STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RONALD FATOULLAH	:	DECISION DTA No. 811707
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 October 31, 1994 with respect to the petition of Ronald Fatoullah, 455 Northern Boulevard, Great Neck, New York 11021. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark and Richard S. Kestenbaum, Esqs., 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 and the Division of Taxation filed a reply brief. Oral argument was heard on June 8, 1995, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the sale of contiguous properties to separate transferees should be treated as a single transfer under the aggregation clause of Tax Law § 1440(7).

II. Whether the Administrative Law Judge improperly considered or weighed certain testimony.

FINDINGS OF FACT

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

In June 1965 petitioner's father, Khanbaba Fatoullah, and petitioner's uncle, Nedjat Lazar,

acquired certain real property located in the Tottenville section of Staten Island. The deed conveying the property described the property by tax lot. Neither petitioner's father nor petitioner's uncle subdivided the property.

The property was considered special inasmuch as it was a rural area a few blocks from the water located within the limits of Staten Island. The property was purchased to be kept as vacant land in the Fatoullah family. At the time of the purchase, petitioner's family was living in Queens.

Upon the death of petitioner's father, the Staten Island property was transferred in a series of two steps to petitioner and his siblings, Ellice and Elliot Fatoullah. In a deed dated December 6, 1983, the trustees of a trust under the last will and testament of Khanbaba Fatoullah transferred to petitioner, petitioner's brother and petitioner's sister the interest of petitioner's father in the Staten Island property. The purchase price was $159,000.00. In a deed dated January 30, 1984, the interest of petitioner's uncle in the Staten Island property was also transferred to petitioner, petitioner's brother and petitioner's sister. The purchase price for this interest was $180,000.00.

When the land was first acquired by petitioner and his family, the price was determined by an appraisal. Petitioner and his siblings represented themselves in the purchase and petitioner participated in the drafting of the legal documents used to effectuate the transfer. This was the first time petitioner was involved in the transfer of undeveloped land.

At or about the time of the respective transfers, petitioner and his siblings executed a mortgage to trustees of a trust under the will of petitioner's father. Petitioner and his siblings also executed a mortgage to their uncle. The eighteenth paragraph of the mortgage to petitioner's uncle stated:

> "This mortgage is subject and subordinate to a first mortgage that mortgagors, their successor and/or assigns, may place on the premises, not to exceed $100,000.00."

At the hearing, petitioner could not recall why the foregoing paragraph was added.

However, he assumed it was included in the event there was a need to raise capital.

Each of the foregoing mortgages contained a rider which stated, in part:

> "Provided that none of the substantial terms and conditions of the mortgage are in default, a release from the lien of this mortgage will be granted upon fifteen (15) days written application or notice in accordance with the following terms and conditions:
>
> "a) The propery [sic] to be released must be in whole building plots, and must be contiguous to property previously released if possible.
>
> "b) All installments of interest due under the terms of the mortgage and all outstanding real estate taxes, sewer rents, water rates or assessment charges on the entire property must be paid before the time of the delivery of the said release.
>
> "c) The owner of the property shall cause to be prepared the release in recordable form and deliver same to the attorney for the holders of the mortgage, for examination and computation of the amount(s) due thereon. The attorneys for the holder of the mortgage shall in addition to the above arrange for the execution, acknowledge and delivery of the release.
>
> "d) Payment of principal for the portion released shall be in accordance with the following formula, with interest thereon to the date payment is received:
>
> $$\frac{\text{AREA TO BE RELEASED}}{\text{TOTAL AREA MORTGAGED}} \times \text{AMOUNT OF MORTGAGE}$$
>
> "At the mortgage holder's option the total area mortgaged may refer instead to the total number of houses to be constructed on the property mortgaged, with the numerator of the above fraction being the number of houses to be released on that particular release.
>
> "e) Releases shall include without additional charge the roadway in front of the premises or whatever area is necessary for access and may reserve access to the remaining parcels not released.
>
> "f) The mortgagor shall not remove from the premises any topsoil or fill, except as may reasonably be required to commence or complete construction or to obtain permits, and the like. This shall not, however, prohibit or in any way limit the mortgagor in his right to excavate, stockpile or transfer such topsoil or fill from any portion of the mortgaged premises to any other part thereof."

Contrary to the inference which could be drawn from the foregoing paragraph of the rider, petitioner did not contemplate a partial release of the mortgage to facilitate sales of lots. In order to prepare the mortgage, petitioner merely copied a form which was provided by an attorney who was a friend of petitioner's uncle. Petitioner did not think that the provisions of the rider would cause any difficulty.

Petitioner and his siblings purchased the property because they wanted to keep the

property in the family. There was no plan to develop it at a future date or to subdivide the property with a goal of future sales. Accordingly, nothing was done by petitioner or his siblings with respect to the property when it was acquired.

In 1986, petitioner, his brother and his sister began receiving unsolicited offers to sell the property. One of the offers was made by S.L. Homes, Inc. ("Homes"). Thereafter, petitioner conferred with several real estate brokers in order to determine an appropriate price. Subsequently they decided to sell some of the tax lots.

In a deed dated December 24, 1986, petitioner and his siblings conveyed a portion of the property located near a street to Homes, a builder, for $969,000.00. Most of the property on the block was retained. As before, the deed described the property in terms of tax lots. At the hearing, petitioner explained that the term "tax lots" is just descriptive as many of the lots were not large enough to be built upon.

The contract of sale, dated December 9, 1986, with Homes listed the seller as "Ronald Fatoullah, Ellice Fatoullah and Elliot Fatoullah" and the purchaser as "S.L. Homes, a New York corporation having an office at 87 Pouch Terrace, Staten Island, New York". The contract had originally listed the purchaser as "SAVINO SAVO, residing at 87 Pouch Terrace, Staten Island, New York", but "SAVINO SAVO, residing" was crossed out and replaced with "S.L. Homes, Inc., a New York corporation having an office . . . ."

When the sale was made in 1986, it was petitioner's intention to hold on to the remainder of the property. Neither petitioner nor his siblings did anything to the property to accommodate the sale such as subdividing the property.

Gains tax forms were filed on the foregoing transaction and, in response, petitioner received a tentative assessment and return stating that no tax was due. The Division did not assert that tax was due because the consideration was under $1,000,000.00.

Starting in 1988, petitioner's family became involved in litigation involving an unrelated piece of property. As a result, they incurred significant legal bills. During the years 1988 through 1990, the legal fees were in excess of $500,000.00. During the year 1991, the legal fees

were approximately $150,000.00. Further, the litigation resulted in other expenses in addition to the legal fees.

In addition to the lawsuit, petitioner began experiencing another problem which involved his practice of law. Until approximately 1989 petitioner was able to earn a satisfactory income representing clients at house closings. During the years 1989 through 1991, the real estate market plummeted and petitioner received only about five percent of the business he received in prior years. Matters became so difficult that it caused a separation between himself and his partner in the practice of law.

The foregoing financial pressures caused petitioner and his family to try to sell the remainder of the property. As a result, petitioner and his family spoke to real estate brokers and tried to market the property directly.

The real estate brokers advised petitioner that the market was weak and that most of the potential buyers would be developers. In order to make the land attractive to buyers and to maximize what they could earn from selling the property, petitioner and his family were advised to prepare the land for construction. Thereafter, they obtained permits to build on the property.

In January 1991, petitioner and his family found willing buyers of one lot who sought to build a home for their own use. At this time they conveyed Lot 23 to Anthony and Katherine Accardo. The consideration for the transfer was $105,000.00. The purchasers of Lot 23 were not related to Homes.

A Transferor Questionnaire and a Transferee Questionnaire were filed on the foregoing transfer. Petitioner also submitted an affidavit in an attempt to establish that the transaction was exempt from tax on the basis it was not made pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be subject to gains tax. The affidavit noted that Homes and its principal, Mr. Savino Savo, are unrelated to Mr. and Mrs. Accardo.

Petitioner and his siblings received a Tentative Assessment and Return dated March 28, 1991 which asserted that tax was due on the sale to Anthony and Katherine Accardo. The

document stated that tax was due in the amount of $9,542.84, plus penalty of $1,336.00 and interest of $217.84, for a total amount due of $11,096.68. Petitioner's attorney advised petitioner that no tax was due and that he should pay the tax under protest. This advice was followed.

The Division of Taxation ("Division") issued a Statement of Proposed Audit Adjustment, dated April 15, 1991, with respect to the transfer to Homes stating that tax was due in the amount of $80,381.00, plus interest of $2,582.00 and penalty of $12,860.00, for a total amount due of $95,823.00.

Petitioner and his family protested the foregoing Statement of Proposed Audit Adjustment. In response, the Division issued a Notice of Determination, dated July 8, 1991, which explained that tax was due in the amount of $80,381.00, plus interest of $3,818.35 and penalty of $16,075.24, for a current balance due of $100,274.59. The notice was based on the Division's position that the consideration from the sale to Homes should be aggregated with the consideration from the sale to Mr. and Mrs. Accardo.

On May 7, 1993, petitioner and his family transferred the remainder of the property in issue to Savo Bros., Inc., 625 Annadale Road, Staten Island, New York 10312 for consideration in the amount of $1,632,672.00. Real property gains tax of $133,048.52 was paid on the sale.

Petitioner's law practice was almost exclusively residential real estate transactions. He was involved in only a few large transactions. In his practice, petitioner had occasion to draft and review contracts of sale, deeds and mortgages.

Petitioner's real estate experience included involvement with a partnership that owned a building in Manhattan. He was also involved with three limited partnerships that engaged in cooperative conversions of small apartment buildings.

At the time of the hearing, petitioner's practice concentrated on law for the elderly since the real estate market was weak.

Petitioner's sister is an attorney who practices law for the elderly and his brother is a psychologist.

In accordance with State Administrative Procedure Act § 307(1), the Division's requested findings of fact have been accepted and substantially incorporated herein.

OPINION

The Administrative Law Judge determined that because the facts here involved the transfer of contiguous parcels to more than one transferee, the regulation at 20 NYCRR 590.43 was applicable and the issue was whether the sale to Homes and the sale to Mr. and Mrs. Accardo were pursuant to an agreement or plan within the meaning of the aggregation clause of section 1440(7) of the Tax Law. To resolve this issue, the Administrative Law Judge first noted that the existence of a plan or agreement could not be presumed merely because adjacent properties were sold.

The Division argues that this statement of the Administrative Law Judge was erroneous as was our decision in Matter of Six Stars Realty (Tax Appeals Tribunal, October 7, 1993) which first explicitly stated the rule relied on by the Administrative Law Judge. The Division urges us to reconsider and reverse our decision in Six Stars Realty.

We reviewed the rule of Six Stars Realty in Matter of Rubin Bros. Holding Co. (Tax Appeals Tribunal, May 18, 1995) and in Matter of Deerwood Estates (Tax Appeals Tribunal, November 17, 1994). The Division has not presented any argument in this case that we have not already considered. Therefore, we affirm the holding of Six Stars Realty and of the Administrative Law Judge that the existence of a plan or agreement will be determined based on the transferor's intent and that multiple transfers to different transferees will not be treated as a single transfer simply because the lots are contiguous or adjacent.

The Administrative Law Judge also concluded that petitioner established that he did not have a plan or agreement to transfer the lots in question. The bases for the Administrative Law Judge's conclusion were:

> "(1) the 1986 sale was based on an unsolicited offer whereas the 1991 sale resulted from unforeseen financial difficulties; (2) there was a substantial period of time between the respective sales; (3) the 1986 and 1991 sales were made to unrelated parties; and (4) petitioner did not pursue a purchaser prior to the sale to Homes whereas the sale to Mr. and Mrs. Accardo was actively sought through the obtaining of

building permits" (Determination, conclusion of law "E").

The Administrative Law Judge then addressed and rejected each of the Division's arguments opposing the Administrative Law Judge's conclusion. The Administrative Law Judge determined that the lot release provisions in the mortgage did not evidence an intent to sell the lots because petitioner credibly testified that these provisions were simply copied without forethought from another document. The Administrative Law Judge also held that the parol evidence rule as applied in Matter of Emery Air Freight Corp. v. New York State Tax Appeals Tribunal (188 AD2d 772, 591 NYS2d 264) did not function to exclude this testimony because the testimony does not conflict with the documentary evidence.

On exception, the Division contends that the Administrative Law Judge erred in not excluding petitioner's testimony pursuant to the parol evidence rule. The Division states "that the effect of crediting Petitioner's testimony is to nullify the meaning of the lot release and development provisions in the riders. Accordingly, the testimony does in fact conflict with the rider provisions and it should not have been allowed to contradict those riders" (Division's brief on exception, p. 6).

We disagree with the Division. Petitioner's testimony does not attempt to affect the meaning of the lot release provisions. Instead, this testimony merely describes the manner in which these provisions were incorporated in the mortgage, i.e., that the provisions were copied without reflection and were not the expression of a plan to subdivide. Although this testimony has bearing on determining petitioner's intent to sell the lots, it has absolutely no impact on the meaning of the mortgage provisions. Accordingly, we agree with the Administrative Law Judge that the testimony was properly considered.

Next, the Division argues that we should not defer to the Administrative Law Judge's determination that petitioner's testimony was credible. The Division asserts that this case is different from cases like Matter of Pay TV of Greater New York (Tax Appeals Tribunal, July 14, 1994) and Matter of Spallina (Tax Appeals Tribunal, February 27, 1992) because here the testimony is contradicted by the mortgage riders and by the fact that, consistent with the

development and lot release provisions, the purchasers of the lots built homes on them.

Because the Administrative Law Judge found petitioner's explanation of the origin of the lot release provisions credible, these provisions do not contradict petitioner's testimony that he did not have a plan to transfer the lots in issue. Further, we do not find the ultimate use of the parcels by the purchasers to be persuasive evidence of petitioner's intent with respect to the lots. Thus, we find no basis to set aside the Administrative Law Judge's evaluation of the credibility of petitioner's testimony. Similarly, we do not agree with the Division that the credible testimony of petitioner was insufficient to satisfy petitioner's burden of proof (Matter of Avildsen, Tax Appeals Tribunal, May 19, 1994).

Having considered all of the arguments advanced by the Division, we affirm the determination of the Administrative Law Judge that the transfer to Homes and to Mr. and Mrs. Accardo should not be treated as a single transfer.

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 Ronald Fatoullah is granted; and

4. The Notice of Determination dated July 8, 1991 is cancelled.

DATED: Troy, New York
November 9, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner