

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**VINCENT MELOMO, ANTHONY MELOMO,** :  
**MARY PACE, PETER MELOMO, JOSEPH MELOMO,** : DECISION  
**MARY ANN ANDERSON, MARGARET BUSSIGEL,** : DTA No. 809365  
**ANNE MARIE GINKEL AND MARY NOBERINI** :  
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. :

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Petitioners Vincent Melomo, 8007 Colonial Road, Brooklyn, New York 11209, Anthony Melomo, 60 Hudson Avenue, Valley Stream, New York 11580, Mary Pace, 1905 Eastridge Road, Timonium, Maryland 21093, Peter Melomo, 2205 Maple Avenue, Peekskill, New York 10566, Joseph Melomo, 11401 Taterwood Drive, Austin, Texas 78750, Mary Ann Anderson, 5081 Meadowcreek Drive, Atlanta, Georgia 30338, Margaret Bussigel, 83 Wallkill Avenue, Montgomery, New York 12549, Anne Marie Ginkel, 1275 Northcliff Trace, Roswell, Georgia 30076 and Mary Noberini, 4 South Park Lane, Nanuet, New York 10954 filed an exception to the determination of the Administrative Law Judge issued on January 16, 1992 with respect to their 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. Petitioners appeared by Stanley Zuckerman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief. Petitioners' request for oral argument was denied.

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

***ISSUES***

I. Whether the residential exemption provided by Tax Law § 1443(2) exempts from gains tax in its entirety a transfer wherein only one transferor out of a number of transferors actually occupied and used the transferred premises as his residence.

II. Whether, assuming exemption as sought above is denied, petitioners are nonetheless entitled to exemption under Tax Law § 1443(1), upon the theory that only the consideration apportioned to petitioners' ownership interests in the premises should be counted in determining whether the gains tax million dollar threshold has been met.

***FINDINGS OF FACT***

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

During the period May 31, 1987 until August 30, 1988, title to premises located at 1437 67th Street, Brooklyn, New York (the "premises") was held by Carlo S. Corsuti (as executor of the Estate of Francis P. Melomo), Vincent Melomo, Anthony Melomo, Mary Pace, Peter Melomo, Joseph Melomo, Mary Ann Anderson, Margaret Bussigel, Anne Marie Ginkel and Mary Noberini. The premises consist of a one-family house together with four lots known as lots 54, 57, 58 and 60 of Block 57-62 in Brooklyn, New York.

Prior to his death on May 31, 1987, Francis P. Melomo, a physician, had occupied the premises as his home. He utilized the premises exclusively as a residence and never practiced medicine thereat. Dr. Melomo had lived at the premises for many years and paid no rent to the other owners of the premises. Dr. Melomo held a 1/6th ownership interest in the premises, with the remaining 5/6ths ownership in the premises held by petitioners herein, being nine other members of Dr. Melomo's family. Dr. Melomo and petitioners herein had inherited title to the premises from Peter Melomo and Giuseppe Melomo who, in turn, had acquired title by purchases under deeds made in the years 1907, 1913, 1914 and 1919.

On August 30, 1988, title to the premises was conveyed by petitioners herein together with Carlo S. Corsuti, as executor of the estate of Francis P. Melomo, to Albert Ingravallo (or his nominee). The selling price for the premises was \$1,100,000.00. The contract of sale for the premises covered the entire premises (the lots together with the one-family house situated thereon).

With respect to the subject transfer, transferor and transferee questionnaires required under Tax Law Article 31-B ("gains tax") were filed. Each questionnaire indicated gross consideration of \$1,100,000.00 to be paid by the transferee. The transferors, on their questionnaire, claimed exemption under Tax Law § 1443(2) (sale of a personal residence). Hence, no tax was indicated as due on such questionnaires.

In response to the noted questionnaires, the Division of Taxation (hereinafter the "Division") completed and returned a Tentative Assessment and Return indicating thereon tax due in the amount of \$91,305.61. The Division calculated such tax due as follows:

Consideration	\$1,100,000.00
Less: Original purchase price based on information supplied	<u>(4,332.70)</u>
Gain	1,095,667.30
Less: Estate of Francis P. Melomo's 16-2/3% interest	<u>(182,611.22)</u>
Taxable gain	913,056.08
Tax	<u>91,305.61</u>

The Division's Tentative Assessment and Return was accompanied by an explanation of the calculation of tax as follows:

"Section 590.43(d) refers to several transferors owning one parcel of land either as joint tenants, tenants in common or as tenants by the entirety selling to one transferee. The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is \$1 million or more. Once the million dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives less his original purchase price for the property. Section 590.7 states that a transferor will be granted a full or partial exemption if he sells his personal residence. In this case, Francis P. Melomo's estate will be granted an exemption for its 16-2/3% ownership interest in the property. The remaining 83-1/3% in ownership interests are taxable."

In effect, the Division recognized a residential exemption to the extent of Francis P. Melomo's interest in the premises, and reduced the amount of taxable gain to the extent thereof, but denied residential exemption for the rest of the transferors.

Petitioners paid the amount of tax determined by the Division and thereafter filed a claim for refund of such amount paid. By letter dated December 5, 1990, the Division denied petitioners' claim for refund. The Division's denial was upon the same basis as that set forth in the explanation to the Tentative Assessment and Return indicated above.

Petitioners admit that only Dr. Melomo occupied and used the premises as his residence, and that none of the other nine owners of the premises occupied or used the premises as a residence.

### ***OPINION***

The Administrative Law Judge determined that petitioners could not be afforded the residential exemption for the premises transferred, as section 1443(2) of the Tax Law only allows the exemption to the extent that the premises are occupied and used for residential purposes by each transferor. The Administrative Law Judge further determined that it was proper to treat the transfer at issue as one transfer and that there was nothing unreasonable in holding that each owner/transferor must, at some point, have occupied the premises in question as their residence.

The Administrative Law Judge rejected petitioners' argument that Francis P. Melomo's residential exemption should be applied to the total consideration before determining the tax due. The Administrative Law Judge held, as provided in 20 NYCRR 590.43(d), that in determining whether the consideration is for \$1 million or more, the consideration received by each transferor must be aggregated before applying the \$1 million exemption.

Finally, the Administrative Law Judge found that summary determination was appropriate in this case because no material issue of fact existed. The Administrative Law Judge granted the Division's cross-motion for summary determination denying petitioners' claim for refund, but denied petitioners' motion for summary determination.

On exception, petitioners continue to argue that the use of residential property by a single transferor is sufficient to grant the exemption to all transferors, relying on section 541 of the Real Property Actions and Proceedings Law in further support of this proposition. In addition, they argue it would be illegal in New York City and unreasonable to require all 10 transferors to occupy the premises in order to qualify for the residential exemption.

Petitioners also argue that since the transfer of real property by tenants in common is a single transfer, the residential exemption should be applied to that single transfer and not to individual taxpayers.

Finally, petitioners argue that the transfer should be exempt because the exemption granted for Francis P. Melomo reduces the consideration to less than \$1 million.

The Division agrees with the legal analysis and conclusions of law of the Administrative Law Judge. The Division finds misplaced petitioners' assertion on exception that section 541 of the Real Property Actions and Proceedings Law supports their position that the residential exemption should extend to all owners. The Division states: "[section 541] concerns the legal subject 'adverse possession' and does not concern the gains tax law in any way. There is no need to travel outside Article 31-B in interpreting Tax Law section 1443(2)" (Division's letter on exception, p. 2).

We find no basis in the record before us for modifying in any respect the determination of the Administrative Law Judge. Therefore, 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 Vincent Melomo, Anthony Melomo, Mary Pace, Peter Melomo, Joseph Melomo, Mary Ann Anderson, Margaret Bussigel, Anne Marie Ginkel and Mary Noberini is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. Petitioners' claim for refund is denied.

DATED: Troy, New York  
August 20, 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