

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>EVANGELINE G. CAREY</b>	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 808933
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

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Petitioner Evangeline G. Carey, 505 North Lake Shore Drive, Suite 214, Chicago, Illinois 60611, filed an exception to the determination of the Administrative Law Judge issued on September 17, 1992 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 Eugene S. Gaffney, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed the same brief on exception that was previously filed below. The Division of Taxation filed a letter in lieu of a brief. Oral argument, requested by petitioner, was denied.

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

***ISSUE***

Whether petitioner has established entitlement to the personal residence exemption from the real property transfer gains tax pursuant to Tax Law § 1443(2).

***FINDINGS OF FACT***

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

On September 20, 1982, petitioner, Evangeline G. Carey, entered into a contract of sale to purchase 961 shares of capital stock of 870 East Tower, Inc. and the accompanying proprietary lease for Apartment 26E at 870 United Nations Plaza, New York, New York ("Apartment 26E") for a purchase price of \$1,050,000.00. The property was acquired on December 14, 1982.

On November 1, 1985, petitioner entered into a non-exclusive listing agreement with J. Rodman & Associates, a real estate broker. The agreement related to Apartment 26E,<sup>1</sup> had a term of 90 days and provided for a listing price of \$2,250,000.00.

On March 7, 1986, petitioner, as lessor, entered into a Sublease Agreement for Apartment 26E. The term of the Sublease Agreement was one year and provided for rental payments of \$12,000.00 per month. The sublease began on April 15, 1986 and ended on April 14, 1987. Paragraph 33 of the Sublease Agreement provided as follows:

"During the term of this Sublease or any renewal thereof, Overtenant [petitioner] or her agent shall have the privilege of showing the demised premises to prospective purchasers, tenants or lenders at reasonable times upon reasonable telephone notice."

For the years 1986 and 1987, petitioner filed a U.S. Individual Income Tax Return on a married filing separate return basis. During these years, petitioner received rental income from Apartment 26E of \$98,000.00 and \$42,000.00, respectively. Petitioner reported this income on the appropriate returns and claimed deductions for expenses attributable to the period during each taxable year that the apartment was rented as follows:

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<sup>1</sup>The listing agreement refers to Apartment "26-C," but this appears to be a typographical error.

<u>Expense</u>	<u>1986</u>	<u>1987</u>
Advertising	\$ 146.00	\$
Cleaning & Maintenance	86.00	
Legal & Other Prof. Fees	5,681.00	
Insurance		369.00
Interest	29,096.00	2,039.00
Repairs		607.00
Taxes	10,465.00	11,051.00
Assessments	27,924.00	10,212.00
Miscellaneous	<u>200.00</u>	<u>47.00</u>
Total	\$73,598.00	\$24,325.00

In addition, petitioner claimed depreciation deductions of \$41,686.00 for 1986 and \$55,768.00 for 1987, utilizing the straight-line method, a 19-year useful life for the apartment, and a 5-year useful life for the carpeting.

On the Supplemental Income Schedule for 1986, petitioner reported rental income from five other properties in addition to the Apartment 26E premises. These five condominiums were located in Chicago, Illinois (3), Ft. Lauderdale, Florida, and Lakewood, Ohio. On the Supplemental Income Schedule for 1987, petitioner reported rental income from three additional properties, as two of the condominiums had been sold in 1986.

On December 1, 1987, petitioner entered into a contract of sale to sell the 961 shares of capital stock of 870 East Tower, Inc. allocated to Apartment 26E in the cooperative apartment building located at 870 United Nations Plaza, New York, New York for a selling price of \$2,000,000.00. The cooperative apartment was transferred on January 29, 1988.

On February 22, 1988, petitioner filed with the Department of Taxation and Finance a Real Property Transfer Gains Tax Affidavit relating to the sale of the cooperative apartment. The affidavit indicated that the apartment had been wholly occupied and used by petitioner exclusively as her residence.

The Division of Taxation issued to petitioner, on February 16, 1989, a Notice of Determination of Real Property Transfer Gains Tax Due in the amount of \$136,224.64. The amount due consisted of tax of \$95,000.00, interest of \$8,924.64 and penalty of \$32,300.00.

***OPINION***

The Administrative Law Judge determined that petitioner bore the burden of showing clear entitlement to the exemption and that petitioner failed to establish such entitlement. The Administrative Law Judge further determined that petitioner's evidence in support of her claim for exemption was minimal, and that petitioner's reliance on affidavits and hearsay evidence to support her entitlement to the residential exemption, rather than oral testimony to establish witness credibility, resulted in such evidence being given little weight.

The Administrative Law Judge found that petitioner did not establish that: 1) she used the apartment as her personal residence; 2) the apartment was rented as a last resort due to the weak real estate market; and 3) no bona fide reasonable offers to buy the apartment were received. Therefore, the Administrative Law Judge determined that the property lost its residential character because it was rented and was depreciated for Federal income tax purposes.

Finally, the Administrative Law Judge found petitioner's reliance on Bolaris v. Commissioner (81 TC 840, affd in part, revd in part 776 F2d 1428, 85-2 USTC ¶ 9822) and Clapham v. Commissioner (63 TC 505) misplaced. The Administrative Law Judge found the record insufficient to meet the criteria set forth in Bolaris and Clapham to establish that the rental of the property was only temporary in nature and that the property retained its residential character.

On exception, petitioner argues that she does qualify for the residential exemption contained in Tax Law § 1443(2). Further, petitioner asserts that the Administrative Law Judge improperly examined other rental properties petitioner owned, and that this examination casts an unjust implication on the property at issue in this matter. Petitioner continues to argue that she has complied with four of the requirements of 20 NYCRR 590.25 to support the conclusion that the property retained its residential character and has substantially complied with the fifth requirement, that the property not be depreciated for Federal income tax purposes. In this

regard, petitioner again relies on the Bolaris and Clapham cases for support for the proposition that "deduction for depreciation within prescribed limits MAY be taken when residential property is rented and yet not change the status of that property" (Petitioner's exception, p. 5).

In response, the Division of Taxation (hereinafter the "Division") states that the Administrative Law Judge correctly placed the burden of establishing entitlement to the exemption on petitioner and correctly weighed the evidence.

The Division further states that the Administrative Law Judge properly concluded that petitioner's rental and depreciation of the property warranted its reclassification from residential to business property.

The Division further argues that there was nothing improper about the Administrative Law Judge's examination of petitioner's other rental properties and their treatment on petitioner's Federal income tax returns. In fact, the Division asserts that "[t]he tax returns conclusively establish that the property was converted from residential property to business property" (Division's letter brief, p. 1). The Division further asserts that the apartment was placed in petitioner's investment portfolio along with her other investment properties when she ceased using it, and that this changed the character of the property from residential to business for tax purposes.

On exception, petitioner has 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, is is ORDERED, ADJUDGED and DECREED that:

1. The exception of Evangeline G. Carey is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Evangeline G. Carey is denied; and
4. The Notice of Determination dated February 16, 1989 is sustained.

DATED: Troy, New York  
April 15, 1993

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

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