STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS GORMAN, THERESE BRANDSHAFT AND HERBERT BRANDSHAFT	:	DECISION DTA No. 814354
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 Thomas Gorman, Therese Brandshaft and Herbert Brandshaft, c/o Francis L. Bosco, Esq., 38 Church Street, Patchogue, New York 11772, filed an exception to the determination of the Administrative Law Judge issued on April 3, 1997. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly aggregated the consideration received from two transfers of real property so that the $1,000,000.00threshold for real property transfer gains tax (hereinafter the "gains tax")[1] liability was met.

FINDINGS OF FACT

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

[1]The gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996.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

Petitioner Thomas J. Gorman became involved in the real estate business shortly after the conclusion of World War II. In the early 1960s petitioner and his associates began erecting buildings. Most of Mr. Gorman's real estate transactions followed the same pattern. It was Mr. Gorman's practice to select a piece of property, obtain a loan to finance an improvement (such as a service station, fast food restaurant, or post office), and then rent the property in order to obtain rental income. Eventually, the mortgage on the property would be satisfied and the amount of rental income would significantly increase. Mr. Gorman's principal source of income arises from the streams of rental income that his investments generated. Over the years, Mr. Gorman and his associates made more than 200 investments in property located in New York, Pennsylvania, Georgia and Florida. Most of the investments have been retained by petitioner and his partners including the first investment which was made in 1960.

In the 1960s Mr. Gorman and his partners assembled a group of vacant lots in order to acquire one large property. The assemblage included the

two properties involved in this matter. Neither of the properties was ever listed for sale.

Mr. Gorman and his partners were approached by Mr. Mullaney and his associates on behalf of VIA Properties Associates, L.P. ("VIA") to purchase a parcel of property in order to build a Hampton Inn. Mr. Gorman responded that he and his partners would be interested in a long-term lease of the land. It was proposed by Mr. Gorman that VIA could build a Hampton Inn and that petitioner and his partners would receive rental income based on a percentage of the revenues generated by the property. The counterproposal was consistent with the usual business practice of Mr. Gorman and his associates.

Mr. Gorman considered the proposal of constructing a Hampton Inn very attractive. A service station, a Howard Johnson's (which is now a Ground Round), a bank and a "strip center" were located adjacent to the property in which VIA was interested. Mr. Gorman and his associates held leases which entitled them to rental income based on a percentage of receipts earned by each of the foregoing properties. It was anticipated that the addition of a Hampton

Inn would lead to greater revenues for the businesses which would, in turn, increase their rental income. Mr. Gorman and his associates also reasoned that they could use the proceeds from the sale to acquire other properties to enhance their investment portfolio.

Mr. Mullaney and his associates ascertained that a bank was unwilling to provide a mortgage to finance the construction of a Hampton Inn unless they owned a fee interest in the property. Under these circumstances, Mr. Gorman and his partners relented and agreed to sell the land in order for the development to proceed. On December 15, 1986, petitioners, Thomas Gorman, Therese Brandshaft and Herbert Brandshaft, as tenants in common, transferred a fee interest in real property to VIA.

At the time Mr. Gorman negotiated the sale of the land for the Hampton Inn, VIA was interested in purchasing a contiguous parcel to provide additional parking in the future and for use as a leaching field. Mr. Gorman countered with a proposal for a 39-year lease with annual cost of living adjustments. Pursuant to the negotiations, the parties agreed on an initial rent of $65,000.00. Mr. Mullaney, however, insisted on an option to purchase. Finally, Mr. Gorman agreed that the lessees would be given an option to purchase the contiguous parcel which could be exercised in the sixth year of the lease. Petitioners anticipated that, in the sixth year, the lessees would not be in a position to purchase the property and Mr. Gorman and his associates would retain ownership of the property.

In accordance with the foregoing, VIA and petitioners executed an Agreement of Lease, dated December 15, 1986, which granted VIA a 39-year lease on the adjacent property. The lease provided, in part that:

> "Tenant shall have the option, exercisable during the one year period from and after the end of the fifth Lease Year, until the end of the sixth Lease Year, to Purchase the fee title of Landlord in and to the land and improvements constituting the Demised Premises. . . ."

Petitioners entered into the transaction of their own free will and were aware of the option to purchase the property in the sixth year.

The Division issued a Tentative Assessment and Return, dated March 12, 1986, which asserted that tax was due in the amount of $115,470.70. The amount of tax due was determined

by aggregating the purchase price for the parcel of $903,000.00 with the value attributed to the long-term lease. Petitioners remitted the tax at the closing of title in December 1986.

When the sixth year arrived, many motels and hotels in the area were being foreclosed upon and, as a result, the bank which held the mortgage on the Hampton Inn insisted that the option be exercised. The bank wanted to protect its interest in the event that the Hampton Inn failed.

When the purchasers decided to exercise the option, Mr. Gorman and his son contacted an attorney, Francis L. Bosco. Mr. Gorman and his son explained to Mr. Bosco that there was a piece of property that a party wished to acquire under an option to purchase. Mr. Bosco was asked to examine the lease and determine whether the option to purchase had to be honored. It was Mr. Bosco's understanding that Mr. Gorman was looking for a way to avoid honoring the option to purchase. At this time, Mr. Gorman explained that the lease was originally drafted with the intention of earning a substantial amount of money over the 39-year term of the lease. He also explained that petitioners wished to keep the property which enhanced the value of the remaining properties. After reviewing the documents, Mr. Bosco was of the opinion that the option was valid, that it was properly exercised, and that petitioners were required to transfer title pursuant to the option in the lease.

In anticipation of the closing of title, transferee and transferor questionnaires were submitted to the Division indicating petitioners' intent to transfer the subject property to VIA. Thereafter, the Division issued a Tentative Assessment and Return, dated January 11, 1993, which stated that the total amount of tax due was $68,239.14.

On January 13, 1993, the real property, which is the subject of this matter, was conveyed by petitioners to VIA. The total consideration for the transfer was $682,391.40.

The amount set forth as tax due in the Tentative Assessment and Return was remitted at the closing of title, on January 13, 1993, by tendering a check to Commonwealth Land Title Insurance Company, the purchaser's title insurance company.

On February 11, 1993, petitioners filed a Claim for Refund of Real Property Transfer Gains Tax seeking a refund in the amount of $68,239.14. In their refund claim, petitioners asserted that aggregation was improper because the sales occurred more than six years apart and because the sale was effected pursuant to an option over which petitioners had no control.

On March 22, 1993, the Division received the payment of $68,239.14. Since the Division regarded the payment as late, it issued a Notice of Determination, dated May 13, 1993, to Thomas Gorman which asserted that there was a balance due of $8,229.72 consisting of interest of $685.03 and a penalty of $8,119.69 for late payment, less payments or credits of $575.00. The foregoing notice included an attachment which stated that the claim for refund in the amount of $68,239.14 was denied. In the statement, the Division explained, among other things, that "[t]here are no provisions in Section 590.42 to grant an exemption from aggregation based on the amount of time between the sales of contiguous or adjacent parcels." It also stated that section 590.45(d) of the gains tax regulations is inapplicable since this section deals only with the aggregation of entity transfers. The Division further noted that the only cost which was part of the original purchase price and which had been verified was legal fees of $5,750.00.

Petitioners filed a request for a conciliation conference which led to the issuance of a conciliation order dated September 8, 1995. In the order, the penalty for late payment asserted in the notice dated May 13, 1993 was cancelled and the amount of interest was recomputed to be $697.08. The conciliation conferee also rejected the refund claim.

Petitioners filed a petition which asserted that it was error to aggregate the sales, that the subject sales, which occurred six years apart, were separate and independent, and that it was error to deny the refund claim.

Petitioners are long-term investors who seek to acquire properties, improve them, retain ownership and eventually have a property that is debt free and generating substantial income.

The 1986 and 1993 transfers were not structured to avoid real property gains tax. There were never any discussions between the owners and the purchasers of the property to structure the property to avoid gains tax.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reasoned that based upon 20 NYCRR former 590.42 and case law, the parcels would be properly aggregated if they were used for a common or related purpose (***see, 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). The Administrative Law Judge stated that the evidence indicated that petitioners conveyed a deed for the development of a Hampton Inn and leased an adjoining parcel to the purchasers of the property for use as a parking lot on the same day. Moreover, petitioners gave the lessees an option to purchase the land used as a parking lot in the sixth year of the lease. Therefore, the Administrative Law Judge concluded that the economic reality was that these two transfers were, in fact, a single transaction. Accordingly, the Administrative Law Judge determined that the Division properly aggregated the consideration received for the two transfers.

ARGUMENTS ON EXCEPTION

In their exception, petitioners state that the subject transfers did not constitute a single sales transaction. Petitioners argue that the Administrative Law Judge specifically found that petitioners intended to retain the optioned property. Thus, petitioners allege that this finding of fact is contrary to the conclusion of the Administrative Law Judge. Petitioners argue that the Administrative Law Judge erred in distinguishing the facts in ***Matter of General Builders Corp.*** (Tax Appeals Tribunal, December 24, 1992) and ***Matter of Armel*** (Tax Appeals Tribunal, July 23, 1992). Petitioners assert that in those cases, the Administrative Law Judge found that there was a different intent with respect to the sales of the contiguous parcels similar to the facts in this case where the Administrative Law Judge found the intent of petitioners was to sell the Hampton Inn parcel but to retain the optioned parcel in the lease.

In opposition, the Division, relying on ***Matter of Sanjaylyn Co. v. State Tax Commn.*** (***supra***), ***Matter of Bombart v. Tax Commn. of the State of New York*** (***supra***) and ***Matter of General Builders Corp.*** (***supra***), states that the case law has consistently held that transfers of

contiguous properties to one transferee will be aggregated to constitute a single sales transaction. The Division agrees with the conclusion reached by the Administrative Law Judge. The Division states that although petitioners attempted to establish that it was not their intent to transfer the subject property, the evidence clearly demonstrated that petitioners intended to enter into both transactions that resulted in the sales to one transferee. Additionally, the Division points out that both parcels were to be used for the same purpose, to wit, hotel accommodations and parking. Therefore, the Division states that the transfers were properly aggregated.

OPINION

Petitioners' argument on exception is based upon a specific finding of fact, which petitioners characterize as the Administrative Law Judge's finding that petitioners intended to retain ownership of the property. We disagree with petitioners' interpretation of the Administrative Law Judge's finding of fact. The Administrative Law Judge specifically found that Mr. Mullaney, who represented the purchasers, insisted on an option to purchase the contiguous parcel to provide additional parking in the future and for use as a leaching field. Petitioners finally agreed to insert the option to purchase in the lease. Although the Administrative Law Judge found that "[p]etitioners anticipated that, in the sixth year, the lessees would not be in a position to purchase the property and Mr. Gorman and his associates would retain ownership of the property" (Determination, finding of fact "6"), the Administrative Law Judge did not find, as alleged by petitioners, that petitioners intended to retain the property. If petitioners planned on retaining the property, they would not have given the purchasers the option to purchase the property under the lease.

Furthermore, we agree with the Administrative Law Judge that the facts in ***Matter of General Builders Corp.*** (***supra***) and ***Matter of Armel*** (***supra***) are distinguishable from the facts presented in this case. Since the Administrative Law Judge adequately and correctly dealt with the issue in this case, we affirm his determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas Gorman, Therese Brandshaft and Herbert Brandshaft is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Thomas Gorman, Therese Brandshaft and Herbert Brandshaft is denied; and

4. The Division of Taxation's denial of petitioners' claim for refund is sustained.

DATED: Troy, New York
December 4, 1997

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner