STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DIMITRI AND TAISA BALABANOW	:	DECISION DTA No. 808898
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 Dimitri and Taisa Balabanow, 3002 Trinity Street, Oceanside, New York 11572, filed an exception to the determination of the Administrative Law Judge issued on October 22, 1992. Petitioners appeared by Herbert Garfinkel, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition to petitioners' exception. Petitioners' request for oral argument was denied. Petitioners filed a reply brief, received on March 15, 1993, which date began the six-month time period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and Jones concur.

ISSUE

Whether petitioners' sales of certain properties 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, Dimitri and Taisa Balabanow, were married in Argentina in 1957. Dimitri Balabanow came to the United States in 1962, followed by his wife, Taisa, in 1965. While

employed in the construction business, Mr. Balabanow began to purchase, renovate and sell apartment buildings on Long Island. When Taisa Balabanow arrived in this country, petitioners purchased the buildings as husband and wife, thereby establishing their ownership interest as tenants by the entirety. However, in 1978, petitioners started purchasing apartment buildings individually or as tenants in common. In the same year, they also began to execute deeds which altered their ownershipinterests in properties they owned as husband and wife to that of tenants in common.

According to the testimony of Mrs. Balabanow, the decision to purchase properties individually and to recast petitioners' ownership interests in various properties from tenants by the entirety to tenants in common was based on several factors. These included attempting to protect the children's beneficiary interest in her property should she predecease her husband, providing for her own financial needs should petitioners divorce and the overall desire to be financially independent of her husband. Mrs. Balabanow wished to insure that the two children would receive their fair share of her investments upon her death. Mrs. Balabanow also explained that owning the investments by herself, individually or as a tenant in common, provided her with a degree of independence as well as a sense of financial security should petitioners divorce.

During the years 1965 through 1973 and 1975 through 1979, petitioners earned the following salaries:

	Dimitri	Taisa
1965	$ 4,949.00	$ 702.00
1966	4,800.00	6,476.00
1967	5,280.00	8,720.00
1968	5,938.00	10,515.00
1969	8,047.00	11,342.00
1970	8,130.00	13,571.00
1971	8,709.00	7,722.00
1972	9,001.00	10,865.00
1973	8,991.00	16,140.00
1975	10,012.00	9,530.00
1976		23,606.00
1977		24,366.00

1978	27,887.00
1979	15,992.00

Petitioners were unable to produce salary information for the year 1974. In addition, Mrs. Balabanow testified that following 1975, the majority of Mr. Balabanow's income was from real estate. Mrs. Balabanow's salary income derived from her employment as a chemist for and later director of research and development of a pharmaceutical company located in Inwood, New York. She had earned her degree in pharmacy while residing in Argentina.

During the years 1975 through 1987, petitioners maintained both individual and joint bank accounts. The interest income earned from these accounts was (in rounded amounts) as follows:

	Dimitri	Taisa	Joint
1975	$	$ 111.00	$
1976		21.00	
1977		510.00	759.00
1978		765.00	1,009.00
1979	69.00	492.00	1,862.00
1980	222.00	238.00	1,999.00
1981	928.00	735.00	4,237.00
1982	1,940.00	1,914.00	5,343.00
1983	16,565.00	14,289.00	9,685.00
1984	7,774.00	19,647.00	5,289.00
1985	3,237.00	6,384.00	6,136.00
1986	14,800.00	16,847.00	6,068.00
1987	8,084.00	10,545.00	6,496.00

On April 20, 1979, petitioners entered into a contract of sale to purchase three lots located at 215, 225 and 235 West Broadway, Long Beach, New York. The three parcels of property were adjacent, with Lot 225 having a common boundary with both Lots 215 and 235. All three buildings were used as rental property, with the building on Lot 215 having 25 apartments and the buildings situated on Lots 225 and 235 having 12 apartments each. At the time of the sale, Lot 215 was owned by Sea Island Apartments, Inc. and Lots 225 and 235 were owned by Louis Katz. Louis Katz represented Sea Island Apartments, Inc. in the negotiations and executed the contracts of sale on behalf of the corporation. The purchase price of the three lots was $425,000.00, which included a note secured by a purchase money first mortgage in the amount of $300,000.00. The contract of sale provided that, at the time of closing, the sellers would

execute three deeds to the premises. Lot 215 was to be conveyed to petitioners, Lot 225 to Dimitri Balabanow and Lot 235 to Taisa Balabanow. Petitioners wished to have the ownership interests in the three buildings set up along these lines to avoid the imposition of rent stabilization, which, according to the testimony of Mrs. Balabanow, was imposed by the Village of Long Beach on an individual or entity which owned more than 25 apartment units. In addition, petitioners were required to prepare three separate mortgage instruments covering the three parcels not to exceed in the aggregate $300,000.00. The contract further provided that in the event the sellers were unable to convey title to any of the three parcels, petitioners had the absolute right to terminate the contract. Both petitioners participated in the negotiations which resulted in the purchase of the three buildings.

On June 30, 1979, petitioners executed a note and purchase money first mortgage payable to Sea Island Apartments, Inc. in the amount of $75,000.00, relating to the sale of Lot 215. On the same date, Taisa Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 225. Finally, on the same date, Dimitri Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 235.

The three parcels were transferred to petitioners on June 28, 1979. The remaining portion of the purchase price was paid by a promissory note in the amount of $25,000.00, signed by Dimitri Balabanow, a cash payment of $10,000.00, made by Taisa Balabanow, and several bank checks, the source of which was funds obtained by petitioners through the remortgaging of certain of their properties.

Following the purchases, petitioners continued to use the buildings on the three lots as rental properties. Petitioners created a management company to collect the rents, to pay all debts, including the mortgages, and to take care of the maintenance and repairs relating to the three buildings. Any extra money in the management company account was divided equally between Taisa and Dimitri Balabanow.

On December 20, 1985, petitioners entered into a contract of sale to sell the Lot 215 property to Stewart Dickler for $934,000.00. The contract provided that petitioners would take back from the purchaser a purchase money note and mortgage in the amount of $675,000.00. On the same date, Taisa Balabanow contracted to sell the Lot 225 property to Fred Pilevsky for $490,000.00. The contract provided that petitioner Taisa Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $320,000.00. On the same December 20, 1985 date, petitioner Dimitri Balabanow entered a contract of sale to sell the Lot 235 property to Allen Pilevsky for $635,000.00. The contract of sale provided that Dimitri Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $464,000.00. Both petitioners participated in the negotiations and discussions with the buyers concerning the sale price of the three buildings.

The process of selling the properties commenced when petitioners were approached by a broker familiar with the lots at issue. Prior to contact by the broker, petitioners had not offered the properties for sale. In fact, the purchase contracts for each of the properties in issue call for the purchasers to pay the brokerage commission.

Each of the contracts of sale contained a provision which stated that the purchasers could assign the contract on or before the closing of title. Immediately prior to the closing of title on June 25, 1986, the purchasers assigned the three contracts of sale to Herbert Tessler. Petitioners then transferred title to Lots 215, 225 and 235 to Herbert Tessler on the same June 25, 1986 date. At the closing, petitioner Dimitri Balabanow was represented by Robert S. Breitbart, Esq., while petitioner Taisa Balabanow was represented by Saul S. Le Vine, Esq. At the time of the closing, the office address for both attorneys was 287 Northern Boulevard, Great Neck, New York 11021.

The proceeds from the sale of the three lots were deposited into the individual accounts of each petitioner as follows:

Petitioner	Amount	Source (Lot)
Dimitri	$ 30,000.00	235
Dimitri	59,500.00	235
Dimitri	50,000.00	215
Taisa	30,000.00	225
Taisa	58,500.00	225
Taisa	168,000.00	215

Proceeds from the sale which had been placed in escrow and paid to petitioners at the time of closing were paid out of special accounts of both Mr. Le Vine and Mr. Breitbart. Mr. Le Vine's special account was the source of funds paid to Taisa Balabanow, while the special accounts of both attorneys were used to transfer funds to Dimitri Balabanow.

On March 23, 1987, Herbert Tessler satisfied the three purchase money notes and mortgages executed at the time of the sale of the property in issue. The proceeds relating to Lot 235 were paid to, and deposited in an account of, Dimitri Balabanow. The proceeds relating to the mortgage on Lot 225 were paid to, and deposited in an account of, Taisa Balabanow. Finally, the proceeds relating to the mortgage on Lot 215 were paid in equal amounts to each petitioner and deposited in their respective accounts.

Petitioners filed New York State resident income tax returns for the years 1985 and 1986 on a married filing separately on one return basis. For Federal purposes, petitioners filed jointly for the same two years.

On the 1985 New York State Resident Income Tax Return, petitioners divided the income earned from capital gain and rents and the losses incurred from partnerships equally between husband and wife. Petitioners combined on the Federal Schedule E, Supplemental Income Schedule, the rents, expenses, depreciation and resulting income arising from all of the properties owned by petitioners as tenants in common as well as the individually owned properties. The Schedule E also included two partnerships whose combined losses were split equally between Dimitri and Taisa Balabanow.

Accompanying petitioners' 1986 New York State Resident Income Tax Return were three Federal Schedule D's, Capital Gains and Losses. The first indicated the combined capital gains

and losses of petitioners. The second and third related to the individual assets of each petitioner. Under Long Term Capital Gains and Losses, the sale of the lots in issue was summarized, with the sales price, cost or other basis and gain realized split equally between Dimitri and Taisa Balabanow. On the attached Federal Schedule E, all of the properties which petitioners owned as tenants in common and individually were listed as one entry. The rents, expenses and depreciation from all petitioners' rental properties were combined and the resulting income split equally between petitioners. In addition, the losses from two partnerships and a subchapter S corporation were evenly divided between husband and wife.

On March 30, 1989, the Division of Taxation (hereinafter the "Division") issued to petitioners a notice of determination asserting real property gains tax due in the amount of $205,900.00, plus penalty and interest. In its Conciliation Order dated August 31, 1990, the Bureau of Conciliation and Mediation Services recomputed the amount of tax due to $159,796.80, plus penalty and interest.

OPINION

The Administrative Law Judge, based on his review of the facts surrounding the purchase of the lots, the management of the premises, the negotiation and sale of the lots, the purpose of the separate ownership and the treatment of the income from the lots, concluded that "petitioners were the beneficial owners of the three lots sold and were properly treated by the Division as one transferor (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 552 NYS2d 972)" (Determination, p. 12).

The Administrative Law Judge next concluded that the assignment of the contracts to Herbert Tessler provided a sufficient basis to conclude that "one purchaser was involved in the transactions at issue and the Division properly treated the transfers as being from one seller to one purchaser" under 20 NYCRR 590.42 (Determination, p. 12).

Having thus concluded that the transactions were from one transferor to one purchaser, the Administrative Law Judge determined that, in order for petitioners to avoid aggregation of

the consideration received from the transfers of the three properties, "they must meet the dual requirements of 20 NYCRR 590.42 and show 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'" (Determination, p. 12).

The Administrative Law Judge determined that petitioners failed to meet this test:

> "[e]ach parcel contained a residential apartment building. The apartment buildings were managed by the same company which collected rents, paid bills and maintained the premises. It is clear from the foregoing that the apartment buildings were operated for a common purpose of generating rental income (Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55; Matter of Bombart v. State Tax Commn., 132 AD2d 745, 516 NYS2d 989; Matter of Calandra, Tax Appeals Tribunal, September 29, 1988).
>
> "Thus, as the apartment buildings are located on contiguous or adjacent parcels and were used for a common purpose, the consideration received from the sale of the lots is properly aggregated (Matter of Sanjaylyn Co. v. State Tax Commn., supra; Matter of Albany Pub. Mkts., Tax Appeals Tribunal, August 27, 1992)" (Determination, p. 13).

Having so concluded, the Administrative Law Judge did not address the Division's alternative argument in its post-hearing brief that the transfers were made pursuant to an agreement or plan and "were properly [aggregated] based upon the third sentence of section 1440(7)" or the Division's regulation (20 NYCRR 590.43) which aggregates partial or successive transfers of contiguous or adjacent parcels unless the transferor can show that there was no plan or agreement to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of Article 31-B (Division's brief at hearing, p. 5).

On exception, petitioners urge us to conclude:

> "1. That the Administrative Law Judge erred in his conclusion that the Petitioners should be considered a single transferor.
>
> "2. That the Administrative Law Judge erred in his determination that Herbert Tessler, a contract assignee, constituted to [sic] a single transferee, when the petitioners had entered into binding contracts with three distinct individuals.
>
> "3. That Section 20 NYCRR 590.42 is inoperable in this matter.

> "4. That the cases cited by the Administrative Law Judge in his conclusion of law do not relate to the facts in this matter" (Exception, p. 1).

In response to the exception, the Division asserts that the Administrative Law Judge correctly applied the law to the facts in this case and that the determination should be affirmed. However, the Division, in its brief in response to the exception, urges this Tribunal to overrule our decision in Matter of General Builders Corp. (Tax Appeals Tribunal, December 24, 1992) issued subsequent to the determination of the Administrative Law Judge in this matter. The Division argues, in essence, that because the ultimate sale from petitioners was to a single transferee, i.e., Mr. Tessler, the contract assignee, there is no basis to consider the contracts with the original purchasers/assignors in determining whether the sales should be aggregated. The Division asserts that "[t]he transferor intent analysis introduced in General Builders is in clear conflict with" and cannot be reconciled with prior decisions of this Tribunal (Division's brief on exception, p. 7).

In their reply brief, petitioners assert that they did not intend to sell the parcels to one transferee and that our decision in General Builders should guide us in reaching this conclusion and in reversing the determination of the Administrative Law Judge.

We deal first with petitioners' assertion that the Administrative Law Judge erred in concluding that the Division properly treated petitioners as one transferor. The assertions made by petitioners are the same as those made at hearing. The Administrative Law Judge fully and correctly dealt with this issue in his determination and, for the reasons stated therein, we affirm his determination on this issue.

We deal next with petitioners' assertion that petitioners made sales to three separate transferees, i.e., Lot 215 to Stewart Dickler; Lot 225 to Fred Pilevsky; and Lot 235 to Allen Pilevsky, and that the Administrative Law Judge erred in concluding that the assignment of the contracts to Mr. Tessler was sufficient basis to conclude that the transfer was to a single transferee and, thus, within the purview of 20 NYCRR 590.42.

Tax Law § 1441, which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located in New York State. Tax Law § 1443(1) provides for a partial or total exemption if the consideration is less than the $1,000,000.00.

The term "transfer of real property" is defined in the first sentence of Tax Law § 1440(7) as follows:

> "'[t]ransfer 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 transfer or acquisition of a controlling interest in any entity with an interest in real property" (emphasis added).

The inclusion of the term "transfers" indicates that "the sale of more than one parcel may be treated as a single transaction" (Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, 235, lv denied 73 NY2d 708, 540 NYS2d 1003).

The third sentence of Tax Law § 1440(7), the so-called "aggregation clause," provides:

> "[t]ransfer 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 . . . ."

Under this clause, the proceeds from certain transfers treated as a single transfer are aggregated to determine the applicability of the $1,000,000.00 exemption.

The Division's regulations utilize these different provisions of the definition of "transfer" to distinguish between transfers of contiguous or adjacent parcels to one transferee (20 NYCRR 590.42) and transfers of contiguous or adjacent parcels to more than one transferee (20 NYCRR 590.43).

20 NYCRR 590.42 provides as follows:

> "Question: Is the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the $1 million exemption?
>
> "Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean 'the transfer or transfers of any interest in real property.' Thus, the separate deed transfers of contiguous

> or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property. It is the consideration for the interests in a single transfer, regardless of the number of deeds used to transfer the property, that is used to determine the application of the $1 million exemption.
>
> "However, if the transferor establishes 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, the consideration will not be aggregated.
>
> "When the transfer is to more than one transferee, whether the amount paid for each deed transfer is added together depends on whether the transferor is subject to the aggregation clause for partial or successive transfers. (See section 590.43 of this Part.)"

20 NYCRR 590.43 provides, in part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
>
> "(a) One transferor, more than one transferee, contiguous or adjacent parcels of land?
>
> "Answer: When the sales are pursuant to a plan or agreement, the consideration for each parcel is to be aggregated in determining whether the consideration is $1 million or more.
>
> "A transferor may furnish, along with his questionnaire, a sworn statement that the sales 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 article 31-B.
>
> "Whether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated."

In Matter of General Builders Corp. (supra), we addressed a fact situation similar to that in this case, i.e., initial contracts for sale by the transferor to multiple transferees and the assignment of those contracts to the ultimate purchaser. We stated:

> "the focus of the analysis [of whether a transaction is subject to the gains tax] is on the economic reality of the transactions (Matter of Bredero Vast Goed, N. V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105 [where the court sustained looking through two tiers of entities to find a transfer of real property]). This requires examining the circumstances surrounding the entire transaction including, of course, events which may have occurred

> many months before the actual closing of title to the property (Matter of Bredero Vast Goed, N.V. v. Tax Commn., supra). In order to analyze whether a taxable transaction has occurred, previous cases have looked at the entire transaction to determine such things as the identity of the transferors or transferees (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 522 NYS2d 972; Matter of Brooks, Tax Appeals Tribunal, September 24, 1992; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988) or whether adjacent or contiguous parcels are related (Matter of Albany Pub. Mkts., Tax Appeals Tribunal, August 27, 1992; Matter of Armel Tax Appeals Tribunal, July 23, 1992; Matter of Eff & Zee Co., Tax Appeals Tribunal, April 16, 1992)" (Matter of General Builders Corp., supra).

In General Builders, we applied these principles to the facts and concluded that the petitioner proved that it did not intend to sell the properties in a single transfer to a single transferee. Specifically, we determined that:

> "[p]etitioner has established that it was not its intention to transfer the two pieces of property in one transaction to one transferor [sic]. Rather, from petitioner's perspective, petitioner made two transfers to unrelated transferees in transactions which would have no gains tax consequences. Had the properties been transferred at the closing to the two transferees with whom petitioner had contracts of sale, no gains tax would have been due . . . . After entering into the contracts of sale, petitioner could do nothing to prevent the property from being transferred to different transferees. Further, there is nothing in the record that suggests that petitioner in any way participated in the assignment of the . . . contract. Nor was petitioner in a position to change the transaction to account for the gains tax consequences arising from the actions of its transferees" (Matter of General Builders Corp., supra).

It is this holding to which the Division objects, asserting that the taxability of the transaction depends only on the "end result," and that the Tribunal erred in focusing on "a transaction which did not occur," i.e., the transfers to the original contract purchasers. Since the "end result" was a transfer to a single transferee by a single transferor argues the Division, 20 NYCRR 590.42 applies and, therefore, transferor intent is irrelevant.

We reject the Division's assertion. The facts of the transaction in this case or in General Builders are not specifically covered in the Division's regulations. The Division attempts to "squeeze" the facts into 20 NYCRR 590.42. In so doing, the Division overlooks the fact that the assignments of the contracts were an integral element of the entire transaction which

culminated with the transfer of the properties by the transferor to Mr. Tessler. As one of the "circumstances" surrounding the entire transaction, this fact falls clearly within the analytical framework established by this Tribunal and the courts for properly determining the taxability of a transaction (Matter of General Builders Corp., supra, and cases cited therein). Moreover, the Division's assertion that these transactions should be ignored because they did not occur is inconsistent with its own regulations dealing with assignments of contracts of sale (20 NYCRR 590.55). To determine if an assignment is taxable, these regulations consider the "transaction which did not occur," by adding together the amount of consideration of the original contracts of sale to the amount of the assignment to determine whether the million dollar threshold is met (20 NYCRR 590.55).

Finally, we point out that none of the cases relied upon by the Division as the basis for its assertion that the assignments be ignored involved assignments from original multiple transferees to a single transferee, as here.

Applying the rationale in General Builders, we conclude that in a case where there is an assignment, the taxability under 20 NYCRR 590.42 is not determined by the "end result," i.e., that there is a transfer to one transferee, but rather by whether petitioner intended to transfer the properties to the single transferee. If it is determined that there was no such intent, the next step is to determine whether the transaction is taxable under 20 NYCRR 590.43, i.e., because there is a plan or agreement by the transferor to avoid the gains tax by partial or successive transfers of the contiguous or adjacent lots. While the Division argued the applicability of 20 NYCRR 590.43 as an alternative ground for finding the transaction taxable, the Administrative Law Judge did not address this aspect of the case in his determination. The conclusions necessary to determine the applicability of each of these regulations are primarily factual and to be established by documentary evidence and testimony.

The Administrative Law Judge was present during the testimony of Ms. Balabanow, the sole witness at the hearing, and is, therefore, in a better position than this Tribunal to evaluate

her testimony, together with the documentary evidence (see, e.g., Exhibit "J") introduced at the hearing to determine, in the first instance, whether the transfer of the properties is taxable under the above rationale, i.e., whether petitioners intended to transfer the properties to one transferee within the purview of 20 NYCRR 590.42 and, if not, whether petitioners transferred the property by partial or successive transfers pursuant to a plan or agreement to avoid the gains tax within the purview of 20 NYCRR 590.43.

Therefore, we remand this case to the Administrative Law Judge so that he may issue an amended determination. Since the record has been developed, no further evidence or briefs are to be accepted. An amended determination is to be issued based upon the current record within 90 days.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded for the issuance of an amended determination by the Administrative Law Judge consistent with this decision.

DATED: Troy, New York
August 19, 1993

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

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

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