

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
50 LINCOLN ROAD, INC. :
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. :

DECISION
DTA Nos. 805954
and 805955

In the Matter of the Petition :
of :
2121 BEEKMAN PLACE, INC. :
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. :

Petitioners 50 Lincoln Road, Inc. and 2121 Beekman Road, Inc., c/o Harry J. Petchesky, Esq., 430 Park Avenue, New York, New York 10022 filed an exception to the determination of the Administrative Law Judge issued on February 27, 1992 with respect to their petitions 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. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief.

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

ISSUE

Whether petitioners' sales of residential apartment buildings should be aggregated pursuant to Tax Law § 1440(7).

FINDINGS OF FACT

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

Petitioners, 50 Lincoln Road, Inc. and 2121 Beekman Place, Inc., were corporations which operated contiguous residential apartment buildings in New York City.

In 1986, an individual approached the shareholders of 2121 Beekman Place, Inc. and 50 Lincoln Road, Inc. with an offer to purchase the apartment buildings. The shareholders agreed to sell the properties at this time because they were concerned with impending changes in the Federal tax law and the Real Property Gains Tax Law.

In a contract dated January 20, 1986, 2121 Beekman Place, Inc. entered into a contract to sell the apartment building it operated to 2121 Realty Co. In a separate contract, also dated January 20, 1986, 50 Lincoln Road, Inc. agreed to sell the apartment building it owned to 50 Realty Co.

At some juncture, each of the foregoing contracts was amended. Under these amendments, 2121 Realty Co. agreed to pay 2121 Beekman Place, Inc. \$850,000.00 in cash at closing and all prior references to a purchase money mortgage were deleted. In the other amendment, 50 Lincoln Road, Inc., as seller, agreed to accept a purchase money mortgage of \$650,000.00 plus \$150,000.00 in cash from 50 Realty Co. The amendment expressly provided that it was to have mortgage clauses similar to the 2121 Beekman Place contract prior to its amendment.

In a contract dated February 5, 1986, 50 Realty Co. sold its interest in the apartment building to Arlene Sardell. In a document dated March 26, 1986, Arlene Sardell assigned her rights as purchaser in the contract dated February 5, 1986 to Lincoln Road Associates, Ltd.¹

In a contract dated February 5, 1986, 2121 Realty Co. conveyed its interest to Arlene Sardell. In a document dated March 26, 1986, Arlene Sardell assigned her rights as purchaser under the contract dated February 5, 1986 to 2121 Beekman Realty Corp.

A transferor questionnaire was filed regarding the transfer of 50 Lincoln Road which reported that no tax was due because the consideration was less than \$1,000,000.00. It also reported that there was a net loss from the transaction. The Division of Taxation (hereinafter the "Division") issued a Tentative Assessment and Return, dated June 20, 1986, which made a series of adjustments and determined that tax was due in the amount of \$4,836.00. In order to conclude that tax was due, the Division aggregated the consideration from the sale of 50 Lincoln Road with the sale of 2121 Beekman Place.

On July 31, 1986, 50 Lincoln Road, Inc. sold the premises at 50 Lincoln Road, Brooklyn, New York to Lincoln Road Associates, Ltd., the assignee of the contract of sale dated January 20, 1986. In connection with the transfer, 50 Lincoln Road, Inc. remitted New York State real property transfer gains tax in the amount of \$4,836.00.

A transferor questionnaire was filed with respect to the transfer of 2121 Beekman Place which reported that the transaction was exempt because the consideration was less than \$1,000,000.00. Although it is not included in the record, it may be inferred that the Division issued a Tentative Assessment and Return which made a series of adjustments and determined that tax was due. Further, in order to make this determination, the Division aggregated the consideration from 2121 Beekman Place and 50 Lincoln Road.

On September 4, 1986, 2121 Beekman Place, Inc. sold the premises at 2121 Beekman Place, Brooklyn, New York to 2121 Beekman Realty Corp., the assignee of the contract of sale

¹In a document dated July 31, 1986, 50 Realty Co. assigned its interest in the contract dated January 20, 1986 to Lincoln Road Associates, Ltd. Arlene Sardell signed the assignment document on behalf of Lincoln Road Associates, Ltd. She also signed in an individual capacity.

dated January 20, 1986. In connection with the transfer, 2121 Beekman Place, Inc. remitted New York State real property transfer gains tax in the amount of \$35,104.80.

Each petitioner filed a claim for refund of gains tax dated April 3, 1987. In essence, each refund claim maintained that the consideration received from the sale of 2121 Beekman Place and 50 Lincoln Road should not have been aggregated for purposes of the gains tax and therefore the sale of the parcels was not subject to gains tax. In separate letters dated July 22, 1987, the Division denied the claims for refund on the ground that the transfers were deemed to be a single transfer of real property.

2121 Beekman Place, Inc. acquired its apartment building in 1952. 50 Lincoln Road, Inc. acquired its property at the same time. Each corporation had the same shareholders. The apartment buildings were incorporated separately in order to limit each petitioner's shareholders' liability.

From the time the properties were acquired in 1952 until they were sold in 1986, 2121 Beekman Place, Inc. and 50 Lincoln Road, Inc. operated as separate corporations. They filed separate tax returns for Federal and State purposes.

Mr. Bernard Livingston was the president of 2121 Beekman Place, Inc. and 50 Lincoln Road, Inc. He was also president of Kellner & Livingston, Inc. which was the firm which managed the corporate petitioners. In 1971 Mr. Peter Kraus became an employee of Kellner & Livingston, Inc. In 1979, he became an assistant secretary of each petitioner. It was the management company's function to handle rents, make disbursements and be responsible for repairs.

The apartment buildings were located on separate blocks. The buildings had separate entrances and their own heating systems. There was a separate superintendent for each building who was paid by the respective corporate employer. Repairs to each apartment building were authorized separately. Rent was collected separately and deposited into independent checking accounts. Each corporation had its own records.

Each building was independently registered with the New York City Department of Buildings and the New York State Division of Housing and Community Renewal.

In letters dated June 20, 1986, Mr. Bernard Livingston confirmed the existence of brokerage agreements which obligated each petitioner to pay Mr. Livingston a brokerage commission.

At the closing between 50 Lincoln Road, Inc., as seller, and Lincoln Road Associates, Ltd., as purchaser, on July 31, 1986, 50 Lincoln Road, Inc. appeared by Bernard S. Livingston, as president. Lincoln Road Associates, Ltd. appeared by Arlene Sardell, as president.

At the closing between 2121 Beekman Place, Inc., as seller, and 2121 Beekman Realty Corp., as purchaser, on September 4, 1986, 2121 Beekman Place, Inc. appeared by Bernard S. Livingston, as president. 2121 Beekman Realty Corp. appeared by Arlene Sardell, as president.

OPINION

In the determination below, the Administrative Law Judge, citing Matter of 307 McKibbin St. Realty Corp. (Tax Appeals Tribunal, October 14, 1988) and Matter of Howes (Tax Appeals Tribunal, September 22, 1988), reiterated the position of the Tax Appeals Tribunal that the focus of the gains tax is to "look through" entities to determine the beneficial ownership of real property. He determined that the cases cited by petitioners in support of the principle that the corporate entity should be recognized were inapplicable to the gains tax. Further, the Administrative Law Judge rejected petitioners' argument that the "look through" principle applies only to the sellers of the property and not to the purchasers.

The Administrative Law Judge also determined that the record supports a conclusion that the beneficial interests of petitioners were the same and that the beneficial interests of the purchasers were the same. Therefore, the Administrative Law Judge concluded, the Division properly treated petitioners as one transferor making a single transfer of real property to one transferee and correctly aggregated the consideration received under 20 NYCRR 590.42.

The Administrative Law Judge further determined that the properties were used for a common purpose and, therefore, that the exemption provided for in 20 NYCRR 590.42 did not apply.

On exception, petitioners continue to maintain that the transactions were separate transfers of distinct parcels of real property and should not be aggregated. Petitioners also argue that they should be treated as separate taxpayers and separate transferors.

In response, the Division requests that the Administrative Law Judge's determination be sustained. The Division argues that it was proper to apply the "look through" principle to determine the beneficial owners of the real property. The Division further argues that petitioners have not met the requirement to show that the property was not used for a common and related purpose.

On exception, petitioners have raised the same arguments made before the Administrative Law Judge. Since the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 50 Lincoln Road, Inc. and 2121 Beekman Place, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petitions of 50 Lincoln Road, Inc. and 2121 Beekman Place, Inc. are denied.

DATED: Troy, New York
October 15, 1992

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner