

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ERIC MARDER	:	DECISION
	:	DTA No. 812258
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.	:	

Petitioner Eric Marder, 45 West 67th Street, New York, New York 10023, filed an exception to the determination of the Administrative Law Judge issued on March 9, 1995. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter on May 2, 1995 stating it would not be filing a brief, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUES

I. Whether petitioner has established that the only correlation between the three contiguous and adjacent condominium units in issue is their contiguity or adjacency and that the units were not used for a common or related purpose.

II. In the alternative, whether the sale of petitioner's interest in three condominium units at one location constituted a transfer of shares by a single investor which should be aggregated for purposes of applying the \$1,000,000.00 exemption.

FINDINGS OF FACT

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

The three properties involved in the transfer at issue are the contiguous and adjacent condominium units 16A, 16B and 16F, located at 45 West 67th Street, New York, New York.

On January 3, 1984, Eric Marder Associates, Inc. ("EM, Inc.") acquired two-bedroom unit 16A from the condominium plan sponsor, 45 West 67th Street Corporation, for \$340,511.00. EM, Inc. was a subchapter S marketing research corporation located at 122 East 42nd Street and wholly owned by petitioner, Eric Marder. Petitioner also served as the chairman and chief executive officer of the corporation. EM, Inc.'s clients were generally major corporations for which EM, Inc. did large scale surveys.

After acquiring unit 16A, petitioner furnished the apartment using corporate funds. The corporation subsequently claimed depreciation expenses for such furniture on its tax returns, along with all other expenses associated with the apartment. In addition, although petitioner could not quantify the benefit received by the corporation from the apartment in specific dollar amounts, petitioner did acknowledge that the apartment made a difference in some vital business transactions, and that it served a good business purpose.

Petitioner lived in Westchester County but conducted most of his business and business entertaining in New York City. He would sometimes take clients out to dinner and instead of having them stay at a hotel, he would offer them accommodations at unit 16A. This provided Mr. Marder and the client with an opportunity to discuss business in a more relaxed setting. In addition, on those nights when petitioner worked late, he would stay over in unit 16A rather than make the trip back home. Finally, petitioner and his wife would stay over in unit 16A after going to the theater in New York City. Unit 16A was never rented out by EM, Inc.

On December 17, 1986, petitioner acquired one-bedroom unit 16F from Mr. Charles Read for \$260,000.00. Two weeks later, on December 31, 1986, petitioner acquired two-bedroom unit 16B from Mr. Peter Brentnall for \$470,000.00. The floor plan of unit 16B was a mirror image of the floor plan of unit 16A. At all times following the purchases of units 16B and 16F, the units were leased to other individuals and acted as a source of rental income for petitioner. Units 16B

and 16F were not used by petitioner or the corporation. The three units, although located on the same floor, did not have a common entrance.

Petitioner subsequently placed all three units (16A, 16B and 16F) on the market at the same time with the same real estate agent. According to petitioner, units 16B and 16F were offered for sale because he felt that the real estate market was soon to fall due to what he considered to be the overbuilding in New York City. Petitioner stated that unit 16A was placed on the market because he and his wife decided to move to New York City. As they would have their own apartment to entertain and house clients, the corporate apartment was no longer needed. The only ensuing offer received by the real estate agent was submitted by one purchaser, Mr. David Roth, for the purchase of all three units. After a period of negotiations, Mr. Roth ultimately agreed upon the purchase prices set by petitioner.

Two identical contracts of sale, one for units 16B and 16F and one for unit 16A, were executed by petitioner and Mr. Roth on March 15, 1989 for a total consideration of \$1,340,000.00. Both petitioner and EM, Inc. were represented by the same attorney, Robert M. Pellegrino, during this transaction.

Following the signing of the contracts, Mr. Roth assigned his interest in unit 16B to Cut & Sold Pension Trust for \$0.00. Mr. Roth, president of Cut & Sold Pension Trust, executed the assignment agreement on behalf of both himself and the company.

On March 20, 1989, the Division of Taxation ("Division") received the following documents regarding the transfers of units 16B and 16F:

- (a) Transferor Questionnaire for unit 16F, dated March 10, 1989, whereby petitioner transferred 100% of his interest to Mr. Roth for \$790,000.00;
- (b) Transferee Questionnaire for unit 16F, dated March 10, 1989;
- (c) A March 1989 contract of sale for units 16B and 16F, signed by David Roth and petitioner;
- (d) Transferor Questionnaire, dated March 17, 1989, for the assignment of the contract of sale for unit 16B from David Roth to Cut & Sold Pension Trust for \$0.00;

(e) Transferee Questionnaire, dated March 17, 1989, for the assignment of the contract of sale for unit 16B signed by David Roth on behalf of Cut & Sold Pension Trust; and

(f) A copy of the March 1989 assignment of the right to purchase unit 16B from David Roth to Cut & Sold Pension Trust for \$0.00.

On the same date, under separate cover, the Division received the following documents regarding the transfer of unit 16A:

(a) Transferor Questionnaire for unit 16A, dated March 10, 1989, signed by petitioner on behalf of Eric Marder Associates, Inc. whereby petitioner transferred 100% of his interest to Mr. Roth for \$550,000.00;

(b) Transferee Questionnaire for unit 16A, dated March 10, 1989; and

(c) A March 1989 contract of sale signed by David Roth and petitioner, on behalf of EM, Inc.

All of the aforementioned documents were prepared by petitioner's attorney upon his request.

On April 20, 1989, the Division received a supplemental Transferor Questionnaire, wherein petitioner aggregated the sales of the three units for purposes of determining the anticipated tax due. Although petitioner maintained that the sales of the three units should not be aggregated, this supplemental form was submitted for reference should the Division reasonably determine that tax was due.

Attached to the Supplemental Transferor Questionnaire was an affidavit signed by petitioner, individually and as chairman of EM, Inc., dated April 18, 1989. In this affidavit, petitioner claimed that the three units should not be aggregated because they had been used for separate and distinct purposes. Petitioner alleged that unit 16A was used solely for the conduct of corporate business (meeting and resting place) and had never been offered for rental. In contrast, petitioner alleged that units 16B and 16F were purchased as investment properties and had been utilized solely for rental purposes and never for the benefit of the corporation.

The three units were subsequently transferred on May 8, 1989 pursuant to three separate deeds.

On March 16, 1992, the Division issued a Notice of Determination for assessment L-005382112-7, indicating that petitioner owed \$16,568.80 in tax, plus interest, for the transfer of the three properties to one transferee for consideration in excess of \$1,000,000.00. The explanation of gains tax due was as follows:

<u>Unit</u>	<u>Consideration</u>	
16A	\$ 550,000.00	
16B	495,000.00	
16F	295,000.00	
	<u>\$1,340,000.00</u>	
Total Consideration		\$1,340,000.00
Less: Brokerage		<u>53,600.00</u>
		\$1,286,400.00
Less: Original Purchase Price		
Original Acquisition	\$1,070,511.00	
Acquisition Costs	8,671.00	
Capital Improvements	37,030.00	
Selling Expenses	<u>4,500.00</u>	
Gain Subject to Tax		\$ 165,688.00
Gains Tax - 10%		\$ 16,568.80

OPINION

The Administrative Law Judge, relying on Matter of Von Mar Realty Co. (Tax Appeals Tribunal, December 19, 1991, affd Matter of Von Mar Realty Co. v. Tax Appeals Tribunal, 191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803), determined that petitioner did not meet his burden to establish that the only correlation between the properties was their contiguity or adjacency. The Administrative Law Judge stated that in Von Mar "both of the parcels involved had been improved with industrial buildings, were acquired from one grantor at the same time and were transferred to one purchaser at the same time" and that "these factors did not establish that the only correlation was the contiguity itself" (Determination, conclusion of law "D"). Here, the Administrative Law Judge found that "the three condominium units were transferred by petitioner at the same time to the same purchaser using identical contracts of sale, the same attorney and the same real estate broker" and while petitioner gave different reasons for selling the units, "his instructions to the real estate broker were to sell all

three units" (Determination, conclusion of law "D"). Based on these facts, the Administrative Law Judge concluded that "it is clear that there existed a correlation between these three units beyond their mere contiguity" (Determination, conclusion of law "D").

The Administrative Law Judge next found that the three units were used for a common or related purpose, i.e., business investments, because petitioner derived a financial benefit from each of the three units (Determination, conclusion of law "D").

With respect to the Division's position that "the transfers of the condominium shares by petitioner, as a single investor, are to be aggregated for purposes of applying the \$1,000,000.00 exemption," the Administrative Law Judge determined that this position provides the second rationale for aggregating the transfers (Determination, conclusion of law "E"). The Administrative Law Judge stated the following in support of this position: (1) that it was the intention of the Legislature "that condominium plans and the sale of apartments pursuant to such plans be treated in the same manner as cooperative plans and the transfers of stock in such cooperative plans" (Determination, conclusion of law "E"); (2) since Tax Law § 1440(7) does not distinguish between transfers made by the original sponsor of the plan and subsequent sales of interests by purchaser/investors, transfers by such purchasers/investors are properly deemed a single transfer and should be aggregated; and (3) since "the ownership interests in the condominium units could not even have been created, but for the existence of the original plan of the sponsor . . . all subsequent transfers of unit interests by one transferor should also be deemed as being pursuant to a condominium plan" (Determination, conclusion of law "E").

The Administrative Law Judge found further support for this position in 20 NYCRR 590.40(b) which provides "all transfers of shares by a single investor are aggregated for purposes of applying the \$1 million exemption." The Administrative Law Judge stated that while the Tax Appeals Tribunal has not directly addressed this issue, the Division has consistently held in numerous letter rulings that 20 NYCRR 590.40(b) "applies to both the initial sale by the sponsor to investors and resales by investors to subsequent investors" (Determination, conclusion of law "E"). In addition, the Administrative Law Judge stated that none of the units were ever used by

petitioner for his personal residence but were purchased for income and investment purposes within the meaning of 20 NYCRR 590.40(b) (Determination, conclusion of law "E").

On exception, petitioner argues that the properties were not used for a common or related purpose and that "the Administrative Law Judge's interpretation of the 'any correlation' criterion would render it meaningless since, of necessity, all 'unstructured' sales between a single transferor and a single transferee involve the 'same time,' 'same purchaser,' 'identical contracts,' 'same attorney' and 'same real estate broker'" (Petitioner's exception, p. 1). In addition, petitioner argues that the Administrative Law Judge ignored the "well-settled dicotomy [sic]" between trade property and passive investment property and the different tax treatment they receive under Federal and State law (Petitioner's exception, p. 1). Petitioner also takes exception to the Administrative Law Judge's reliance on 20 NYCRR 590.40(b) stating that those regulations deal "with transfers by an investor" while Unit 16A was acquired for use in a business rather than as an investment (Petitioner's exception, p. 1).

The Division of Taxation relies on its brief below and asks that the determination of the Administrative Law Judge be affirmed.

On exception, petitioner has not put forth any legal authority nor explained his argument regarding the different tax treatment for trade or business property and passive investment property. The Administrative Law Judge correctly and adequately addressed all of the issues raised before him and we find no basis in the record for modifying the Administrative Law Judge's determination in any respect; 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 Eric Marder is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Eric Marder is denied; and

4. The Notice of Determination dated March 16, 1992 is sustained.

DATED: Troy, New York
October 5, 1995

/s/John P. Dugan

John P. Dugan
President

/s/Donald C. DeWitt

Donald C. DeWitt
Commissioner