STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
OSCAR W. PUTTICK, ROBERT W. PUTTICK AND PATRICIA A. RENKE	:	DECISION DTA No. 810786
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 Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke, c/o Leonard Weber, Esq., 100 Crossways Park West, Woodbury, New York 11797, filed an exception to the determination of the Administrative Law Judge issued on July 7, 1994. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a letter brief in opposition. The six-month period to issue this decision began on September 22, 1994, the date by which petitioners could submit a reply brief. Oral argument, requested by petitioners, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether the Division of Taxation properly found the two parcels at issue to be "adjacent" pursuant to Tax Law § 1440(7) and 20 NYCRR 590.42 for purposes of aggregating the consideration received by petitioners upon the transfer of the parcels.

FINDINGS OF FACT

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

The facts stipulated to by the parties have been substantially incorporated in the following Findings of Fact. Several supplementary facts have been added where necessary to more accurately reflect the record.

Petitioners, Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke, as transferors and tenants in common, entered into two contracts of sale on March 16, 1990 for two parcels of property with David F. Rapp as thepurchaser. The consideration paid for the parcel at 2 Jericho Turnpike was $323,800.00, and the consideration paid for the parcel at 383 Jericho Turnpike was $1,676,200.00.

The two parcels are separated by Jericho Turnpike, a six-lane highway, with two lanes of traffic in each direction and an additional parking lane on each side. The highway is approximately 120 feet wide with a concrete median strip a few inches in height dividing the east and west bound lanes. The median is broken at every intersection.

The two properties were used by the transferors as an automobile dealership; the lot on one side of Jericho Turnpike was improved with a building used as a showroom and offices and the lot on the other side was used to display and park the automobiles.

Photographs of the relevant portion of Jericho Turnpike reveal that: (1) the two parcels in question are on the same block of Jericho Turnpike, albeit on opposite sides; (2) the parcels are almost directly across the street from each other, with the parcels beginning at approximately the same point along Jericho Turnpike at or near an intersection with a traffic light, with the parcel containing the automobile lot extending further down Jericho Turnpike (away from the

intersection) than the parcel containing the showroom and offices;[1] and (3) there are curb cuts at the street corners by the car lot parcel, making the corners accessible to the disabled.

Petitioners filed a refund claim in the amount of $32,380.00 on or about January 15, 1991. Attached to the refund claim was: (1) a brief statement to the effect that the parcels in question are not subject to aggregation pursuant to 20 NYCRR 590.43(e) because the parcels are non-contiguous, i.e., they are separated by a major highway and are not "nearby" as that word is construed in Matter of Calandra (Tax Appeals Tribunal, September 29, 1988); (2) an affidavit of Robert W. Puttick wherein the affiant states that the parcels are 120 feet apart from each other and are not contiguous; (3) a map of the area with the two lots in question highlighted; and (4) powers of attorney for the three petitioners.

On or about May 7, 1991, Karen Galarneau, a Tax Technician for the Real Property Transfer Gains Tax Unit of the Division of Taxation ("Division") wrote to petitioners' representative denying the refund claim. In this letter, Ms. Galarneau stated that a February 19, 1991 letter was sent to Mr. Koff requesting additional information and documentation, that in response to this letter, Mr. Koff asked for and was granted an extension of time (until April 5, 1991) to submit the information, that as of May 7, 1991, no additional information or documentation was submitted by petitioners, and that based on the information on file, the refund claim must be denied. The letter also informed petitioners' representative that the denial would become final and irrevocable unless petitioners filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") or a petition for a tax appeals hearing with the Division of Tax Appeals within 90 days of the date of the denial letter.

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[1]Although it would have been helpful to use more specific designations here, such as "the parcel on the north side of Jericho Turnpike," such characterizations are impossible to make since, although petitioners' map (see, infra) and transferor questionnaires taken together clarify that 2 Jericho Turnpike was on the south side and 383 Jericho Turnpike was on the north side of the highway, neither party provided information as to which of the two parcels (i.e., the showroom or the car lot parcel) was number 2 and which was number 383. Because it is impossible to know from the photographs which side of the highway was north and which was south, it is also indeterminable which lane of traffic runs east and which west.

On January 31, 1992, petitioners forwarded to the Division a set of eight photographs (detailed, supra) of the portion of Jericho Turnpike featuring the two parcels in question. These photographs, taken as a whole, reveal that the parcels in question are, as noted, almost directly across the street from each other, with the car lot parcel extending beyond the length of the showroom parcel.

A conciliation conference was held on February 4, 1992 and by conciliation order (CMS No. 114442) dated April 3, 1992, petitioners' request was denied and the refund denial sustained.

Petitioners' petition, seeking a refund of taxes paid in the amount of $32,380.00, was filed with the Division of Tax Appeals on May 5, 1992. In their petition, petitioners allege that the subject parcels should not have been aggregated because they are not contiguous or adjacent, nor are they nearby or in close proximity, being separated by Jericho Turnpike, a "major four-lane highway" with "heavy traffic" which "hindered intercourse between the two properties and constituted a barrier between them that would negate the conclusion that they existed and were transferred as a single economic unit."

The Division, in its answer, denies all of petitioners' allegations and affirmatively states that the transfers of the subject properties constituted a transfer of contiguous or adjacent parcels to a single transferee within the meaning of 20 NYCRR 590.42, or, in the alternative, that the transfers were partial or successive transfers pursuant to an agreement or plan within the meaning of Tax Law § 1440.7. The Division affirmatively states that, therefore, the transfers were properly aggregated and the refund claim properly denied. Finally, the Division affirmatively states that petitioners bear the burden of proving that the Division acted erroneously or improperly.

Transferor questionnaires on file for both of the properties reveal that petitioners' original purchase price for 2 Jericho Turnpike (which sold for $323,800.00) was $53,589.00, for a gain subject to tax of $270,211.00 (notwithstanding the possibility of a statutory exemption pursuant to Tax Law § 1443[1]), and for 383 Jericho Turnpike (which sold for $1,676,200.00) was $360,070.00, for a gain subject to tax of $1,316,130.00.

OPINION

In the determination below, the Administrative Law Judge held that:

> "[i]t is undisputed that this controversy depends on the meaning of 'adjacent' in the Division's regulation at 20 NYCRR 590.42 . . . . This regulation provides that the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property used for a common or related purpose to one transferee is to be added together for purposes of applying the $1,000,000.00 exemption under Tax Law § 1443(1)" (Determination, conclusion of law "A").

The Administrative Law Judge, after reviewing 20 NYCRR 590.42 and our decision in Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), held that the case at hand is much like Calandra as the two parcels are being used for a common or related purpose, are almost directly across a public way from each other and only differ from Calandra in that the public way is not a two-lane country roadway (with parking lanes), but a highly trafficked four-lane major highway (with parking lanes).

The Administrative Law Judge also found petitioners' reasoning faulty in citing Matter of Minzer (Tax Appeals Tribunal, May 20, 1993), holding that:

> "[t]he present matter, unlike Matter of Minzer, provides a fact pattern so similar to Calandra that to find the properties to be adjacent and a single economic unit would be a logical extension of Calandra. The only significant difference between the public way separating the two properties here and the public way separating them in Calandra is, as noted, that the public way here is wider and more trafficked than the one in Calandra" (Determination, conclusion of law "C").

In concluding that 2 Jericho Turnpike and 383 Jericho Turnpike, where the property in question is located, are adjacent to each other within the meaning of 20 NYCRR 590.42, the Administrative Law Judge also rejected petitioners' argument comparing Jericho Turnpike to Long Island Expressway, holding that Jericho Turnpike is not a major expressway but is more akin to the two-lane country roadway in Calandra.

On exception, petitioners, in referencing Calandra, state that parcels of real property are deemed "adjacent" only where:

1) intercourse between the subject properties is not hindered by any physical barrier; and

2) such parcels are nearby each other.

Petitioners point out that the Administrative Law Judge erred in focusing exclusively on the first requirement while ignoring completely the second requirement, the "nearby" test.

Arguing that the Administrative Law Judge, in conclusion of law "C," stated that the only significant difference between the public way separating the two properties here and the public way separating them in Calandra is, as noted, that the public way here is wider, petitioners were quick to point out that "[i]ndeed, the width of the subject highway is more than twice the width of the country road involved in Calandra" (see, footnote, petitioners' brief).

Petitioners argue that in view of this significant difference the subject parcels are not nearby each other and are not "adjacent" and, therefore, not being contiguous or adjacent, aggregation is unauthorized and inappropriate.

The Division, in reply, argues petitioners' assertion on exception is in error and refers the Tax Appeals Tribunal to its letter brief below as well as the eight photographs offered in evidence for the purpose of making an independent review of the "nearby" factor.

The Division argues that based on the above and its letter brief below, the determination of the Administrative Law Judge should be affirmed and the refund denial sustained.

We affirm the determination of the administrative Law Judge.

Petitioners have not raised any issues on exception that were not addressed by the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke is denied;

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

3. The petition of Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke is denied; and

4. The refund claim of Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke is denied.

DATED: Troy, New York
March 16, 1995

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

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