STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
REINSTEIN FAMILY TRUST	:	DECISION DTA No. 810873
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.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 10, 1994 with respect to the petition of Reinstein Family Trust, Richard A. Grimm, Jr., Trustee, 1105 Liberty Building, Buffalo, New York 14202. Petitioner appeared by Duke, Holzman, Yaeger & Photiadis (Michael J. Lombardo, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument was heard on October 20, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether Tax Law § 1440(7) requires that petitioner's transfer of two adjacent parcels of land to two unrelated transferees be treated as a single transfer.

FINDINGS OF FACT

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

On or about October 27, 1989, the Division of Taxation ("Division") issued to petitioner, Reinstein Family Trust, a Notice of Determination of real property transfer gains tax due in the

amount of $133,200.00 plus interest. Following a conciliation conference, the Division issued a Conciliation Order dated March 13, 1992, reducing the amount of tax due to $109,490.77. Petitioner paid the tax so determined plus interest in the amount of $38,315.04 to the Division on or about March 23, 1992. By its petition to the Division of Tax Appeals, petitioner seeks a refund of tax and interest paid, together with interest on the total amount.

Petitioner is a charitable remainder trust (hereinafter "petitioner" or the "charitable remainder trust") created by Item VII of the Last Will and Testament of Dr. Victor P. Reinstein.

Dr. Reinstein was a practicing physician in the Town of Cheektowaga for many years and was active in the affairs of the town. He purchased many parcels of land in the Town of Cheektowaga, although he was not a land developer.

In 1949, Dr. Reinstein purchased a single parcel of land in the Town of Cheektowaga consisting of about 7.6 acres. Approximately 4 acres of that land was leased in 1964 to Bedie J.M, Inc., a corporation which operated a miniature golf course on the leased land. Petitioner refers to this as the "Putt-Putt" parcel. The remainder of the real property was left vacant until its sale to Mobil Oil Corporation in 1988. It is referred to by petitioner as the "Mobil" parcel. Both parcels fronted on and had access to Union Road. They were bordered on the west by several parcels of land also owned by Dr. Reinstein (the dates of acquisition of these other parcels are not in the record). The parcels to the west of the Putt Putt and Mobil parcels were not accessible by public road. In 1980, Dr. Reinstein installed the road commonly known as Postal Drive in order to provide access from Union Road to those parcels of land lying to the west. Postal Drive effectively divided the single parcel of land fronting on Union Road into two separate parcels. Postal Drive was formally dedicated to the Town of Cheektowaga in 1981.

The Putt-Putt parcel was improved with a miniature golf course and a refreshment stand constructed by the tenant. The initial lease ran for a term of five years with an option to renew for five years. The tenant was responsible for all expenses, including real property taxes. From

1974 through 1983, the tenant continued to occupy the premises under the terms of the original lease. In 1983 a new lease was executed for a term of 20 years beginning January 1, 1984, with four five-year options to renew. The rental amount was $35,000.00 per year with a cost of living increase at the time of the first renewal. All expenses were to be the responsibility of the tenant. Bedie J.M., Inc. assigned the lease to Putt Putt Golf and Games of Cheektowaga, Inc. ("Putt-Putt, Inc.") in December 1983. The assignment was approved by the executors of the Reinstein estate on August 30, 1984.

Although the Mobil parcel was left vacant, Dr. Reinstein allowed a nearby restaurant to use a small portion of the property as a parking lot. This strip of land, approximately 50 by 350 feet, was blacktopped. No rent was charged for the restaurant's use of the land during Dr. Reinstein's lifetime.

Dr. Reinstein was approached on several occasions by the tenants of the Putt-Putt parcel who expressed a desire to purchase the property. Dr. Reinstein rejected these offers, since he had no intention of selling either the Putt-Putt or the Mobil parcel and was generally loath to sell the real property he acquired over his lifetime.

Dr. Reinstein died on May 27, 1984, leaving a substantial estate. For estate tax purposes, the estate was valued at $13,000,000.00, consisting of liquid assets valued at $3,500,000.00 and real property. It was Dr. Reinstein's intention to provide for his wife and children during their lifetimes but to leave the greater part of his estate to the Town of Cheektowaga for the construction of a public library. To accomplish this purpose, Dr. Reinstein's Last Will and Testament established a one-third marital deduction trust for his wife under Item VI of the will and a charitable remainder trust (petitioner) under Item VII of the will. The purpose of the Item VI trust was to create a charitable deduction for a substantial portion of the Reinstein estate. The income from the charitable remainder trust was to be paid to Dr. Reinstein's wife and children during their lifetimes, with the remainderman being the Town of Cheektowaga. The executors and trustees under the will were the same persons (the "Fiduciaries").

Dr. Reinstein placed a number of provisions in his will which reflect his lifetime intention of retaining the real property he had acquired. Item XI, paragraph 4, of the will contains the following provision:

> "I hereby expressly direct that any real property fronting on Union Road, Dick Road, or Walden Avenue in the Town of Cheektowaga, New York, which is part of my estate, shall not be sold or conveyed in fee simple for a period of twenty-one (21) years from the date of my death."

Thus, the will restricted the sale of the Putt-Putt and Mobil parcels.

After Dr. Reinstein's death, it was discovered that the charitable remainder interest in the trust created under Item VII did not qualify for the charitable estate tax deduction provided in section 2055(e)(2) of the Internal Revenue Code. As a consequence of this failure to qualify, the additional estate tax liability for the entire estate would have been substantial. The Fiduciaries determined that in order to carry out Dr. Reinstein's intention of preserving the greatest portion of his estate for the Town of Cheektowaga and to decrease the estate's tax liability, it would be necessary to reform the will.

The Fiduciaries sought a decree of reformation of the will from Surrogate's Court by petition dated August 1985. A decree was issued on September 15, 1987, reforming the will as requested. Among other things, the reformation increased the amount of income to be paid to the income beneficiaries of the charitable remainder trust and removed the restrictions on the sale of real property contained in Item XI, paragraph 4, of the will.

After Dr. Reinstein's death, the Fiduciaries continued the same uses of the Putt-Putt parcel and the Mobil parcel as had existed prior to Dr. Reinstein's death. In short, rent was collected from the Putt-Putt tenants and the Mobil parcel was left vacant. The Fiduciaries continued to allow the nearby restaurant to use a strip of the Mobil parcel as a parking lot; however, because of their fiduciary duty to the estate and to the charitable remainderman, they began charging a monthly rent of $416.00 as of May 1, 1987.

After receiving the reformation decree, the Fiduciaries allocated the assets of the Reinstein estate to the marital deduction trust (Item VI) and the charitable remainder trust (Item

VII). Based upon the recommendation of a firm specializing in trust administration, the Putt-Putt parcel and the Mobil parcel were each allocated to the charitable remainder trust.

The Fiduciaries were advised that in order to qualify for the desired charitable deduction, the Item VII trust would be required to have an annual payout rate equal to 7.4 percent of the initial net fair market value of the trust property. As reformed, Item VII, paragraph 1, of the will required a 7.4 percent payout. Moreover, the Fiduciaries understood that petitioner would lose its classification as a charitable trust if it retained property which produced no income. Based on these considerations, the Fiduciaries made a decision to sell a number of parcels of real property which had been a part of the Reinstein estate, among them the Mobil parcel.

A realtor, Gurney, Becker & Bourne, Inc., was engaged as the exclusive listing agent for 40-50 Reinstein parcels. Through their offices a buyer was found for the Mobil parcel, Mobil Oil Corporation, and the sale was consummated on May 18, 1989. The sale price was $782,000.00.

For estate tax purposes, the Putt-Putt parcel was valued at $295,000.00. At the time of Dr. Reinstein's death, it was encumbered with a 20-year lease with 4 5-year options to renew. The annual return for the charitable remainder trust was $35,000.00; thus, it was a profitable investment and the Fiduciaries intended to retain the property. They received several inquiries from the tenants of the Putt-Putt parcel about a possible sale, but they refused to entertain an offer. However, in or about September 1987 the principals of Putt-Putt, Inc. (through their attorney) offered to purchase the property for $500,000.00. They later increased their offer to $550,000.00. The Fiduciaries believed that refusing an offer of that magnitude would be inadvisable, due to the increased annual investment income which would be generated from an increase in the trust principal, and would subject them to criticism and a possible penalty. Consequently, they agreed to sell the Putt-Putt parcel to principals of Putt-Putt, Inc. The Putt-Putt parcel was sold on January 21, 1988.

Either before or shortly after the Putt-Putt parcel was sold, the Fiduciaries learned that the buyers were purchasing the parcel with the intention of selling it to Citibank. In fact, a portion of the property was later sold to Citibank.

The Putt-Putt parcel was erroneously listed with Gurney, Becker & Bourne as one of those the Fiduciaries were seeking to sell. However, the real estate agent and the Fiduciaries understood that the Putt-Putt property was not for sale. The real estate agent made no effort to sell the Putt-Putt property. When the deed of sale was being prepared, the Fiduciaries learned of the erroneous listing. Because they had an exclusive listing agreement with Gurney, Becker & Bourne, the Fiduciaries agreed to pay the real estate agent its commission.

James P. Fallon, vice-president of Gurney, Becker & Bourne, executed a sworn affidavit stating, in pertinent part:

> "[T]he premises at the northwest corner of Postal Drive and Union Road in the Town of Cheektowaga, New York . . . was not on the open market for sale for the reason that it was burdened by a leasehold agreement, . . . making a sale on the open market to a third party, other than the existing tenant, highly improbable.
>
> "[T]he premises although appearing on the listing agreement with GURNEY, BECKER & BOURNE, was not advertised, marketed or offered for sale for the reasons above stated, and the ultimate sale on April 25, 1988, to the tenant came about through no actions or marketing of GURNEY, BECKER & BOURNE."

The purchase agreements or contracts for purchase of the Putt-Putt and Mobil parcels are substantially different in form and content.

Petitioner timely filed real property transfer gains tax questionnaires reporting the transfer of the Mobil and Putt-Putt parcels as separate transfers. They claimed that each property was exempt from gains tax because it qualified for the $1,000,000.00 exemption of Tax Law § 1443(1).

By its answer, the Division asserted that the transfers of the Mobil parcel and the Putt-Putt parcel "were 'partial or successive transfers pursuant to an agreement or plan' within the meaning of Tax Law § 1440.7 and were therefore properly aggregated." At hearing, the Division's attorney asserted an additional ground for the assessment, stating: "the transfers of the Putt-Putt and Mobil parcels are subject to aggregation as transfers of subdivided parcels."

Petitioner objected to the Division's assertion of an additional ground for the assessment at the beginning of the hearing. The Administrative Law Judge ruled that the Division would be allowed to raise the issue and petitioner would have an opportunity to address it either by the submission of additional documentation or by continuation of the hearing, if necessary.

OPINION

The Administrative Law Judge determined that the evidence and credible testimony at hearing were sufficient to show that the transfers of the Putt-Putt and Mobil parcels were not pursuant to a plan or agreement to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of the gains tax. The Administrative Law Judge found that the evidence did not show there was a plan to liquidate the Reinstein estate and that, "through credible testimony, petitioner established that the Fiduciaries had no intention of selling the Putt-Putt parcel as a part of the plan to dispose of nonproductive properties" (Determination, conclusion of law "B"). The Administrative Law Judge also found that the affidavit of James Fallon "confirms that the Putt-Putt parcel was never offered for sale on the open market" (Determination, conclusion of law "B"). Relying on Matter on DiMasi (Tax Appeals Tribunal, March 4, 1993) and Matter of General Builders Corp. (Tax Appeals Tribunal, December 24, 1992), the Administrative Law Judge found that the consideration from the two transfers at issue was not subject to aggregation because the transfers were independent transfers and were not pursuant to a plan. In support of this conclusion, the Administrative Law Judge stated that the parcels were sold independently, the selling prices were substantially different, buyers were solicited for the Mobil parcel but not for the Putt-Putt parcel, the contracts of sale were different in form and content and the sales had no relationship to each other (Determination, conclusion of law "B").

The Administrative Law Judge rejected the Division's position that the parcels should be aggregated because they were originally part of the same parcel. The Administrative Law Judge determined that this position was rejected by the Tax Appeals Tribunal in Matter of Six Stars Realty (Tax Appeals Tribunal, October 7, 1993) and is contrary to the Court's decision in Matter

of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127). The Administrative Law Judge found no evidence to show that Postal Road was "constructed with the intention of subdividing the original parcel or 'to effectuate by partial . . . transfers a transfer which would otherwise' be subject to the gains tax" (Determination, conclusion of law "C").

The Division, in its exception to the Administrative Law Judge's determination, has requested nine findings of fact. The Division also disagrees with the Administrative Law Judge's findings of fact "7" and "18."

On exception, the Division argues that petitioner did not meet its burden to prove that it was entitled to the exemption in Tax Law § 1443(1). The Division, relying on Matter of Sanjaylyn Co. v. State Tax Commn. (141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55, citing Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715; Matter of Old Nut Co. v. New York State Tax Commn., 126 AD2d 869, 511 NYS2d 161, lv denied 69 NY2d 609, 516 NYS2d 1025), argues that the party claiming the exemption must clearly demonstrate its entitlement to the exemption and petitioner has not done this.

The Division also argues that the sales of the Mobil and Putt-Putt parcels were properly subject to the gains tax because both parcels were sold as part of a plan to fund the charitable remainder trust. In support of this argument, the Division stated that:

> "the contracts for the sales of both the Mobil and Putt-Putt parcels were executed before those properties were transferred to the Trust, so it cannot be said that the Mobil property was sold as part of a plan to sell off trust property which was not producing income. Only when the properties were subject to contracts which would convert them to cash were they transferred to the trust" (Division's brief, p. 12).

The Division further argues that the reason for not selling the Putt-Putt parcel was because of the restrictions in the will prohibiting its sale not because of a lack of intent to sell. The Division argues that this is evidenced by the fact that "a mere two weeks after the Surrogate Court Judge signed the Reformation Decree, negotiations for the sale of the Putt-Putt parcel were well underway and the contract for the sale of the Putt-Putt parcel was executed on

November 16, 1987, just two months after the restrictions were lifted" (Division's brief, pp. 13-14).

In addition, the Division argues that petitioner showed an intent to sell the Putt-Putt parcel because of the listing of that property with the broker and the payment of the brokerage commission. The Division argues that finding of fact "18" is internally inconsistent stating that:

> "[i]n the first sentence, the ALJ states that the Putt-Putt parcel was erroneously listed with the broker, but then a finding is made in the last sentence that '[b]ecause they had an exclusive listing agreement with Gurney, Becker & Bourne, the Fiduciaries agreed to pay the real estate agent its commission'" (Division's brief, p. 15).

The Division asserts that if the listing of the Putt-Putt parcel with the broker was done in error, then petitioner would have been under no obligation to pay the brokerage commission.

Finally, the Division argues that the transfers of the Mobil and Putt-Putt parcels were transfers of subdivided parcels that were not improved with residences and, therefore, should have been subject to aggregation.

In response, petitioner first argues that the Division's exception should be dismissed because it does not set forth "any references to the relevant pages of the transcript of the hearing or exhibits to support any grounds for any such exception" (Petitioner's brief, p. 12).

Petitioner also argues that aggregation of real property sales is not required under Tax Law § 1440(7) merely because the parcels were subdivided prior to sale. Petitioner argues that the Division's position, that the parcels should be aggregated because they were not improved with residences, is not supported by the statute, the regulations or any of the cases cited by the Division (Petitioner's brief, p. 15). Petitioner further argues that Executive Land Corp. v. Chu (150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692) and Matter of Six Stars Realty (supra) both support its position that there must be a plan or agreement before sales are aggregated.

Petitioner also continues to argue that the sales of the Putt-Putt and Mobil parcels are not subject to aggregation because the record does not establish an intent to dispose of the Mobil

and Putt-Putt parcels as part of a collective intent by Dr. Reinstein and the Fiduciaries to dispose of the property abutting Postal Drive or that the sales of the Mobil and Putt-Putt parcels were part of an overall attempt to fund the trust.

Next, petitioner argues that the evidence fully supports finding of fact "18." Petitioner states that the Putt-Putt parcel was listed with the realtor in error and that all the parties knew that the parcel was not for sale. In addition, petitioner states that the Division's argument that the listing of the Putt-Putt parcel was not done in error is not logical given that the only real prospective purchasers were the principals (Petitioner's brief, p. 38).

In its reply brief, the Division argues that its exception is not defective in any way and fully complies with 20 NYCRR 3000.11(b)(1)(ii).

The Division has also requested two additional findings of fact in its reply brief.

In addition, the Division, relying on Matter of General Builders Corp. (supra), argues that the transfers must be aggregated because petitioner had a plan to transfer both parcels by the time the contract for the first transfer was executed.

First, we will not incorporate the findings of fact requested by the Division because we find them to be irrelevant.

Second, we find the Division's exception to be in substantial compliance with 20 NYCRR 3000.11(b)(1)(ii).

The Administrative Law Judge correctly and adequately addressed all of the issues raised before her and we find no basis in the record before us for modifying the Administrative Law Judge's determination on these issues in any respect. Therefore, we affirm the determination of the Administrative Law Judge on these issues for the reasons stated in said determination.

However, we will comment on the Division's argument made in its reply brief that the transfers are subject to aggregation because petitioner had a plan to sell both properties at the time the contract of sale for the Putt-Putt parcel (the first sale) was entered into. In support of its argument, the Division relies on Matter of General Builders Corp. (supra). There, the Division states that the taxpayer was able to avoid aggregation because at the time of entering

into a contract of sale for the first property, there was no plan or intention to sell the second property. However, the Division argues that here there was always a plan to sell the second property (the Mobil parcel). We reject this argument. While petitioner had a plan to sell the Mobil parcel when the contract of sale for the Putt-Putt parcel was entered into, petitioner never had a plan to sell the Putt-Putt parcel. The record establishes that the contract to sell the Putt-Putt parcel came about solely through an unsolicited purchase offer and that the parcel was never offered for sale on the open market.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of the Reinstein Family Trust is granted; and

4. The Division of Taxation is directed to refund taxes and interest paid pursuant to the Notice of Determination issued on October 27, 1989.

DATED: Troy, New York
April 6, 1995

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

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