STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **DEL LERTNAC, INC.** 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.	:	DECISION DTA Nos. 810929 and 810930
In the Matter of the Petition of **GRANDVIEW ACRES, INC.** 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 Del Lertnac, Inc., 38 Abbey Street, Massapequa Park, New York 11762-3013 and Grandview Acres, Inc., 38 Abbey Street, Massapequa Park, New York 11762-3013, each filed an exception to the determination of the Administrative Law Judge issued on April 28, 1994. Petitioner Del Lertnac, Inc. appeared by Hinman, Howard & Kattell (James M. Hayes, Esq., of counsel). Petitioner Grandview Acres, Inc. appeared by Griffen, Zube & Chariff (Frederick A. Griffen, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners did not file a brief in reply. Oral argument was scheduled for November 17, 1994. By letter dated November 10, 1994, the parties informed the Tax Appeals Tribunal of their decision to forego oral argument. This letter was received on November 14, 1994 and began the six-month period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the consideration received by two separately owned corporations on sales of real property should be aggregated for purposes of applying the gains tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

The following Findings of Fact incorporate the two stipulations executed by the parties on July 13, 1993 and some of the proposed findings of fact submitted by petitioners. Proposed findings of petitioners 1 through 32, 34, 35, 41, 42, 43, 45 through 48, and proposed findings 33, 36, 37 and 40 as modified by the Division of Taxation ("Division") have been incorporated into this determination. Proposed findings 23, 38, 39 and petitioners' "ultimate finding of fact" have been modified or omitted because they were irrelevant, immaterial, conclusory or were not found in the record. The Division's sole proposed finding has been incorporated herein.

Del Lertnac, Inc. ("Del Lertnac") is a New York corporation, formed under a Certificate of Incorporation dated March 14, 1985, prepared by Attorney F. Gerald Mackin, of Hancock, New York, and filed with the New York Secretary of State on May 2, 1985.

Grandview Acres, Inc. ("Grandview") is a New York corporation, formed under a Certificate of Incorporation dated April 30, 1985, prepared by Attorney Dwight R. Ball, of Binghamton, New York, and filed with the New York Secretary of State on May 9, 1985.

Joan Baldassano was the sole shareholder of Del Lertnac at all times during the period from 1985 through 1989, which includes the period involved in these proceedings. The corporation's name spelled backwards is CANTRELL (ED).

Edward R. Cantrell was the sole shareholder of Grandview at all times during the period from 1985 to 1989, which includes the period involved in these proceedings.

Joan Baldassano and Edward R. Cantrell were at no time legally related by marriage. However, they were involved in a romantic relationship and at one time shared a residence in Hancock, New York.

Joan Baldassano and Edward R. Cantrell were each officers and directors of Grandview and Del Lertnac and were authorized by their positions to execute legal documents on behalf of both corporations.

On May 12, 1985, Del Lertnac entered into a contract to purchase a parcel of vacant land in the Town of Hancock, Delaware County, New York, from Paul Segerdahl and Arthur Marks for the sum of $250,000.00.[1]

Joan Baldassano contributed cash capital and loans to Del Lertnac for the purpose of funding the downpayment and closing expenses for the property purchased by Del Lertnac, and Edward R. Cantrell contributed cash capital and loans to Grandview for the purpose of funding the downpayment and closing costs for the property purchased by Grandview.

Prior to the closing of the sale, the two corporations ordered, obtained and paid for surveys of the respective parcels each corporation was purchasing. Said surveys were completed by Gary Packer, licensed land surveyor of Honesdale, Pennsylvania, and combined into a single survey map.

Del Lertnac purchased its parcel for $173,024.00, of which $27,684.52 was paid at closing.

Grandview purchased its parcel for $76,976.00, of which $12,316.48 was paid at closing.

Del Lertnac and Grandview each gave back a purchase money mortgage, secured by the parcel each had purchased, to the sellers. The sellers required as a condition of taking back the mortgages that the entire property secure repayment of the entire balance of each purchase. As a result, the mortgages were drawn so that Del Lertnac's property secured both corporations'

[1]Sometime between the signing of the contract and the closing, petitioners elected to divide the property into parcels with each corporation purchasing a separate parcel. There is no evidence in the record describing the legal means (i.e., new contract, assignment, etc.) used to accomplish this.

obligations, and Grandview's property did likewise. This was a condition imposed by the sellers, and not the two corporations. Sellers also demanded a collateral security mortgage on both transfers in the sum of $210,000.00 which was given by RQM, Inc., a corporation controlled by Ed Cantrell, secured by property owned by RQM, Inc.

Del Lertnac paid the recording expense, title insurance premiums and mortgage tax for the property it acquired, and Grandview Acres, Inc. did the same for the property it acquired.

The two corporations cooperated in the development of the land, including retaining one contractor to design and construct the roads serving the subdivided lots in the two parcels.

A separate accounting was kept of all of the expenses incurred by the two corporations in common, and each of the corporations paid the same fractional share of those expenses as their fractional share of the total acreage of the two parcels by adjustments and payments between the corporations.

Each of the corporations kept separate financial books and records, paid all of its own expenses or reimbursed the other corporation when such other corporation paid more than its fractional share of an expense, and retained the profit from the sale of all of the individual lots from its respective parcels.

Each corporation filed separate Federal and State income tax returns each year.

Each sale of an individual lot was made by the corporation which owned the lot, and that corporation received the proceeds of sale or took back a purchase money mortgage for the unpaid portion of the purchase price.

Joan Baldassano was president of both Del Lertnac and Grandview in order that, among other things, she could handle contracts for Grandview as well as her own corporation because Edward R. Cantrell spent a substantial portion of his time out of state and was not available to sign documents.

The two corporations cooperated in the development of the property, the payment of the cost of development and the cost of sale of individual lots, resulting in a decrease in the cost of

development and sale of the individual lots.

The two corporations paid disproportionate amounts of the operating expense and the costs associated with the acquisition of the parcels between 1985 and 1989, and adjustments were made between the two corporations for these differences. Attached to the stipulation of the parties are statements prepared from the records of the two corporations showing the amounts paid by each of the corporations for the costs of the property showing a balance due to Del Lertnac from Grandview of $15,027.56, and a statement of payment of common operating expenses between 1985 and 1988 by the two corporations over and above their respective shares, showing a net amount due Grandview from Del Lertnac for payment of expenses in the sum of $783.00.

Del Lertnac and Grandview prepared and filed separate U.S. corporate income tax returns for the years 1985 through 1989.

Del Lertnac received a gross sale price of $884,929.00 and Grandview a gross sale price of $606,732.00 for all of their lots sold.

Loans were made by Del Lertnac to Grandview in 1985 and 1986, which were repaid with interest, either by Grandview or by RQM Inc., another corporation owned by Edward R. Cantrell.

Grandview and Del Lertnac each filed a TP-580, Real Property Transfer Gains Tax Questionnaire, in July 1989, setting forth the separate amount of gross consideration, purchase price and the acquisition cost incurred by each of them, indicating that the consideration received was less than $1,000,000.00 by each corporation. Said questionnaire did not list the cost of capital improvements or the allowable selling expenses incurred by each of the corporations.

Following the filing of the TP-580's, the matter was referred to an auditor in the Division, who reached the conclusion that the sales of parcels made by the two corporations should be aggregated for purposes of application of the real property transfer gains tax, which

recommendation was controverted by the two corporations. Notices of determination were issued to both corporations on June 18, 1990 for the years 1987, 1988 and 1989. Grandview was assessed gains tax in the sum of $32,909.44, plus penalty and interest. Del Lertnac was assessed gains tax of $56,035.03, plus penalty and interest.

The issue was then referred to a conferee in the Bureau of Conciliation and Mediation Services, and a conference was held on August 14, 1991.

On February 13, 1992, the conferee, William J. Proefrock, issued his decision, finding that the sales of the parcels by the two corporations should be aggregated for purposes of application of the real property transfer gains tax.

In orders dated March 27, 1992, the conferee computed the deficiency due from Del Lertnac in the amount of $56,035.03, and from Grandview in the amount of $32,909.44. Penalties and additional interest in excess of the minimum were cancelled.

Petitions dated June 23, 1992 by both corporations to the Division of Tax Appeals requested a redetermination of the decision of the conferee aggregating the two corporations and their properties for the purpose of application of Article 31-B of the Tax Law.

Joan Baldassano ("Baldassano") first met Edward Cantrell ("Cantrell") in 1984 in regard to a real estate advertisement. Cantrell was actively involved in real estate activities.

As a result of Baldassano's meeting with Cantrell, she, through her corporation (petitioner Del Lertnac), purchased property from a party known as Doyon. The property was subdivided and sold. Cantrell was not involved.

Purchase of the Doyon property was the reason Del Lertnac was formed. Del Lertnac is Ed Cantrell spelled backwards. The reason this name was selected was because of information regarding corporate names given to her by her attorney indicating that if a name was rejected, a delay in incorporation would occur "and it also was kind of thank-you [to Cantrell]."

The real estate involved in the instant case was discovered by Gary Packer, surveyor, who called it to the attention of Cantrell. Cantrell asked Baldassano if she was interested in a

purchase.

Separate parcels making up the total parcel to be sold were purchased by Del Lertnac and Grandview in their names. The parcels were split between the two corporations based on the capital invested and the time involved.

Baldassano selected the parcel for her corporation based on what she thought would be first to sell.

Baldassano made the decision to purchase the Segerdahl and Marks property through Del Lertnac rather than by just forming another corporation with Cantrell and purchasing the entire parcel as one piece because she did not know Cantrell that well at that time and did not trust him.

There were no formal written agreements regarding joint development of the property or joint venture or partnership agreement regarding the same. However, when surveyor Gary Packer approached Cantrell in April of 1985 to see if he was interested in purchasing the parcels in issue, Cantrell went to Baldassano and asked if she would be interested in buying part of the land. The land appeared to be good for development and Cantrell and Baldassano walked the property a couple of times. Since neither Baldassano nor Cantrell could develop the land themselves -- Cantrell because he lacked the capital and Baldassano because she lacked the knowledge of land development -- they agreed to purchase the parcel together in the names of their respective corporations, petitioners herein.

No subdivision surveys of lots were done when they purchased the property and began to develop it. Five-acre parcels were surveyed, lots staked and sold and the lot surveys paid for when the lots were sold.

Three surveys were prepared and filed for Del Lertnac parcels and one for the Grandview parcel. No local law required a subdivision map at the time Baldassano commenced her investment in the property. Later, a complete subdivision map was prepared. Each corporation paid for the surveys of its individual lots as they were sold.

Ed Cantrell expired in August 1990.

Baldassano never heard of a gains tax regarding real estate sales in excess of $1,000,000.00 until sometime in 1988 or 1989 when her attorney made an inquiry.

Each parcel purchased by Baldassano's and Cantrell's corporations could be developed independent of each other.

A list of the sales of lots by the corporations, attached to Attorney R. Dwight Ball's ("Ball") affidavit in evidence, was prepared by him from his files. Ball was Cantrell's attorney, performing various legal services for him prior to May 1985.

Attorney Ball, by his own knowledge, knew it was the intent of the parties that the two parcels could be best developed and marketed together and therefore each stockholder was made an officer of each corporation. Protection was inserted in the bylaws to protect an individual's ownership.

Mr. Melvin Koenig ("Koenig"), a public accountant, prepared petitioners' corporate tax returns; conversed with both owners regarding books and records of each corporation; examined the corporate books and records; signed the corporate tax returns as preparer; prepared the respective expenses of each corporation and determined any reimbursements due from one to another; and determined gross proceeds reportable by each corporation.

Transfers of the parcels purchased by Del Lertnac and Grandview were by separate deeds and their respective sales and mortgages taken back in regard to sales to third parties of the individual parcels sold were in the name of the corporation selling its lots.

We make the following additional finding of fact.

> Joan Baldassano and Edward Cantrell each had the authority to make sales in his or her capacity as officer and director of the other's corporation. That authority was limited, however, in that Baldassano set the selling prices for lots owned by Del Lertnac and Cantrell set the selling prices for lots owned by Grandview Acres.

OPINION

The Administrative Law Judge held that the substance of the transactions must be analyzed rather than solely looking to the form. The Administrative Law Judge held that the relationship between Joan Baldassano vis-a-vis Del Lertnac, Inc. and Edward Cantrell vis-a-vis Grandview was a critical element in determining whether the consideration received on sales made by the respective corporations should be aggregated for purposes of applying the gains tax. The Administrative Law Judge held that the relationship between the two corporations was that of a joint venture and, therefore, the Division properly aggregated the consideration received on sales of land by the respective corporations. Among the factors that the Administrative Law Judge based his conclusion on was that neither Baldassano nor Cantrell could develop the property by her or himself and each was a director of the other's corporation with power to execute legal documents, make sales and sign deeds. Additionally, the Administrative Law Judge found the degree of cooperation between the two corporations to be an important factor, i.e., the corporations engaged the same contractor, surveyor and attorney and split the fees in proportion to their respective parcel. The Administrative Law Judge held that although petitioners did not have a specific agreement to share losses, "their share in the profits and losses of the development was dictated by their capital investments, which provided the ratio by which they shared proportionately" (Determination, conclusion of law "A").

On exception, petitioners assert that Del Lertnac and Grandview Acres are separate and distinct entities each owned by unrelated individuals. Petitioners assert that it was erroneous for the Administrative Law Judge to conclude that both corporations were engaged in a joint venture when the requisite elements for a joint venture were lacking.

In response, the Division urges the Tax Appeals Tribunal to affirm the determination of the Administrative Law Judge in all respects. The Division asserts that "[t]he definition of 'transfer of real property' encompasses transfers made by legally separate persons or entities" (Division's brief, p. 1). The Division asserts that consideration from the sales was properly aggregated because petitioners were acting in concert for mutual economic gain.

We reverse the determination of the Administrative Law Judge.

Article 31-B of the Tax Law imposes a tax of ten percent on gain derived from the sale of real property (Tax Law § 1441). If the consideration received on the transfer is less than one million dollars, the transfer is exempted from gains tax (Tax Law § 1443[1]). For purposes of determining whether consideration received on the transfer is less than one million dollars, consideration received by multiple transferors may be aggregated (Tax Law § 1440[7]). Petitioners assert that aggregation of consideration received on their respective transfers was inappropriate as they were two separate entities without the same beneficial ownership. We agree.

The Division's regulations provide that consideration is not aggregated when "[s]everal transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the other," transfer their respective interest to one transferee (20 NYCRR 590.44[b]).

The Administrative Law Judge applied this regulation along with the look through principle to determine if petitioners were in fact truly separate legal entities or whether the economic realities of the transaction dictated that petitioners were to be treated as a single transferor. The Administrative Law Judge concluded that the look through principle focuses on the economic realities of the transaction and treats multiple transferors as a single transferor when: (1) the transferors are entities owned by the same beneficial owner; or (2) one transferor is controlling the acts of the other transferor (Matter of B.V. Brooks, Tax Appeals Tribunal, September 24, 1992, affd 196 AD2d 140, 608 NYS2d 714). The Administrative Law Judge examined the relationship between Joan Baldassano and Edward Cantrell and their respective corporations. Among the factors the Administrative Law Judge relied on to warrant aggregation were: (1) Baldassano and Cantrell were each directors of the other's corporation; (2) each petitioner's parcel also served as security for the other petitioner's purchase money mortgage; (3) petitioners' purchase money mortgages were further secured by property owned by RQM, another corporation wholly owned by Edward Cantrell; (4) petitioners shared the cost of development

and paid disproportionate amounts of operating expenses later making adjustments to account for the differences.

Although we believe the Administrative Law Judge was correct to apply the look through principle and that the aforementioned factors are relevant, these factors are not a sufficient basis to treat petitioners as a single transferor for gains tax purposes. First, the petitioner corporations were not beneficially owned by the same person. Grandview Acres was wholly owned by Cantrell and Del Lertnac was wholly owned by Baldassano. Second, there is no indication that one transferor was controlling the acts of the other transferor. Although Baldassano and Cantrell were both directors of the other's corporation, the power each could exercise in capacity as director of the other's corporation was limited. Both Baldassano and Cantrell had authority to make sales as director of the other's corporation, but the selling prices of the lots owned by Grandview Acres were determined by Cantrell and Baldassano set the prices at which Cantrell was authorized to sell lots for Del Lertnac. Third, petitioners did not share profits and losses. Profits or losses made or incurred by Del Lertnac on sales of its respective parcels were Del Lertnac's profits or losses. Likewise, profits or losses made or incurred by Grandview Acres on sales of its respective parcels were Grandview Acres' profits or losses. Fourth, each petitioner was liable for its own expenses. Fifth, each petitioner executed a separate purchase money mortgage. The requirement that each petitioner's respective parcel of land also secure the other's purchase money mortgage was imposed by the original transferor and was not a condition imposed by petitioners. Sixth, although the degree of cooperation is a relevant consideration in determining whether petitioners should be treated as a single transferor, petitioners had a valid business justification for doing so, i.e., a decrease in their individual expenses as a result of economies of scale.

In reaching our decision, we note that this is not the type of situation that aggregation under the gains tax was intended to encompass. Aggregation applies in cases where there are multiple transferors which are beneficially owned by the same individual or where one transferor

is controlling the acts of another transferor. In these cases, such transferors are not treated as separate transferors under the gains tax (Matter of Kim Poy Lee, Tax Appeals Tribunal, October 15, 1992, affd 202 AD2d 924, 610 NYS2d 330; Matter of B.V. Brooks, supra; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988). Likewise, consideration received on transfers by joint tenants is aggregated for purposes of applying the gains tax (20 NYCRR 590.43; Matter of Tomback, Tax Appeals Tribunal, September 1, 1994). Additionally, multiple transfers will be treated as a single transfer if such transfers are pursuant to a plan to effectuate by partial or successive transfers a transfer which, but for the structuring of the transaction into partial or successive transfers, would be subject to gains tax (Tax Law § 1440[7]); Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127, 129). None of these situations are analogous to the present matter. We find it crucial that each corporation separately owned its parcel, that petitioners did not share in profits and losses and that there is no evidence that either of the corporations or shareholders controlled the other. Additionally, Joan Baldassano's testimony at hearing demonstrates that there was not a plan to avoid gains tax. Joan Baldassano stated that each corporation purchased its own individual parcel because she did not know Ed Cantrell that well at the the time of purchase to trust him.

The Administrative Law Judge classified petitioners as a single transferor on the basis that petitioners were a joint venture. We disagree.

In determining whether there is a joint venture, "[t]he ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit . . ." (Steinbeck v. Gerosa, 4 NY2d 302, 175 NYS2d 1, 13, appeal dismissed 358 US 39, quoting Hasday v. Barocas, 10 Misc 2d 22, 115 NYS2d 209). Here, petitioners have not combined their property, interests, skills and

risks together in such a way as to classify them as a joint venture. Petitioners each held their respective parcel separately from the other. Petitioners did not share profits and losses. The Administrative Law Judge, however, found that petitioners did share in profits and losses and "their share of the profits and losses of the development was dictated by their capital investments, which provided the ratio by which they shared proportionately" (Determination, conclusion of law "A"). This was clearly not the case. The original parcel conveyed to petitioners by Segerdahl and Marks was split between petitioners in relation to each petitioner's capital investment. Thereafter, any profits and losses earned or incurred on sales of parcels owned by petitioner Del Lertnac were Del Lertnac's profits or losses. The same was true for petitioner Grandview Acres. Although petitioners shared common expenses, each petitioner was liable for its proportionate share of such expenses. This does not signify, nor result in, a sharing of profits and losses.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Del Lertnac, Inc., and Grandview Acres, Inc., are granted;
2. The determination of the Administrative Law Judge is reversed; and
3. The notices of determination dated June 18, 1990 are cancelled.

DATED: Troy, New York
May 11, 1995

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

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