

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

HEBARON ENTERPRISES, ORRIN M.C. HEIN, :
HOLLY HEIN MCCUTCHEN AND MELVIN KLEIN :

DECISION
DTA Nos. 812751
through 812763

for Revision of Determinations or for Refund of Tax on
Gains Derived from Certain Real Property Transfers under :
Article 31-B of the Tax Law.

Petitioners Hebaron Enterprises, Orrin M.C. Hein, Holly Hein McCutchen and Melvin Klein, c/o Larry Levine, 1700 York Avenue 1T, New York, New York 10128, filed an exception to the February 22, 1996 determination of the Administrative Law Judge in this proceeding. On July 10, 1997, the Tax Appeals Tribunal rendered a decision on this exception and petitioners thereafter commenced a proceeding pursuant to Article 78 of the Civil Practice Law and Rules before the Appellate Division, Third Department for a review of said decision of the Tax Appeals Tribunal.

On March 4, 1999, the Appellate Division issued a judgment in that Article 78 proceeding affirming so much of the decision of the Tax Appeals Tribunal as concluded that the simultaneous transfer of all parcels of real property at issue herein by petitioners, as tenants in common, to a single transferee pursuant to a court order constituted a single transfer of petitioners' interests in the parcels and, hence, a single transaction for purposes of the real

property transfer gains tax imposed pursuant to former Article 31-B of the Tax Law.¹ However, the Appellate Division remitted this matter to the Tax Appeals Tribunal for its consideration and decision, based upon the existing record, of whether the affidavits submitted by petitioners were sufficient to establish that the only correlation between the 13 properties at issue herein was the contiguity or adjacency of such properties and that the properties were not being used for a common or related purpose,

NOW, after reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision on remittur. Commissioner Pinto took no part in the consideration of this decision.

ISSUE

Whether the affidavits submitted by petitioners were sufficient to establish that the only correlation between the 13 properties at issue herein was the contiguity or adjacency of such properties and that the properties were not being used for a common or related purpose.

FINDINGS OF FACT

We find the facts as determined in our previous decision in this matter. These facts are set forth below.

On June 15, 1995, the parties entered into a Stipulation of Facts with regard to the instant matter. The nine paragraphs constituting the stipulation have been incorporated into the findings of fact below. In addition, petitioners submitted six proposed findings of fact which have been

¹The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

incorporated into the findings of fact below, to the extent they were not duplicative of the stipulated facts or irrelevant and/or immaterial.

On June 11, 1992, the New York City School Construction Authority ("NYCSCA"), by its powers of eminent domain, filed a Notice of Acquisition and a Notice of Entry in the Supreme Court of New York, County of Queens, and acquired all of the lots comprising Tax Block 15820 in the Borough of Queens, City of New York. Petitioners collectively owned 13 of the lots condemned, specifically, lots 1, 11, 18, 21, 25, 29, 30, 33, 188, 190, 191, 192, and 193. The lots are contiguous and they front on 29th Street.

None of petitioners initiated the transfer of the lots to NYCSCA and the compensation negotiations did not yield a settlement until August 5, 1992. Upon reaching the settlement, petitioners complied with the pre-transfer audit process by filing form TP-580, Transferor Questionnaire, for each of the lots, which indicated that the conveyance of each of the lots was exempt from the imposition of the gains tax because the amount of the consideration received by petitioners in connection with each of the lots did not exceed one million dollars.

Upon the Division of Taxation's ("Division") review of the forms TP-580, it concluded that, for purposes of applying the one million dollar exemption, the condemnation award received by each petitioner with regard to his or her tenant-in-common interest in each of the lots should be aggregated with the condemnation awards received by each petitioner in connection with his or her tenant-in-common interests in all other lots located in Tax Block 15820.

On or about October 28, 1992, each petitioner paid, under protest, his or her proportionate share of the gains tax assessed on each form TP-582 with respect to the transfer of the lots. On or about July 26, 1993, each petitioner requested a full refund of the gains tax paid in connection

with the transfer of the lots plus interest on such refund at the statutory rate. All said applications for refund were denied by the Division by 13 letters, all dated August 19, 1993.

Petitioners Orrin M. C. Hein, Holly Hein McCutchen and Hebaron Enterprises owned a tenant-in-common interest in all 13 lots. Petitioner Melvin Klein owned a tenant-in-common interest in 11 of the 13 lots; he did not own an interest in lots 11 and 188. Each of the foregoing petitioners acquired a tenant-in-common interest in the lots at different times and through various means. Orrin M. C. Hein and Holly Hein McCutchen, who are siblings, each obtained their tenant-in-common interests by gift from their mother in 1987 and 1988. Hebaron Enterprises obtained its interests by purchase in 1981. Melvin Klein obtained his interests by gift in 1977. George West, who is not a party to this proceeding, obtained his interest by purchase in 1984. Other than the sibling relationship between Orrin Hein and Holly Hein McCutchen, none of petitioners are related to each other.

Following the condemnation of the lots comprising Block 15820, petitioners reported the following amounts as the consideration received as compensation for the 13 lots condemned:

<u>LOT</u>	<u>TOTAL CONSIDERATION</u>
1	\$ 939,035.72
11	704,276.79
18	234,758.93
21	328,662.50
25	234,758.93
29	234,758.93
30	234,758.93
33	234,758.93
188	710,990.89
190	25,567.80
191	30,216.49
192	30,216.49
193	31,378.67
TOTAL	<u>\$3,974,140.00</u>

In petitioners' real property gains tax filings, the amount received for each condemned lot was further broken down by petitioners, such that the amounts received by each petitioner are as follows:

<u>LOT</u>	<u>Hein</u>	<u>McCutchen</u>	<u>Klein</u>	<u>Hebaron</u>
1	\$156,505.95	\$156,505.95	\$313,011.91	\$ 313,011.91
11	\$176,069.19	\$176,069.20	-0-	\$ 294,029.75
18	\$ 39,126.48	\$ 39,126.49	\$ 78,252.98	\$ 78,252.98
21	\$ 54,777.08	\$ 54,777.08	\$109,554.17	\$ 109,554.17
25	\$ 39,126.48	\$ 39,126.49	\$ 78,252.98	\$ 78,252.98
29	\$ 39,126.48	\$ 39,126.49	\$ 78,252.98	\$ 78,252.98
30	\$ 39,126.48	\$ 39,126.49	\$ 78,252.98	\$ 78,252.98
33	\$ 39,126.48	\$ 39,126.49	\$ 78,252.98	\$ 78,252.98
188	\$177,747.72	\$177,747.72	-0-	\$ 285,765.07
190	\$ 4,261.30	\$ 4,261.30	\$ 8,522.60	\$ 8,522.60
191	\$ 5,036.08	\$ 5,036.09	\$ 10,072.16	\$ 10,072.16
192	\$ 5,036.08	\$ 5,036.09	\$ 10,072.16	\$ 10,072.16
193	\$ <u>5,229.77</u>	\$ <u>5,229.78</u>	\$ <u>10,459.56</u>	\$ <u>10,459.56</u>
TOTALS	<u>\$780,295.57</u>	<u>\$780,295.66</u>	<u>\$852,957.46</u>	<u>\$1,432,752.28</u>

On or about October 28, 1992, petitioners paid the gains tax assessed on the transfers of the 13 condemned lots and subsequently filed refund claims on or about July 26, 1993. Each of the refund claims was denied by letter dated August 19, 1993. Attached hereto as Appendix "A" is a schedule of petitioners' lots in issue, the percentage of ownership by each petitioner in each lot, the individual refund claim, the refund claim by the group of individuals and the corresponding assessment number.

Petitioners protested the denials of their refund applications but their requests for a conference before the Bureau of Conciliation and Mediation Services were dismissed by order, dated January 14, 1994, because they were deemed to be untimely. Petitioners appealed this dismissal and the Division agreed to concede the issue of timeliness and proceed on the merits. Therefore, the issue of timeliness is not an issue herein.

Up until the time of the condemnation, no petitioner either in an individual capacity or as part of a group, caused there to be any alterations to, or development of, the lots or surrounding lots. The lots were not leased and did not generate any income.

Petitioners, Orrin M. C. Hein, Holly Hein McCutchen and Hebaron Enterprises, by Larry Levine, submitted affidavits which indicated that each of the parties had ownership interests in the 13 parcels in issue and that they had not intended to transfer their interests in the parcels but for the condemnation proceedings, which proceedings they claim they disputed. However, it is noted that in the Supreme Court Order, entered June 11, 1992, Judge Kassoff stated that no one appeared in opposition to the application by the New York City School Construction Authority to take title and possession of the property, even though notified of the condemnation by the posting

of handbills upon or near the property and notices of pendency filed in the office of the Clerk of Queens County on May 22, 1992 against the parcels in issue.

Each of these petitioners considered the investment in the parcels to be long term and averred that the parcels were not used for any purpose during the period when these three petitioners held them and petitioners never made any arrangement to sell their interests in the properties, including listing the properties with a broker or advertising the parcels for sale. Except for the sibling relationship between Orrin M.C. Hein and Holly Hein McCutchen, none of the petitioners had any relationship with any of the other co-owners. Unique to Hebaron was its stated hope that the property would one day be chosen for the site of a gambling casino, should legalized gambling ever become a reality in the State of New York.

Petitioner Melvin Klein had an ownership interest in 11 of the 13 parcels (all except 11 and 188), and like the other petitioners he was holding his interest in the properties as a long-term investment. He stated that the properties were not used for any purpose while being held and that he never listed the properties with a broker or advertised them for sale.

OPINION

Tax Law former § 1440(7) provided, in relevant part, that a transfer of real property was defined as the transfer or transfers of any interest in real property by any method. In 20 NYCRR former 590.42, the Division expressed its interpretation of Tax Law former § 1440(7):

the separate deed transfers of contiguous or adjacent properties to one transferee is, for purposes of the gains tax, a single transfer of real property However, if the transferor establishes that *the only correlation between the properties is the contiguity or adjacency itself*, and that the properties were not *used for a common or related purpose*, the consideration will not be aggregated (20 NYCRR former 590.42 [emphasis added]).

Thus, two separate showings are required under 20 NYCRR former 590.42 by a taxpayer seeking to defeat the aggregation of consideration for contiguous or adjacent properties (*Matter of Sanjaylyn Co. v. State Tax Commn.*, 141 AD2d 916, 528 NYS2d 948, *appeal dismissed* 72 NY2d 950, 533 NYS2d 55; *Matter of Bombart v. Tax Commn. of the State of New York*, 132 AD2d 745, 516 NYS2d 989 [whether the properties were used for a common or related purpose]; *Matter of 307 McKibbon St. Realty Corp.*, Tax Appeals Tribunal, October 14, 1988 [whether the only correlation between the properties is their contiguity or adjacency itself]).

This first requirement of 20 NYCRR former 590.42, i.e., that "the only correlation between the properties is their contiguity or adjacency itself," poses a significant hurdle to taxpayers in light of its broad language. As the Administrative Law Judge determined in this matter, "petitioners were multiple tenants in common with interests in multiple parcels who transferred their interests simultaneously and pursuant to identical terms" (Determination, conclusion of law "F"). Each of the affidavits of petitioners provided that the properties were unimproved, not leased and non-income producing during the period of ownership. Each petitioner stated that the properties were held as a long-term investment. None of the affidavits, taken separately or together, establish that the only correlation between the properties themselves was the fact that they were contiguous or adjacent. In our opinion, therefore, petitioners have not met their burden to establish that the only correlation between these properties was their contiguity or adjacency (*Matter of 307 McKibbon St. Realty Corp.*, *supra*).

Additionally, there is no evidence that the properties were not used for a common or related purpose. The scant evidence submitted concerning the nature of petitioners' holdings indicates a common intent to hold these parcels for long-term investment. Holding contiguous or

adjacent properties for investment has been held to be a common or related purpose (*Matter of Iveli v. Tax Appeals Tribunal*, 145 AD2d 691, 535 NYS2d 234, *lv denied* 73 NY2d 708, 540 NYS2d 1003). Thus, petitioners have also failed to meet their burden on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that petitioners have failed to prove that the only correlation between the properties herein at issue was the contiguity or adjacency of the properties themselves and have likewise failed to prove that the properties were not being used for a common or related purpose.

DATED: Troy, New York
May 27, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

APPENDIX A

<u>Lot 1</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$14,065.10		A-28467-2
Holly Hein McCutchen	16.67%	\$14,065.10		
Melvin M. Klein	33.33%	\$28,234.53		
Hebaron Enterprises	33.33%	\$26,640.52		
Group	100%		\$83,006.00	
<u>Lot 11</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	25%	\$16,377.23		A-28467-3
Holly Hein McCutchen	25%	\$16,377.15		
Hebaron Enterprises	41.75%	\$24,758.04		
Group	91.75		\$57,512.42	
<u>Lot 18</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 3,516.97		A-28467-4
Holly Hein McCutchen	16.67%	\$ 3,516.27		
Melvin M. Klein	33.33%	\$ 7,058.63		
Hebaron Enterprises	33.33%	\$ 6,660.13		
Group	100%		\$20,751.00	

<u>Lot 21</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 4,792.79		A-28467-4
Holly Hein McCutchen	16.67%	\$ 4,792.79		
Melvin M. Klein	33.33%	\$ 9,622.08		
Hebaron Enterprises	33.33%	\$ 9,324.19		
Group	100%		\$28,532.00	

<u>Lot 25</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 3,316.27		A-28467-4
Holly Hein McCutchen	16.67%	\$ 3,316.28		
Melvin M. Klein	33.33%	\$ 6,658.63		
Hebaron Enterprises	33.33%	\$ 6,660.13		
Group	100%		\$19,951.00	

<u>Lot 29</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 3,394.19		A-28467-4
Holly Hein McCutchen	16.67%	\$ 3,394.19		
Melvin M. Klein	33.33%	\$ 6,814.46		
Hebaron Enterprises	33.33%	\$ 6,660.13		
Group	100%		\$20,263.00	

<u>Lot 30</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 3,310.44		A-28467-4
Holly Hein McCutchen	16.67%	\$ 3,310.44		
Melvin M. Klein	33.33%	\$ 6,646.97		
Hearon Enterprises	33.33%	\$ 6,660.13		
Group	100%		\$19,928.00	
<u>Lot 33</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 3,310.44		A-28467-4
Holly Hein McCutchen	16.67%	\$ 3,310.44		
Melvin M. Klein	33.33%	\$ 6,646.97		
Hebaron Enterprises	33.33%	\$ 6,660.13		
Group	100%		\$19,928.00	
<u>Lot 188</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	25%	\$16,533.07		A-28467-1
Holly Hein McCutchen	25%	\$16,533.28		
Hebaron Enterprises	40.19%	\$24,062.13		
Group	90.19%		\$57,128.48	
<u>Lot 190</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 258.27		A-28467-2
Holly Hein McCutchen	16.67%	\$ 258.27		
Melvin M. Klein	33.33%	\$ 518.93		
Hebaron Enterprises	33.33%	\$ 725.36		
Group	100%		\$ 1,760.00	

<u>Lot 191</u>	<u>Percentage of Ownership</u>	<u>Individual Refund Claim</u>	<u>Group Refund Claim</u>	<u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 376.93		A-28467-2
Holly Hein McCutchen	16.67%	\$ 376.93		
Melvin M. Klein	33.33%	\$ 757.22		
Hebaron Enterprises	33.33%	\$ 857.24		
Group	100%		\$ 2,368.00	
 <u>Lot 192</u>	 <u>Percentage of Ownership</u>	 <u>Individual Refund Claim</u>	 <u>Group Refund Claim</u>	 <u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 335.26		A-28467-2
Holly Hein McCutchen	16.67%	\$ 335.26		
Melvin M. Klein	33.33%	\$ 673.88		
Hebaron Enterprises	33.33%	\$ 857.24		
Group	100%		\$ 2,201.00	
 <u>Lot 193</u>	 <u>Percentage of Ownership</u>	 <u>Individual Refund Claim</u>	 <u>Group Refund Claim</u>	 <u>Petition Notice/Assessment Number</u>
Orrin M. C. Hein	16.67%	\$ 321.23		A-28467-2
Holly Hein McCutchen	16.67%	\$ 321.24		
Melvin M. Klein	33.33%	\$ 645.95		
Hebaron Enterprises	33.33%	\$ 890.22		
Group	100%		\$ 2,179.00	

