

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
THOMAS IVELI AND ROBERT SIGMUND : DETERMINATION  
for Revision of a Determination or for Refund :  
of Tax on Gains from Certain Real Property :  
Transfers under Article 31-B of the Tax Law. :

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Petitioners, Thomas Iveli and Robert Sigmund, 452 West 25th Street, New York, New York 10001, filed a petition 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 (File No. 67253).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1987 at 3:10 P.M., with all briefs to be submitted by March 11, 1987. Petitioner appeared by Joseph Gaier, P.C., Esqs. (Joseph Gaier & Mark L. Koren, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly aggregated the consideration received by petitioners upon their transfer of two contiguous properties, thereby subjecting such transfers to tax under Tax Law Article 31-B.

FINDINGS OF FACT

1. Petitioners, Thomas Iveli and Robert Sigmund, were the owners of two parcels of real property known as 370 and 372 West 11th Street, New York City (hereinafter "parcel 370" and "parcel 372"). These properties were previously owned by Lucia Realty, Inc., and were acquired by the petitioners by separated deeds on March 30, 1982. As part consideration of petitioners' purchase price, separate purchase money mortgages, held by Lucia Realty Inc., were executed covering each parcel of property. Each parcel is an independent zoning lot and separate tax lot;

to wit 370 is designated as block 637, lot 55 and parcel 372 as block 637, lot 54.

2. Each parcel was separately assessed by the City of New York for real estate tax purposes. Each parcel has its own separate entrance, water and sewer line into the street and is taxed by the City of New York separately for water and sewer charges. Each building has its own independent electric, plumbing and heating systems with separate service from the street to each.

3. Parcel 370 is a four story brick building, approximately 50 feet deep, consisting of a three family multiple dwelling with a ground floor store. Parcel 372 is a three story and attic building, with a one-story extension, containing three multiple dwellings and a ground floor store. Parcel 372 was refinanced with a new first mortgage placed by the Amalgamated Savings Bank in the principal sum of \$100,000, with the mortgage held by Lucia Realty, Inc. reduced to the sum of \$81,000 and then subordinated to the Amalgamated mortgage. Thus, the total encumbrance covering parcel 372 (after refinancing) was \$181,000. The mortgage covering parcel 370 remained unchanged.

4. Each property has an entirely different physical configuration, including differences in lot sizes and facades. The buildings were built at different times by different builders under different architectural plans and designs.

5. The properties are physically contiguous, but each parcel is otherwise separate from the other, totally independent and self-contained. Each property could freely be transferred independent of the other to the same or different transferees without the requirement of any subdivision or other action on the part of the transferor.

6. As of July 1985, parcel 372 was totally vacant of all occupants while parcel 370 had two rent controlled tenants. Elyon Holding Corp. ("Elyon") was itself, or through affiliate or related corporations, the owner of the properties located at 362-8 West 11th Street, New York City, which properties adjoin those at issue. Elyon was in the process of development of this adjoining property. Elyon approached petitioners to purchase the two subject properties, as a result of which acquisition Elyon would have greater development rights for the adjoining property which it already owned. Elyon was interested only in purchasing both properties. The purchase price was negotiated and agreed upon between the parties at \$700,000 for parcel 372, the vacant building, and \$550,000 for parcel 370, the partially occupied building, and the parties entered into a single contract for the sale of the two parcels.<sup>1</sup>

7. As required by Article 31-B of the Tax Law (the "Gains Tax"), Transferor and Transferee Questionnaires were submitted for each parcel to the Audit Division prior to closing on the premises. Each Transferor and Transferee Questionnaire set forth the agreed upon purchase price for its respective parcel. The parties contemplated that at closing separate deeds would be delivered in accordance with the terms of the contract.

8. The Audit Division determined that the properties transferred should be aggregated, and concluded that since the aggregated price for the two parcels exceeded \$1,000,000, the transfer was a taxable transaction. Accordingly, a gains tax of \$93,019.30 was imposed.

9. At closing on September 13, 1985, separate deeds were delivered. Separate New York City Transfer Tax Returns were executed by both transferor and transferee, and separate City Transfer taxes were paid on each parcel. Petitioners also paid the gains tax as determined by the Audit Division, under protest.

10. On November 7, 1985 petitioners filed a Claim for Refund seeking refund of the gains tax paid under protest. By a letter dated February 10, 1986, the Audit Division denied in full petitioners' claim for refund. Petitioners in turn commenced this proceeding, maintaining that, while contiguous, the properties are essentially independent parcels separately transferred and not

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<sup>1</sup>Elyon subsequently assigned the contract to Arizona Associates, an affiliate of Elyon, which ultimately took title to the property.

properly subject to aggregation.

CONCLUSIONS OF LAW

A. That Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of ten percent on gains derived from the transfer of real property within New York State. However, Tax Law § 1443(1) provides that no tax shall be imposed if the consideration is less than one million dollars.

B. That Tax Law § 1440(7) provides, in part, as follows:

"'Transfer of real property' means the transfer or transfers of any interest in real property by any method.... Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article...."

C. That 20 NYCRR 590.42 provides, in part, as follows:

"590.42 Contiguous or adjacent parcels. [Tax Law, §1440(7)]

Question: Is the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the \$1 million exemption?

Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean 'the transfer or transfers of any interest in real property.' Thus, the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property. It is the consideration for the interests in a single transfer, regardless of the number of deeds used to transfer the property, that is used to determine the application of the \$1 million exemption.

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."

D. That the Audit Division properly required aggregation of the consideration received by petitioners for the transfers of the two parcels. The facts reveal a single transferor transferring pursuant to one contract two adjacent parcels of rental income property to a single transferee interested only in purchasing both parcels. Notwithstanding the use of two deeds, this was in essence a single transfer of the petitioners' interest in two parcels for a total consideration in excess of the gains tax million dollar threshold and, as such, was properly subject to the gains tax (see Matter of Bombart v. State Tax Commn., \_\_\_AD2d\_\_\_, July 2, 1987; Matter of Sanjaylyn Co., State Tax Commn., December 23, 1986).

E. That the petition of Thomas Iveli and Robert Sigmund is hereby denied and the denial

of claim for refund is sustained.

DATED: Albany, New York  
July 8, 1987

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ADMINISTRATIVE LAW JUDGE