 [the amount of gains tax petitioner claims was actually payable]).

(b) Petitioner continues to dispute the aggregation of any of the four parcels she inherited or lots within any parcel with any other parcel or lots within the other parcel on the ground that each parcel is a separate property and each was sold or the lots within it sold in a separate, independently bargained-for transaction. Thus, she disputes the aggregation of Lots 1 and 8 of Parcel A with any other parcel or lot (Lot 7 or Parcel D), or Lot 7 with any other parcel or lot (Parcels A or D).

(c) Petitioner disputes the aggregation of Lots 1 and 8 within Parcel A for the reason that the combined consideration paid for those parcels does not exceed the statutory threshold of $1,000,000.00 (Lot 1: $425,000.00, plus Lot 8: $300,000.00 = $725,000.00).

(d) Petitioner disputes the payment of gains tax on Lot 7 for the reason that the consideration paid for Lot 7 ($500,000.00) does not exceed the statutory threshold of $1,000,000.00.

(e) Petitioner continues to challenge the Division's refusal to add the estate taxes paid on the seven lots in issue when calculating the original purchase price of each lot for determining petitioner's gain subject to taxation. However, petitioner modifies the amount she claims on this ground, from $122,860.00 claimed in the petition to $53,271.50, the amount of additional gains tax she actually paid as a result of exclusion of the estate taxes from the original purchase prices of the properties in issue.

Were the estate taxes added to the original purchase prices of the properties in issue, petitioner's taxable gain for each parcel would be as follows:

Parcel	Transferee's Consideration	Basis Allowed By Division	Estate Taxes	Gain
Parcel A, Lot 1	$ 425,000.00	$ 37,853.00	$ 65,257.00	$321,890.00
Parcel A, Lot 8	300,000.00	35,588.32	83,589.00	180,822.68
Parcel D, Lots 3-6	1,125,000.00	115,413.40	319,571.00	690,015.60
Lot 7	500,000.00	36,853.33	64,297.00	398,849.67

By this calculation, even if petitioner's aggregation claims are rejected in their entirety, the total gains tax payable on the seven sales in issue would be $159,157.72, or $53,271.50 less than the gains tax which was in fact paid by petitioner:

Parcel	Gain	Tax Payable
Parcel A, Lot 1	$321,890.00	$ 32,189.40
Parcel A, Lot 8	180,822.68	18,082.26
Parcel D, Lots 3-6	690,015.60	69,001.56
Lot 7	398,849.67	39,884.90
Total	$159,157.72	

Petitioner claims a refund of the entire gains tax paid with respect to Lot 1 ($38,714.70), Lot 8 ($26,441.17) and Lot 7 ($46,314.67), plus the additional gains tax she paid on Lots 3 through 6 ($31,957.12), as a result of the exclusion of the estate taxes from the calculation of petitioner's basis, for a total refund claim of $143,427.66. Alternatively, petitioner claims $53,271.50, the additional gains tax she paid on all seven properties in issue as a result of the estate tax exclusion.

Subsequent to the July 26, 1989 hearing in this matter, the Division reviewed its decision to aggregate Lot 7 with the other lots which were determined to be taxable. The Division decided to grant an exemption to the sale of Lot 7 due to the fact that it was sold at the same time and to the same person who purchased the contiguous residence.

Therefore, the Division agreed to issue a partial refund to petitioner in the amount of the tax paid and it agreed to do so immediately, thus removing all issues with regard to Lot 7 from this proceeding. Therefore, only the aggregation of Lots 3 through 6 contained in Parcel D and Lots 1, 8 and 9 contained in Parcel A remain in issue.

OPINION

In the determination below, the Administrative Law Judge held that all of the lots within parcels A and D sold by petitioner were properly aggregated pursuant to the aggregation clause of Tax Law § 1440(7), as petitioner's treatment of the inherited property amounted to the subdivision and sale of one large tract of land, and the lots were adjacent or contiguous. It was

also determined that estate taxes were properly excluded from the "original purchase price" of these parcels in determining the amount of the real property transfer gains tax (hereinafter "gains tax").

On exception, petitioner argues that it is contrary to the gains tax law as construed by the Department's own regulations to aggregate the proceeds received from the sale of lots within Parcel A with those from Parcel D. Alternatively, petitioner argues that even if aggregation is permissible, petitioner is owed a refund because the estate taxes attributable to those parcels should have been included in the original purchase price of the parcels for purposes of calculating the gains tax.

In response, the Division of Taxation (hereinafter the "Division") contends that because the devised property was actually a single tract of land held by petitioner as a unit, the facts surrounding its subdivision and sale warrant the inference that the sales were pursuant to a plan or agreement and, thus, were properly aggregated. Additionally, the Division argues that a proper reading of the Tax Law requires that the payment of estate taxes be excluded from petitioner's original purchase price of the devised parcels.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1441 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 one million dollars or more (Tax Law §§ 1441, 1443[1]).

Section 1440(7) of the Tax Law defines "transfer of real property" to include: "partial or successive transfers . . . pursuant to an agreement or plan to effectuate . . . a transfer which would otherwise be included in the coverage of this article."
This is referred to as the "aggregation clause." This aggregation clause affects the application of the $1 million exemption because the consideration received from transfers treated as a single transfer is aggregated to determine whether the $1 million exemption has been met.

Petitioner contends that in applying the aggregation clause of section 1440(7), the Division has engaged in a fiction whereby Parcels A through D are treated as one unit, contrary

to the intentions of the statute. She argues that Parcels A, B, C, and D never were one piece of property, and the fact that subdivisions were made within these parcels cannot magically make the property one.

Petitioner contends that Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127), which served as the basis for the Administrative Law Judge's determination, does not support aggregation in this case. In Cove Hollow Farm, the taxpayer purchased a large parcel of land and subdivided it into 42 lots. Twenty-seven of these lots were sold prior to the enactment of the gains tax. After its enactment, the taxpayer sold an additional seven lots in five separate transactions to four unrelated purchasers. These sales were held to be properly aggregated. The Appellate Division reasoned that had the seller transferred his entire parcel in one transaction, it would have been subject to the gains tax, and the seller could not avoid taxation by "structuring" the disposal of its single parcel into partial or successive transfers of subdivided lots (Matter of Cove Hollow Farm v. State of New York Tax Commn., supra).

Petitioner contends that Cove Hollow Farm is distinguishable from this case because, unlike the taxpayer there, she did not "structure" the sales of Parcels A and D to avoid taxation.[1] She states that because the lots sold from these parcels still respected the original borders of these parcels, they should not be aggregated. In taking this position, petitioner appears to attach great importance to the deed descriptions of Parcels A and D, which, prior to the transactions in question, were located within a chain of contiguous lots held by a common owner (first Closson, then petitioner). Thus, the threshold issue is whether, under these facts, deed descriptions should be recognized in determining whether the aggregation clause applies.

Petitioner emphasizes the fact that each of the parcels were purchased by Closson in separate transactions over a twenty-three year period. Further, she notes that these original

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[1] Petitioner admits that aggregation is proper as to the subdivided lots contained within Parcels A and D, respectively.

boundary lines had at all times been observed by Closson, and later by petitioner. However, petitioner provides no authority to support such deference to these boundaries, and fails to reconcile her position with the very broad language of "real property" in section 1440(6), which includes "every estate or right . . . in lands . . . ," without limitation as to deeds or the physical location of the property (see, Matter of Calandra, Tax Appeals Tribunal, September 29, 1988). We find nothing in the case law, or in the language of Tax Law § 1440(7), which implies that deed descriptions existing at the time a parcel is acquired should govern in determining whether the aggregation clause is applicable. In our opinion, to allow deed descriptions to effectively partition what was in substance one large tract of land would unjustifiably exalt the form in which these parcels were acquired over the substance of the transfer (see, Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied, 73 NY2d 708, 540 NYS2d 1003; Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55 [where separate deed descriptions were ignored in holding that the transfers of multiple parcels constituted a single transfer]).

Allowing substance to govern over form in this case is consistent with the aggregation clause set forth in section 1440(7). The aggregation clause implicitly authorizes the Division to impose tax based upon the substance of a seller's actions, while disregarding changes in form that a property may take through the simple alteration of deed maps. In our opinion, the fact that deed descriptions of Parcels A, B, C, and D existed before petitioner received them does not warrant different treatment than had the property been received by petitioner as one parcel and then subdivided. In the latter scenario, Parcels A and D would clearly be aggregated under the holding of Cove Hollow Farm. The properties received in these scenarios are identical in substance. Thus, in the absence of any provision in the Tax Law which would shield this tract of land from similar treatment, Parcels A and D should be aggregated as "a matter of economic justice"

(Matter of Cove Hollow Farm v. State of New York Tax Commn., supra, citing Matter of Chemical Bank v. Tully, 94 AD2d 1, 464 NYS2d 228).

In order for aggregation to occur, section 1440(7) requires that: "partial or successive transfers . . . pursuant to an agreement or plan to effectuate . . . a transfer which would otherwise be included in the coverage of this article" (Tax Law § 1440[7], emphasis added). Thus, we must determine whether the transfers of Parcels A and D 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). In making this determination, we must look at the intent of the transferor at the time of each transfer (20 NYCRR 590.43). Intention will be manifested by petitioner's actions and the facts and circumstances surrounding the transfer (20 NYCRR 590.43).

Petitioner filed a subdivision plan with the Village of East Hampton on December 12, 1984. This map contained all of the property inherited from Closson, and indicated the subdivision of Parcels A and D (see, exhibit D). Within two months, all of the lots at issue, each subdivided from Parcels A and D, had been sold. We find that the subdivision of these parcels within the same plan, coupled with the sale of all of the lots at issue within a very short time from each other, support the conclusion that the sale of these parcels was made pursuant to a plan. The absence of affirmative acts by petitioner to avoid gains tax by altering boundary lines is of no consequence.[2] As petitioner's successive sales were pursuant to a plan to effectuate the disposal of the entire tract of land bequeathed to her, which would have been subject to the real property transfer gains tax as a single disposition, aggregation was proper.

We note further the fact that a residence was located on Parcel 7 (which was also sold by petitioner) is not inconsistent with our disregard for deed descriptions and our treatment of

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[2] In Cove Hollow Farm, the Appellate Division, in reference to the phrase in section 1440(7), "which would otherwise be included in this article," made clear that a taxpayer's partial or successive transfers need not be engaged in for purposes of tax avoidance to be subject to aggregation, noting that the Division had been given statutory authority to ignore such devices under Tax Law § 1448(1) (Matter of Cove Hollow Farm v. State of New York Tax Commn., supra).

Parcels A, B, C, and D as one unit. Tax Law § 1443(2) states that an exemption from the gains tax shall be allowed "[i]f the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes)" (emphasis added). Here, the Legislature's decision not to define the area to which the exemption would apply in terms of deed descriptions is further evidence that it was the Legislature's intention that such descriptions do not control in determining whether the aggregation clause applies. The mere fact that the Division granted the exemption to petitioner for the sales of Lots 2 and 7 based on these boundaries does not affect this result.

Petitioner contends that the Administrative Law Judge's conclusion that Parcels A and D are "adjacent" is erroneous, as it is inconsistent with the plain meaning of the word. However, we conclude that a finding of adjacency is not necessary to aggregate Parcels A and D in this case. We conclude that the only finding necessary is that the transfers of 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 (Matter of Cove Hollow Farm v. State of New York Tax Commn., supra; Matter of Benaquista, Polsinelli & Serafini Mgt. Corp., Tax Appeals Tribunal, February, 22, 1991).

We will now address the second issue, which is whether estate taxes attributable to Parcels A and D were properly excluded from petitioner's "original purchase price" of these parcels in determining the gains tax.

Tax Law § 1440(3) defines "gain" for purposes of Article 31-B as the "difference between the consideration paid for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price" (emphasis added). Tax Law § 1440(5)(b), which provides the applicable definition of "original purchase price" in this situation, states:

> "In the case of a transfer of real property by a gift, devise, bequest or inheritance, the original purchase price of the real property in the hands of the transferee immediately after the transfer shall be the same as the original purchase price of such property in the hands of the transferor immediately before the transfer" (Tax Law § 1440[5][b], emphasis added).

The Division correctly notes that because petitioner received these parcels by devise, section 1440(5)(b) dictates that petitioner's "original purchase price" for purposes of calculating the gain is the same as the original purchase price of Closson's estate immediately before the transfer. To determine this amount, we must look to the definition of original purchase price contained in section 1440(5)(a). This provision states:

> "'Original purchase price' means the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property. . . . Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property. . . . " (Tax Law § 1440[5][a]).

Petitioner contends that because an indebtedness of the transferor, i.e., the estate taxes attributable to Parcels A and D, was satisfied at the time the parcels were devised to the transferee, the amount of the taxes should be includable in petitioner's original purchase price. Petitioner, citing Matter of Estate of Boyd v. Commissioner (819 F2d 170, 87-1 USTC ¶ 13720), emphasizes that although petitioner did not actually pay the estate tax, they were paid from a residuary clause under which she was a residuary legatee. Therefore, petitioner contends that she constructively paid the tax.

Without commenting on petitioner's interpretation of this Federal rule, we believe that this argument fails to focus on the correct person in determining original purchase price, which under the language of Tax Law § 1440(5) is clearly the original purchase price "in the hands of the transferor" (i.e., Closson's estate), not petitioner. Section 1440(5)(a) lists the items that may be included in the original purchase price. The items fall into three categories: costs incurred by the transferor 1) to acquire the real property, 2) for capital improvements, and 3) for certain legal, engineering and architectural fees incurred to sell the property. It is a rule of statutory construction that when a statute lists particular instances under which it is to apply, an irrefutable inference must be drawn that what is omitted was intended to be excluded (McKinney's Statutes § 240; Schultz Mgt. v. Board of Stds. and Appeals of the City of New York, 103 AD2d 687, 477 NYS2d 351, affd 64 NY2d 1057, 489 NYS2d 902). Because

payment of estate taxes clearly is not within the ambit of section 1440(5)(b), we hold that estate taxes were properly excluded from the calculation of the gains tax to petitioner. Further, if the estate taxes are not within one of the categories authorized by the statute as an element of the original purchase price of petitioner's transferor, they cannot be authorized by the regulations, whether enumerated or not at 20 NYCRR 590.15.

Petitioner, citing regulations in 20 NYCRR 590.10(c) and 590.18, states that because the cancellation or discharge of an indebtedness or obligation is included in the definition of "consideration" under Tax Law § 1440(1)(a), estate taxes should be included in petitioner's "original purchase price." Regulation 20 NYCRR 590.18 states in part:

> "[I]f there has been a series of transfers by gift, devise, bequest or inheritance, the original purchase price of real property is the consideration paid by the last transferor who paid consideration to acquire the real property plus the consideration paid for capital improvements by all intervening transferors.
>
> "If in connection with the transfer by gift the transferee/donee assumes or takes subject to a liability encumbering the real property, the original purchase price of such property in the hands of the transferee shall be increased by the amount of gain, if any, to the transferor on the transfer. If there is no gain, the transferee will have a carry-over original purchase price as determined under the above paragraph. (See section 590.10 of this Part for more information about the computation of gain to a transferor/donor)" (emphasis added).

20 NYCRR 590.10(c) states in part:

> "Question: What is the consideration received by a transferor who transfers real property by gift if in connection with such transfer the transferee/donee assumes or takes subject to a liability encumbering the property?
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> "Answer: The consideration received by the transferor is the amount of the liabilities assumed or taken subject to by the transferee. If such consideration exceeds the transferor/donor's original purchase price for the property, the transferor may have gain subject to tax."

Petitioner contends that these regulations illustrate an intention to accord the word "consideration" under this Article a meaning beyond merely those transfers of property pursuant to a contract.

In response to petitioner's argument, the Division contends that the definition of "consideration" in section 1440(1) was intended to be consistent with the general legal definition. Accordingly, they argue that its use is applicable only where real property is transferred pursuant to a contract.

We hold, without determining the breadth of "consideration" in this context, that regulations 20 NYCRR 590.10(c) and 590.18 referenced by petitioner are simply not applicable to the facts of this case. It is clear from an examination of these regulations that only the portion of 20 NYCRR 590.18 which addresses "the original purchase price of real property acquired by gift, devise, bequest, or inheritance" is pertinent here. The remainder of 590.18, as well as 590.10(c) are intended to address the situation where a single transaction is composed of two elements, a taxable transfer and a nontaxable gift. In such a situation, the regulations allow an increase to the transferee's original purchase price to the extent that the taxable component results in gain (20 NYCRR 590.18). The clear purpose of the regulation is to ensure that the same gain is not taxed twice. Since no part of the transaction by which petitioner acquired her interest was a transfer subject to gains tax (Tax Law § 1440[7]), it is clear that the regulations have no application and that petitioner's original purchase price is completely a carryover original purchase price based on her transferor's original purchase price.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Lela C. Brown is denied;

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

3. The petition of Lela C. Brown is denied; and

4. Petitioner's claim for refund of real property transfer gains tax dated December 19, 1986 is, in all respects, denied.

DATED: Troy, New York
September 5, 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