

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>MICHAEL GORDON</b>	:	DECISION
for Revision of a Determination or for Refund of Tax on	:	DTA No. 812459
Gains Derived from Certain Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

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Petitioner Michael Gordon, c/o Koret, 136 Madison Avenue, New York, New York 10016, filed an exception to the determination of the Administrative Law Judge issued on February 23, 1995. Petitioner appeared by Arthur Andersen & Co. (Henry F. Chiwaya and Michael H. Goldsmith, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioner's reply brief was received on July 17, 1995 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

***ISSUES***

I. Whether the sales of two contiguous parcels of real property to two separate transferees each involving a sales price under \$1,000,000.00 were "partial or successive transfers" pursuant to a "plan or agreement" and were, therefore, properly treated by the Division of Taxation as a single transfer under the aggregation clause of Tax Law § 1440(7).

II. Whether petitioner has established that penalties asserted for failure to correctly report and remit the gains tax due should be abated.

III. Whether a frivolous petition penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.15 should be imposed in this matter.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "6" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On August 18, 1994, the Division of Taxation ("Division") submitted, along with its brief, 17 proposed findings of fact, each of which has been incorporated into the following Findings of Fact.

On September 15, 1994, petitioner submitted, along with his reply brief, 22 proposed findings of fact, each of which has been incorporated into the following Findings of Fact, except for the following:

Proposed finding of fact "2" and the first part of proposed finding of fact "3" (that both properties were insured individually) are rejected as not being supported by the record.

On or about May 27, 1976, Largor Realty Corp. ("Largor"), a corporation owned by Michael Gordon ("petitioner"), purchased premises known as 323A-325 East 89th Street, New York, New York for the sum of \$120,000.00.

Petitioner testified that the name Largor was derived from his name and the name of his son. After the death of his son, it became very painful for petitioner to use the corporate name. For that reason and because his accountant advised him that title to the properties should be in his name, Largor deeded the properties to petitioner on October 14, 1982 (see, Exhibit "G").

The buildings on each of the parcels of real property are residential apartment buildings which are similar in size and age. The properties were rented to various residential tenants.

Petitioner never managed the apartment buildings. After purchase, he engaged the management services of Essie Herman and, upon her death, the services of Otypka Real Estate, Inc. ("OREI"). OREI was controlled by Mojmir Otypka and was operated by Mr. Otypka and

by Arthur Philbin. Mojmir Otypka died in 1993; an affidavit of Mr. Otypka, sworn to on January 22, 1993, was introduced into evidence as Exhibit "6." The managing agent (Ms. Herman or OREI) prepared separate monthly statements of account for each building and submitted them to petitioner.

Petitioner testified that, in early 1988, he decided to sell the property located at 323A East 89th Street because he had been having difficulties with the tenants, i.e., tenants had not been paying rent and some of the tenants were destroying the premises. In furtherance of his decision to sell the 323A East 89th Street property, he requested that OREI, the managing agent of the building, attempt to locate a purchaser therefor.

In January 1988, OREI prepared a mailing (known as a set-up) describing the premises at 323A East 89th Street and sent it to the owners of other properties in the vicinity (see, Exhibits "3" and "5"). Bocon Realty Corp. ("Bocon") responded to the mailing, viewed the property and entered into negotiations to purchase 323A East 89th Street. Because Bocon wanted petitioner to finance \$60,000.00 of the contemplated purchase price, negotiations with Bocon deteriorated. As a result, petitioner instructed OREI to attempt to locate another prospective purchaser for 323A East 89th Street.

Pursuant to petitioner's instructions, OREI again advertised the property in March 1988 (see, Exhibit "4"). Wilmar Brokerage ("Wilmar") responded to the advertising and expressed interest in purchasing 323A East 89th Street. During the negotiations with Wilmar, Bocon revised the terms of its offer. Thereafter, OREI notified Wilmar that the sale to Bocon would probably occur and negotiations with Wilmar ceased. Arthur Philbin of OREI appeared at the hearing and testified that Wilmar then expressed an interest in purchasing 325 East 89th Street. OREI, through its officers, Mr. Otypka and Mr. Philbin, informed petitioner of Wilmar's interest in 325 East 89th Street.

By a contract of sale dated May 4, 1988, petitioner agreed to sell 323A East 89th Street to Bocon for the sum of \$590,000.00.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as

follows:

Petitioner testified that he informed Mr. Otypka and Mr. Philbin, both verbally and in writing, that he did not want to sell 325 East 89th Street. The letter from petitioner to Mr. Otypka is dated April 15, 1988 and reads as follows:

"The only thing that annoys me is your feeling that my decision not to sell 325 East 89th Street is an emotional one.

"I just don't want to sell, period. And I'm not annoyed at your trying to earn another commission. I know that's your profession" (Exhibit "2").

Mr. Philbin testified that, in an attempt to get petitioner to change his mind, both he and Mr. Otypka telephoned petitioner on several occasions and sent him a letter informing him that it would be in his best interest to sell 325 East 89th Street. The letter from Mr. Otypka to Mr. Gordon dated April 11, 1988 reads as follows:

"I did hear you loud and clear regarding your desire to hold on to the building at 325 East 89th Street, but I did want at the risk of your annoyance with me to try one more time to change your mind.

"Michael this property really holds no promise of substantial appreciation in the foreseeable future and, would not be sound business decision to continue to turn down Mr. Kluff's offer.

"Please reconsider this calmly and then hopefully you will come to what, as your real estate advisor I strongly believe is the proper decision and let us negotiate a sale of this property" (Exhibit "1").<sup>1</sup>

Petitioner stated that the reason that he did not want to sell 325 East 89th Street was

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Finding of fact "6" of the Administrative Law Judge's determination read as follows:

"Petitioner testified that he informed Mr. Otypka and Mr. Philbin, both verbally and in writing (see, Exhibit "2"), that he did not want to sell 325 East 89th Street. Mr. Philbin testified that, in an attempt to get petitioner to change his mind, both he and Mr. Otypka telephoned petitioner on several occasions and sent him a letter (see, Exhibit "1") informing him that it would be in his best interest to sell 325 East 89th Street."

We have modified this finding of fact to set forth the full text of the two letters put in the record by petitioner.

because he had a son who he thought might want to live there or, in the alternative, he considered giving the property to his son.

Mr. Otypka had discussions with Thomas Tillander, the vice president of petitioner's business (Koret-Givanchy), who thereafter also advised petitioner to sell 325 East 89th Street. He told petitioner that the neighborhood was declining, there were many old buildings there and that, by selling, petitioner would no longer have to be bothered all the time. Mr. Tillander was present at the hearing, but was not called to testify. Petitioner, therefore, relented and agreed to sell 325 East 89th Street to Wilmar.

By a contract of sale dated May 24, 1988 (see, Exhibit "J"), petitioner agreed to sell the premises at 325 East 89th Street to Jerome M. Kluft, a principal of Wilmar, for the sum of \$610,000.00. Mr. Kluft thereafter assigned his rights under the contract of sale to Wilmar (see, Exhibit "K").

The May 24, 1988 contract of sale wherein petitioner sold 325 East 89th Street to Jerome Kluft contained a rider which provided as follows:

"Section 29. Tax Free Exchange.

"29.01 Seller shall have the right to accept all or any part of the purchase money by directing Purchaser to purchase a building or buildings designated by Seller for the benefit of Seller, and in a 'like-kind' exchange with Seller.

"29.02 Seller will defend, indemnify and hold Purchaser harmless from any costs, fees, or expenses or actions for breach of contract that may arise or result from the Purchaser's purchase of the 'like-kind' exchange property.

"29.03 Purchaser acknowledges that the provisions of this Section are a major consideration for this transaction, and without which this Contract would not have been executed. Nothing herein contained, however, shall make this Contract subject to the failure of Seller to designate property to be exchanged, and the obligations of Seller hereunder shall remain in full force and effect.

"29.04 To implement the foregoing, in the event Seller has not designated the property to be exchanged so that there would be simultaneous closings, all of the proceeds of this sale shall be held in escrow by either Spengler Carlson Gubar Brodsky & Frischling or Purchaser's title company, as the parties hereto may designate, pursuant to an escrow agreement to be executed at closing. The escrowed funds shall be held for the specific purpose of purchasing a building on behalf of Purchaser to be used in exchange for the Premises. The money shall be held in escrow until:

- "1. Seller designates the real estate to be purchased within forty-five (45) days from the closing; and
- "2. For one hundred eighty (180) days, but not beyond the date required for the Seller to file the Federal Tax Returns, after the closing of title of the Premises.

"In the event Seller herein does not designate a building to be purchased within the aforesaid forty-five (45) day period, then in that event, the escrowed funds shall be turned over to Seller forthwith."

Transferor and transferee questionnaires were filed with respect to 323A East 89th Street which indicated that the consideration paid therefor was \$590,000.00 (see, Exhibit "I"). Transferor and transferee questionnaires for 325 East 89th Street were filed with the Division (see, Exhibit "L"). The transferor questionnaire stated that the gross consideration paid was \$610,000.00, less brokerage fees paid by the transferor of \$25,925.00, with the resulting consideration having been \$584,075.00. Original purchase price was listed as \$135,747.00; gain subject to tax was, therefore, determined to be \$448,328.00.

On May 28, 1991, the Division issued a Notice of Determination to petitioner in the amount of \$108,000.00, plus penalty and interest, for a total amount due of \$180,491.96.

An attachment to a Statement of Proposed Audit Changes (see, Exhibit "E") explained that the properties were subject to aggregation pursuant to Tax Law § 1440(7) and that penalty (for late payment) and interest were imposed pursuant to Tax Law § 1446. The calculation of tax due was performed by adding together the purchase price of 323A East 89th Street (\$590,000.00) and 325 East 89th Street (\$610,000.00) for a total of \$1,200,000.00, less original purchase price (\$60,000.00 each or a total of \$120,000.00), for a taxable gain of \$1,080,000.00. Tax due thereon, at 10% of taxable gain, is \$108,000.00.

In response to a Statement of Proposed Audit Changes issued by the Division (an attachment to the document was introduced into evidence as Exhibit "E"; the actual statement was not made a part of the record) on April 15, 1991, petitioner, upon the advice of counsel, sent a letter dated May 14, 1991 to the Tax Compliance Division. The letter was prepared in petitioner's office by his secretary, Yoriko Korita, and was signed by petitioner. Petitioner testified that his attorney drafted the contents of the letter and that, despite having signed it, he

never really understood its content. On page 2 of the letter, under the heading of "Absence of Plan", were the following statements:

"1.) When I made the decision to sell these properties, it was my business judgement that separate sales to separate entities would result in the maximum selling price for each property. Coincidentally, our desire to sell these properties separately matched market conditions during the period surrounding these sales, because I received no valid offers on the two properties from any single entity.

"2.) Further, it was my intention to make tax free exchanges, under Section 1031 of the Internal Revenue Code, of each of these properties and I decided that separate sales to separate buyers resulting in a lower amount individual transaction, would afford a greater flexibility in finding exchange properties."

Petitioner timely filed a Request for Conciliation Conference which was received by the Division's Bureau of Conciliation and Mediation Services on August 26, 1991. Attached thereto was a copy of petitioner's May 14, 1991 letter to the Tax Compliance Division. On that portion of the Request for Conciliation Conference which asks the taxpayer to state the basis for making his claim, petitioner made specific reference to his May 14, 1991 letter.

At the hearing held on May 24, 1994, petitioner stated that there was no plan to sell both of the buildings and that, prior to signing the contract to sell 323A East 89th Street, no one had approached him concerning the sale of 325 East 89th Street.

Petitioner is a handbag manufacturer and designer and is the owner of Koret located at 136 Madison Avenue in New York City. He has been involved in the business of handbag designing and manufacturing for approximately 50 years. Originally from Hungary, petitioner spent seven years in Paris before coming to the United States in 1953. He initially worked for Mondaine and, when the owner of Koret died in a plane crash in 1967, petitioner purchased the company. Petitioner has never worked as a real estate developer, salesperson or broker. He is not a tax professional nor has he ever rendered tax advice to anyone.

### ***OPINION***

The Administrative Law Judge found that "the record contains no evidence as to when the actual transfers of 323A and 325 East 89th Street occurred. However, the contract for the sale of 323A was executed on May 4, 1988 and the contract for the sale of 325 was signed on May 24, 1988" (Determination, conclusion of law "B").

He then noted that:

"[p]etitioner testified that, in early 1988, he decided to sell one of his parcels of real property, i.e., 323A East 89th Street. He stated that it was only after he agreed to sell this property to Bocon that Wilmar expressed an interest in purchasing the 325 East 89th Street property and that the pressure from Mr. Otypka and Mr. Philbin commenced. The documentary evidence presented (the letters between Mojmir Otypka and petitioner [Exhibits '1' and '2']) indicates that the pressure to sell was exerted and initially resisted by petitioner in mid-April 1988. No evidence was produced which would indicate when petitioner changed his mind and consented to sell the property at 325 East 89th Street. What is of primary concern, therefore, is whether on the date of execution of the contract for sale of 323A (May 4, 1988), petitioner had already decided to sell 325 as well" (Determination, conclusion of law "B").

The Administrative Law Judge found that:

"[p]etitioner testified that prior to the signing of the contract to sell 323A, no one had approached him concerning the sale of 325 (see, Finding of Fact '15'; tr., p. 37). This testimony is contradicted by the letters between Mojmir Otypka and petitioner (see, Exhibits '1' and '2') which were both dated in April 1988. In addition to this discrepancy, there is other evidence which calls into question the credibility of petitioner's testimony, i.e., his May 14, 1991 letter which was initially sent to the Tax Compliance Division in response to a Statement of Proposed Audit Changes and which was subsequently attached to and made a part of his Request for Conciliation Conference in August 1991 (see, Exhibit 'D').

"As indicated in Finding of Fact '13', the May 14, 1991 letter stated that '[w]hen I made the decision to sell these properties' (emphasis added), and then goes on to explain his reasons for making separate sales to separate entities because, in the words of the letter, doing so 'would result in the maximum selling price for each property' and 'separate sales to separate buyers resulting in a lower amount individual transaction, would afford a greater flexibility in finding exchange properties.' A literal reading of this language would reasonably lead one to conclude that petitioner intended to sell both properties and, in order to maximize his profit and to afford greater flexibility in finding exchange properties, he decided to make separate sales to separate purchasers.

"Moreover, as the Division correctly points out, nowhere in the explanatory letter of May 14, 1991 is there any mention of the series of facts subsequently (and for the first time) brought out at the hearing. While petitioner contends that the letter was drafted by his attorney and that he did not fully understand its content, there was no testimony or affidavit from the attorney to corroborate petitioner's contention" (Determination, conclusion of law "B," emphasis added).

The Administrative Law Judge concluded that:

"[b]ased upon the inconsistencies between petitioner's testimony and the documentary evidence presented, it must be found that his argument is insufficient to overcome his burden of establishing that he did not transfer



the subject properties pursuant to a section 1440(7) plan and that he is, therefore, entitled to an exemption from the gains tax" (Determination, conclusion of law "B").

The Administrative Law Judge also found that "[b]ecause petitioner erroneously maintained that his sales of real property at 323A and 325 East 89th Street were not subject to tax, it must follow that his reliance thereon to show reasonable cause for failure to file returns and remit tax must also fail" (Determination, conclusion of law "C").

On exception, petitioner asserts that the "determination of the Administrative Law Judge was erroneous because it placed the burden of establishing the imposition of the gains tax on the Petitioner" (Petitioner's brief, p. 3). Petitioner asserts that the burden is on the Division to establish that the transfers of the two properties were pursuant to a plan or agreement, not on petitioner to prove a negative, i.e., that there was no plan (Petitioner's brief, pp. 4 and 5). Petitioner also asserts that the conclusion of the Administrative Law Judge does not reflect the facts in the case. Petitioner asserts that he offered evidence to show that "the decision to sell the second property was made subsequent to the closing of the first sale" (Petitioner's brief, p. 7). He refers to the following colloquy at hearing:

"Q. And then what happened?

"A. Then we closed the sale of 323A East 89th Street.

"Q. And what happened to the negotiations with Wilmar?

"A. Otypka told me they were interested in the 325 building.

"Q. This is the second building?

"A. Yes, and I told him that I don't want to sell . . ." (Tr., pp. 22-23).

Petitioner asserts that:

"[a] fair reading of this testimony . . . observing the use of the words 'and then' at the beginning of each question clearly demonstrates that a time sequence is being elected and described, and the time sequence at this juncture, does not include the decision to sell the property at 325. Petitioner clearly states in that sequence that he told Mr. Otypka (his broker) that he did not want to sell the second building even after he sold the first building" (Petitioner's brief, p. 7).

Petitioner points to his subsequent testimony on cross-examination as being consistent

with and supporting his position:

"Q. Prior to the signing of that contract [for 323A], did anyone approach you concerning the sale of 325?

"A. No.

"Q. When did those discussions start?

"A. That happened in the meantime when we sold the 323A.

"Q. The timing here is important. Do you remember exactly when after you closed the deal for 323A?

"A. It was very close. We didn't know if we should do it or not do it . . ." (Tr., p. 37).

Petitioner asserts that "[t]his answer can only read -- it was very close after -- the closing of 323A" (Petitioner's brief, p. 7).

We affirm the determination of the Administrative Law Judge that petitioner failed to prove that when he entered into the contract for the sale of 323A East 89th Street on May 4, 1988 he did not, at that time, intend to sell 325 East 89th Street. The determination of the Administrative Law Judge found, in essence, that petitioner's testimony was not credible. The credibility of witnesses is a determination within the domain of the trier of facts, the person who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony (see, Matter of Moss, Tax Appeals Tribunal, November 25, 1992; Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992; Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). Although this Tribunal is not bound by the Administrative Law Judge's evaluation of a witness's credibility (Tax Law § 2006[7]; 20 NYCRR 3000.17[e][1]; Matter of Moss, *supra*; Matter of Jericho Delicatessen, *supra*), we find nothing in the record here which causes us to alter the determination of the Administrative Law Judge (*cf.*, Matter of Wachsman, Tax Appeals Tribunal, November 30, 1995).

The Administrative Law Judge dealt fully and correctly with the issues and we affirm his determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael Gordon is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Michael Gordon is denied; and
4. The Notice of Determination issued May 28, 1991 is sustained.

DATED: Troy, New York  
January 4, 1996

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Donald C. DeWitt

Donald C. DeWitt  
Commissioner