STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JACK ARMEL AND HELEN ARMEL	:	DETERMINATION
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, Jack Armel and Helen Armel, 770 South Palm Avenue, Sarasota, Florida 33577, 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. 804703).

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on July 10, 1990 at 9:15 A.M. and continued to conclusion at the same location on August 22, 1990 at 9:00 A.M., with all briefs to be submitted by December 3, 1990. Petitioners appeared by Richard V. D'Alessandro, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation established a rational basis for the assessment so that petitioners' motion to cancel it, made after the introduction of documents by the Division, should be denied.

II. Whether the Division of Taxation properly aggregated the consideration from 36 sales of real property so that the $1 million threshold for gains tax liability was met or whether certain of the salesshould not be included in the aggregation because they (1) were not sales of contiguous or adjacent parcels of land or (2) were not based upon some related or common use or purpose with the other real property transfers. In the alternative, whether transfers made by Helen Armel should be viewed as separate and distinct from transfers made by Jack Armel and

transfers made jointly by Helen Armel and Jack Armel.

III. Whether the real property transfer gains tax law is unconstitutional and/or whether the application of such law to petitioners, who established separate ownership of certain real property prior to its enactment, is unconstitutional.

IV. Whether Helen Armel was denied her constitutional due process rights because the auditor only communicated with Jack Armel.

V. Whether penalties imposed against petitioners should be abated.

FINDINGS OF FACT

The Division of Taxation has an audit selection process to ensure that taxpayers comply with the real property transfer gains tax law. According to Peter Van Buren, the State auditor, frequent reviews are made of the grantor indices maintained by county clerks. In this instance, in early 1987, Mr. Van Buren was reviewing the grantor index in the Saratoga County Clerk's Office and noticed numerous conveyances by petitioners, Jack and Helen Armel. He determined that there were approximately 36 conveyances that occurred after the enactment of the real property transfer gains tax:

> "On the 36 lots that we identified, we determined consideration by working with the transfer tax, which is the deed stamp tax amount of the recorded deed. By using a mathematical formula, you can work back from the transfer tax paid to determine the consideration."

Using this methodology, Mr. Van Buren calculated aggregated consideration of $1,049,000.00 on the transfers of the 36 lots.

Mr. Van Buren then sent a letter dated February 3, 1987 to Jack Armel advising him as follows:

> "The records of the Clerk of Saratoga County reveal that you have sold several subdivided lots of real property shown and designated on various maps in the 'Knoll Spring Park' subdivision. The aggregate consideration received from these sales is in excess of $1,000,000.00.
>
> Article 31-B of the Tax Law imposes a tax on the gain derived from a transfer of an interest in real property which is located in New York State where the consideration for such transfer is $1 million or more.
>
> Section 1447 of Article 31-B requires the transferor and transferee to file questionnaires with the Tax Department at least 20 days prior to the date of transfer

of the real property where the gross consideration is $500,000.00 or more.[1]

We have reviewed our files and find no record that you have met the aforesaid statutory filing requirements.

This letter is to inform you that you must file a Gains Tax Questionnaire for each parcel of real property sold to date pursuant to 'Knoll Spring Park' subdivision and file a transferors [sic] questionnaire for each subsequent transfer at least 20 days before the date of transfer of such subdivided lot."

Jack Armel replied by a letter dated February 16, 1987 as follows:

"We still own three lots in Knoll Spring Park in New York State, but we are now residents of Sarasota, Florida. The lots which you mention in your letter were sold individually since 1974 when the subdivision was first approved. If I understand you correctly you wish for me to recite to you the parcels or lots sold. There is no way I could do this since that is too far back and I don't have any records other than the last three years. I am sure the records you mention from the county clerk are better than mine.

The rules governing parcels of $500,000 and one million are not applicable since they were sold for far less than that. I was also unaware of any such rules and all sales were handled by my attorney. I feel sue [sic] that whatever was required by the State was given to me to sign at the time of the closing.

I will make sure that before the remaining lots are sold I will bring up to my attorney the 20 days rule you mention." (Emphasis added.)

Mr. Van Buren responded with a letter dated March 25, 1987 to Mr. Armel that advised that it was his understanding that:

"[T]he aggregate consideration received from the sale of the lots [exceeded] $1 million and, therefore, the gain derived from the transfer of such lots [was] subject to the Gains Tax."

Consequently, Mr. Van Buren informed petitioners that they should make "a gains tax filing".

The Division of Taxation introduced into evidence the envelope in which this letter was mailed.

It was stamped by the Post Office, "Returned to Sender", with "refused" as the reason checked

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[1] Petitioners had filed instead "real property transfer gains tax affidavits of individuals" for each transfer at issue herein noting that the respective transfers were of real property where the consideration was less than $500,000.00, and that the transfers were not pursuant to a cooperative or condominium plan or partial or successive transfers pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be subject to gains tax.

off.

The Division of Taxation then issued a Notice of Determination of Tax Due Under Gains Tax Law dated May 7, 1987 against petitioners assessing gains tax of $104,900.00, plus penalty and interest. The notice explained that because Mr. Van Buren's letter of March 25, 1987 had been returned "as being refused by you", petitioners' gains tax liability was computed "using the best information obtainable" and without the information which would have been included on gains tax questionnaires (including the original purchase prices and development costs for the parcels of real property). Consequently, the Division computed gains tax on total gross consideration of $1,049,000.00 on the sale of the 36 lots as listed in Appendix "A" attached hereto (which corresponds to petitioners' Exhibit "6").

Petitioners' financial success, achieved by the sale of land in Saratoga Springs, occurred almost by chance. In the early 1970's, Jack Armel's fortunes were at a low ebb. A nuclear engineer, Mr. Armel had started his own business, Gamma Processing Company, which marketed the utilization of gamma radiation for industrial purposes. At its height, it had annual sales of several million dollars, 20 to 25 employees, and its stock was publicly traded. However, by the early 1970's the business had collapsed and, in Mr. Armel's words, "we were broke".

In 1968, Jack Armel bought out his mother's interest in approximately 50 acres of land in Saratoga Springs, which he had jointly owned with her (hereinafter the "Armel parcel"). He then built a home on this land when his business, which had a plant in nearby Malta, New York, was prospering. However, in November 1973, as a result of his serious ill health as well as his reversal of business fortunes, Jack Armel transferred a portion of the Armel parcel to his wife, Helen Armel, while retaining approximately 13½ acres in his own name for their personal residence. Helen Armel had come up with the idea of subdividing the other 36½ acres of land, and she undertook this task in order to improve petitioners' financial situation.

Helen Armel hired a surveyor, Richard Danskin, who assisted in developing a subdivision

plan, which was marked into evidence as petitioner's Exhibit "8".[2] This "Subdivision Plan of 'Knoll Spring Park' Section 1" dated July 19, 1973 (hereinafter "subdivision plan dated July 19, 1973") shows 11 lots, each consisting of approximately two acres, numbered "3" to "13", to be developed. Helen Armel's idea to subdivide the land, which petitioners could not sell in one piece when they tried prior to

Jack Armel's transfer to Helen Armel, proved successful. Helen Armel testified that she "originally sold 11"[3] (in the mid 1970's) of the 13 subdivided lots available for sale and the remaining couple of lots in the early 1980's before the tax at issue became effective.

Part of this land transferred by Jack Armel to Helen Armel was designated on the subdivision plan dated July 19, 1973 as "not to be developed at this time", including lots numbered "1" and "2". Such land was not offered for sale because the Armels thought that their two sons, at some future time, might want to build on the land. Helen Armel testified that over the years she refused offers from third parties to buy this land and did not intend to sell it as part of the subdivision sales. However, in 1984 or 1985, the Armels decided to establish a new residence in Sarasota, Florida. Consequently, when Helen Armel received an offer to purchase lot 2, part of the land "not to be developed at this time", from Gary Stone, an adjoining land owner, she agreed to its sale. As noted in Appendix "A", this lot was sold to Mr. Stone for $27,000.00. Approximately four months later, on March 6, 1986, Helen Armel sold another portion of the land "not to be developed at this time" to G.W.R. Construction Co., Inc. (hereinafter "GWR Construction"). Helen Armel testified:

> "Witness: Well, Jerry called me on the phone and said he wanted to build a house there.

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[2]However, petitioners did not explain the fact that the subdivision plan developed by Mr. Danskin shows Jack Armel as "owner and developer".

[3]She probably meant to say 9, since her testimony was that only 11 lots were available for sale.

ALJ: Jerry who?

Witness: Jerry Robusto, who was a builder who lives in the area. And I said, 'Go ahead'.

* * *

Jerry gave me approximately $1,000 down, and it was paid for when the building was built and sold.

* * *

I'm sure it was about $26,500[4] because at that time I wasn't selling any lots."

As noted in Finding of Fact "7", supra, Jack Armel retained petitioners' residence and approximately 13½ acres in his own name. In May 1984, Mr. Armel sold a portion of this retained land (described under the heading "lot" in Appendix "A" as "Corrall & Estate"). He testified as follows:

"It is a little bit of a long story, but it doesn't matter. He [Herbert Schwartz] stopped by. He came over, walked across the lawn and he said, 'I like this. Can I buy this?' And I said yes, because here I had 13½ acres that we were living on and I was mowing all of it. And I was very glad to have somebody buy a piece off of me, so I wouldn't have to mow quite as much. So, that was it and I said yes."[5]

This sale to Mr. Schwartz was a cash sale for $75,000.00, and Jack Armel expanded upon his reason for selling part of the land:

"Attorney D'Alessandro: I think you indicated the reason you wanted to do this was you got a little tired of mowing the lawn?

Witness: Yes, but it was very good to get the $75,000 too.

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4 As noted in Appendix "A", Footnote "6", the consideration paid for this lot is in dispute. Petitioners introduced into evidence a certified copy of a mortgage between GWR Construction and Helen Armel for this property in the amount of $25,700.00. A copy of a contract of sale was not introduced.

5 Later in the hearing, petitioners' real estate attorney, John Carusone, testified that the reason Jack Armel sold part of the land near petitioners' residence was because petitioners "were going to be making Florida their full-time residence."

Attorney D'Alessandro: Had you decided already that you were going to move from the State of New York to Florida?

Witness: Yes."

On February 4, 1972, prior to his illness, Jack Armel purchased approximately 84 acres of land from his neighbor, Marie Briscoe, for $25,000.00. Shortly thereafter, Jack Armel became seriously ill, and he tried very hard to resell the 84 acres. He testified, "but we couldn't sell it. There was no market." (Emphasis added.) Petitioners introduced into evidence a subdivision plan dated February 28, 1979 entitled "Knoll Spring Park Section 2, Jack & Helen Armel [emphasis added], Owners & Developers" (hereinafter "subdivision plan dated February 28, 1979"). Nonetheless, Jack Armel testified that he "initiated this subdivision action":

"Well, I learned a lot in ten years about lots and what happens in there. And it was in my name, and so I just stood up on my own two feet and proceeded with it."

This land, obtained from Marie Briscoe seven years earlier in 1972, was subdivided into 37 lots numbered "14" through "50" ranging in size from 2 acres to 2.86 acres. As detailed in Appendix "A", 26 out of the 37 lots were sold for amounts ranging from $20,000.00 (for lot 43) to $34,500.00 (for each one of lots 33 and 46). These 25 sales were made from June 1983 to October 1986.

On June 29, 1981, Jack Armel and Helen Armel purchased approximately 20 acres of land from the City of Saratoga Springs for $5,000.00. Petitioners introduced into evidence a certified copy of a subdivision plan dated December 29, 1982 entitled "Knoll Spring Park Section 3 and a Portion of Section 2 Revised" (hereinafter "subdivision plan dated December 29, 1982"). The 20 acres were subdivided into nine lots numbered "51" through "59". The lots for sale ranged in size from 2.03 acres to 2.10 acres. The subdivision plan dated December 29, 1982 also shows the revision of the eight lots previously included in the subdivision plan dated February 28, 1979, which were numbered "23R" through "36R". The revisions were necessary in order to extend road access to the nine newly-created lots in Knoll Spring Park Section 3.

As detailed in Appendix "A", seven out of the nine lots were sold for amounts ranging from $36,500.00 (for lot 57) to $15,000.00 (for lot 55).[6]

Petitioners and the Division of Taxation agreed to an allowance and an allocation of original purchase prices (including various development costs) to the sale of each of the 36 lots at issue herein, as detailed in joint exhibits "24" and "25". If the consideration received by Helen Armel for the sale of lot HA, as noted in Appendix "A", Footnote "6", is determined to be $26,700.00 as petitioners assert, the parties agreed that the total gain on the sale of the 36 lots was $626,013.00. If $30,000.00 was the consideration received by Helen Armel on the sale of lot HA, the parties agreed that the total gain would be $628,544.00.

Paul L. Tommell, a licensed surveyor, was qualified by petitioners' representative as an expert on surveys, lot size, location and configuration of property. Mr. Tommell gave the opinion that the subdivision plan dated July 19, 1973 (Knoll Spring Park Section 1), the subdivision plan dated February 28, 1979 (Knoll Spring Park Section 2), and

the subdivision plan dated December 29, 1982 (Knoll Spring Park Section 3) represent separate and distinct subdivisions because "the properties were picked up at different times and no one was dependent on the other...."

Petitioners assert that Helen Armel acted independently of Jack Armel with regard to the subdividing and sale of properties owned in her name and that Jack Armel acted independently of Helen Armel with regard to the subdividing and sale of properties owned in his name. Paul Tommell, the surveyor hired to do much of the professional work necessary to subdivide the property at issue, testified, in part, as follows on direct examination:

> "Helen Armel called me and asked me to prepare a map on the HA lot and add the acre -- approximately one acre -- behind it to it and get it approved as a building lot.

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[6]This 2.03-acre lot was sold in January 1985 to Barry and Melissa Goldberg. The adjacent lot 54 of 2.04 acres was sold eight months later to the Goldbergs for $20,000.00. They purchased, in sum, 4.07 acres for $35,000.00, which was one-half the approximate going price of 2-acre lots sold to GWR Construction by petitioners.

* * *

Attorney D'Alessandro: And can you describe the kind of services that you undertook to perform for Helen?

Witness: Yes. I had to go out and check the boundary of that area because it was not included in the boundary survey that I had done.... I prepared a map, reviewed it with Helen, and then made application to the Saratoga Planning Board and to the...New York State Health Department for approval....

* * *

Attorney D'Alessandro: During the course of your investigation, how often did you meet with Helen?

Witness: Oh, probably once a week.

Attorney D'Alessandro: And can you, in a general way, describe things that were discussed during those meetings?

Witness: The Health Department requirement that fill be brought in for an acceptable sanitary disposal system, and just what we might expect in meetings with the City of Saratoga Springs.

Attorney D'Alessandro: Can you describe the extent to which she participated in these discussions?

Witness: Fully. She was my client in these discussions.

* * *

Attorney D'Alessandro: From your observations of Helen during the time that you met with her, did you ever observe Jack during any of these times?

Witness: Yes. Jack sat in on some of our meetings.

Attorney D'Alessandro: Was he always there?

Witness: No.

Attorney D'Alessandro: And when he was there, did he ever seek to influence or control Helen in any of her decisions?

Witness: No.

Attorney D'Alessandro: From your observations of Helen, did she look to anyone else for guidance in making decisions with respect to these properties?

Witness: No.

* * *

Attorney D'Alessandro: Were you engaged by Jack to perform some service for him?

Witness: Yes.

* * *

Attorney D'Alessandro: From your observations, did you ever observe Helen with him during those discussions?

Witness: Yes.

Attorney D'Alessandro: From your observations, were you able to determine whether or not Helen controlled or influenced any of these actions?

Witness: Jack was his own person. He made the decision for the subdivisions that he had me working on.

* * *

Attorney D'Alessandro: How long have you known Jack?

Witness: I have known Jack and Helen since 1979, 1978.

* * *

Attorney D'Alessandro: How would you describe their ability to make decisions?

Witness: They can make decisions as well as anyone.

Attorney D'Alessandro: Did you ever observe Helen look to Jack to make a decision for her?

Witness: No.

Attorney D'Alessandro: And did Jack look to Helen to make a decision for him?

Witness: Not that I was aware of."

On direct examination, Helen Armel testified as follows:

"Attorney D'Alessandro: Did your husband Jack influence or control you in any way with respect to any of the terms of that sale [to Gary Stone]?

Witness: No."

On direct examination, Jack Armel testified as follows:

"Attorney D'Alessandro: Did Helen influence you in your decision to sell this property [estate and corrall lots sold to Mr. Schwartz]?

Witness: No, nobody.

Attorney D'Alessandro: Did she influence or control your decision with respect to the purchase price or any of its terms?

Witness: No way.

* * *

Attorney D'Alessandro: Now, with respect to Section 2, which was in your name, were you influenced or controlled by Helen in any way with respect to the development of those lots?

Witness: No. You asked me that already and the answer was 'No'.

Attorney D'Alessandro: Were you influenced or controlled by Helen in any way with respect to the sale proceeds?

Witness: No. Nothing. No part of it. I ran my show, and she ran her show."

On direct examination, John Carusone, an attorney who specializes in real estate and advised petitioners on their land sales, testified as follows:

"Attorney D'Alessandro: When she discussed with you the sale [of the land which had originally been retained for the children], was Jack ever present?

Witness: Was he ever present? He may have been, although my recollection is that, particularly with this one -- because I think she had some specific questions about the mortgage -- that she and and I spent maybe two or three sessions together.

Attorney D'Alessandro: Was she required to make some decisions?

Witness: Yes.

Attorney D'Alessandro: Did she make those decisions?

Witness: Yes, she did.

Attorney D'Alessandro: Was Jack present when she made these decisions?

Witness: No, he was not.

Attorney D'Alessandro: In your observations of Jack and Helen with respect to this transaction, did you ever observe Jack try to influence or control her or any of her actions or affect her decisions?

Witness: No.

Attorney D'Alessandro: Do you know if Helen looked to anyone else for guidance in making decisions?

Witness: I don't think so. She, I guess, looked to me for some advice, but my impression was that they each had their own ways of doing things and they were both strong-willed people and each pretty much made up their own mind.

* * *

Attorney D'Alessandro: Did you observe Jack in making any of these

decisions [concerning the sale of land to Mr. Schwartz]?

Witness: Yes.

Attorney D'Alessandro: Was he influenced in his actions by his wife in any way?

Witness: Not to my knowledge.

Attorney D'Alessandro: Was he controlled in his actions by his wife in any way of your own knowledge?

Witness: Not to my knowledge.

Attorney D'Alessandro: Now, from a professional viewpoint and in any other relationship, how long have you known Jack?

Witness: We represented Marie Briscoe. Our office began dealing with Jack, I think, in the early '70s. And I have forgotten exactly when he began to use our office for his legal work, but I think it was in the early '80s. But I have known Jack and Helen through the '70s -- but not very well.

Attorney D'Alessandro: Did you have an opportunity to observe them together?

Witness: Both together and separately, yes.

Attorney D'Alessandro: And at the times you observed them together, how many would you say that would be, just generally?

Witness: Together?

Attorney D'Alessandro: Yes.

Witness: Oh, a couple hundred maybe.

Attorney D'Alessandro: Did you ever observe Jack influencing any action that Helen would take?

Witness: No, never.

Attorney D'Alessandro: Did you ever observe Helen influence any action that Jack might take?

Witness: Well, I think there might have been an attempt on either of their parts, but it was unsuccessful. As I said before, Dick, they were both strong-willed people. They had their own backgrounds. They were married rather late in life and kind of set in their own ways. They did things their own way."

On cross-examination, Helen Armel testified that "some" of the money spent on the development of the subdivision plan dated July 19, 1973 came from petitioners' joint bank account, and apparently all of the proceeds from the sale of lots in such subdivision were

deposited in the joint account.

Helen Armel was formerly (in the 1960's) a stockbroker, who owned a seat on the so-called National Stock Exchange and managed between 30 to 40 investment portfolios, which totalled approximately $1,000,000.00 in value. In 1965, she married Jack Armel. Helen Armel's first husband had passed away, and she was concerned when Jack Armel became quite ill in 1973. Her desire for financial security prompted the attempt to subdivide the land which Jack Armel deeded over to her. The need for some emotional security prompted her to designate a certain portion of such land as "not to be developed at this time" so it could be retained for possible use by her son from her previous marriage and Jack Armel's son from his previous marriage.

The lots in all three subdivision plans were marketed as lots in Knoll Spring Park without differentiation between Sections 1, 2 and 3. In reviewing the list of grantees of each of the 36 lots detailed in Appendix "A", it is observed that the grantee for 23 of the 36 lots was GWR Construction and for one was Gerald and Kathleen Robusto as individuals. Mr. Armel described GWR Construction as follows:

> "That's Jerry Robusto and his wife. That's the corporation, GWR.
>
> * * *
>
> They would contract with somebody to build a house and proceed to build.
>
> * * *
>
> He is pretty good at it and we have an easy relationship, in the sense that sometimes he would start building on the lot without even telling me about it. You know, we didn't negotiate every lot from lot to lot." (Emphasis added.)

Further, four of the 36 lots were deeded to Mertin A. and Edith F. Carlston who Mr. Armel described as follows:

> "When we went to Florida, we saw a condominium there and we thought it would be a good investment and it was owned by these people. And I said, 'Look, how about a trade, your condominium for four lots up there?' and the deal was made and that's what it is."

Consequently, it would seem that little marketing of the lots by petitioners was necessary. It is unknown to what extent GWR Construction marketed its building sites. Nonetheless, it

would seem that the value of petitioners' subdivided lots would depend greatly on GWR Construction's ability to market its building sites especially since the purchases by GWR Construction of the lots at issue herein were spread out over nearly a three-year period.

John Carusone, the lawyer whom petitioners consulted concerning their real estate transactions, advised petitioners that the gains tax at issue herein was not applicable because there was no contiguity between Jack Armel's lots and the two sold by Helen Armel, which had been originally retained for petitioners' children, and Helen Armel's transfers were separate and distinct from Jack Armel's:

> "[T]hese were separate people making separate decisions; that the transfer [by Jack Armel] to Helen was maybe 10 years before this [the gains tax] came into effect, and it certainly was not done with this [avoiding gains tax] in mind."

Petitioners also introduced into evidence a copy of a letter dated April 6, 1987 from Ralph J. Fatato on the letterhead of the Technical Services Bureau noting the following:

> "The Department does not take the position that transferors should be aggregated solely on the basis of family relationships, however, such a relationship may indicate that one transferor is controlling the act of the other."

Petitioners' representative submitted 156 proposed findings of fact. Proposed findings of fact 1, 3-45, 47, 52, 53, 54, 55, 56, 58, 59, 60, 62-70, 72, 74, 75, 76, 77, 82, 83, 85, 86, 87, 88, 89, 91, 92, 93, 100, 101, 102, 103, 105, 106, 111, 112, 113, 114, 115, 116, 118, 119, 122-132, 134, 136, 137, 139, 140 and 142-155 are accepted and incorporated into this decision. Proposed finding of fact 156 is rejected as conclusory in nature. Proposed findings of fact 48, 49, 61, 78, 79, 80, 81, 84, 90, 94, 95, 96, 97, 104, 107, 108, 109, 110, 133, 135, and 138 are not accepted for the reasons elaborated in the Conclusions of Law, infra. Proposed findings of fact 2, 46, 47, 50, 51, 57, 71, 73, 98, 99, 117, 120, 121, 141 and 154 are accepted with explanation or in part only. The accepted parts are incorporated into this decision. Necessary explanation and/or the rejected parts are as follows:

(i) Proposed finding of fact 2 states that petitioners are residents of Sarasota, Florida. The Division's Amended Answer admitted that petitioners "reside in Sarasota, Florida". This proposed finding is accepted, but in doing so there is no finding or conclusion that petitioners

are (or are not) residents of New York for income tax purposes.

(ii) Proposed finding of fact 46 describes Jack Armel as "unwilling" to undertake the sale of the land (he transferred to Helen Armel in 1973) by subdividing it, which is inaccurate. There is no evidence that he was "unwilling" to subdivide the land, although his ill health apparently prompted him to transfer the land to Helen Armel so she could try to sell the land by subdividing it.

(iii) Proposed finding of fact 50 is inexact in that the land was subdivided into 13 lots although lots 1 and 2 were designated "not to be developed at this time".

(iv) Proposed finding of fact 51 is inexact in that it is more accurate to say that the land retained for the children was not part of the land to be sold as subdivided lots to third parties.

(v) Proposed finding of fact 57 is inexact in that the improvements were also financed by funds from petitioners' joint bank account.

(vi) Proposed findings of fact 71 and 73 are accepted, but with the same limitation noted with reference to proposed finding of fact 2, supra.

(vii) Proposed findings of fact 98 and 99 are inexact because the reasons for the sale of part of petitioners' residential property to Herbert and Arlene Schwartz given by Jack Armel were the attraction of having to mow less acreage and the appealing selling price of $75,000.00. John Carusone in his testimony added the explanation that by the time of such sale, petitioners were planning to move to Florida.

(viii) Proposed finding of fact 117 incorrectly notes that 10 years later, instead of the correct 7 years after the purchase of the Briscoe parcel, Jack Armel subdivided it.

(ix) Proposed findings of fact 120 and 121 are inexact by referring to the requirement, that streets in a newly-subdivided area be tied into existing streets, as one done by "force". There was no evidence introduced by petitioners concerning the rejection by the planning board of any alternate proposal by them for the construction of roads in the newly-subdivided land.

(x) Proposed finding of fact 141 is inexact in that regulation 590.43(b) was not

promulgated until after counsel's initial opinion was provided to petitioners.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the Division of Taxation incorrectly aggregated the consideration from 36 property sales in order to marginally exceed the $1 million exemption from gains tax liability. They argue that:

> "Like the fabled alchemist, it [the Division of Taxation] seeks to change petitioners' identity from two transferors into one transferor and the configuration of the parcels from several non-contiguous parcels into one contiguous parcel."

They also assert that Helen Armel was denied due process because the auditor "ignored entirely Helen, as if she didn't exist" thereby failing to provide her with "any administrative safeguards during this audit". Furthermore, petitioners contend that the gains tax statute is unconstitutionally vague on its face and is unconstitutionally retrospective in its application.

The Division of Taxation, in contrast, contends that the 36 conveyances were all from the same subdivision or from contiguous and/or adjacent property and the consideration received from the 36 sales was properly aggregated. According to the auditor:

> "The divesting of unimproved lots within [the Knoll Spring Park subdivision] by Helen, Jack or Helen and Jack, in the Audit Division, would be viewed as subject to aggregation."

The fact that the subdivision might have been developed in phases or sections would not affect the aggregation of consideration.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a ten percent tax upon gains derived from the transfer of real property located within New York State. Tax Law § 1443(1) provides an exemption from gains tax when the consideration is less than a $1 million dollar threshold.

B. Tax Law § 1440(7) defines "transfer of real property" and includes, in part, the following so-called "aggregation clause":

> "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. The regulations provide some guidance concerning the application of the "aggregation

clause". 20 NYCRR 590.43, in part, provides as follows:

> "Q. How is the aggregation clause of section 1440(7) of the Tax Law...applied in the case of:
>
> (a) One transfer, more than one transferee, contiguous or adjacent parcels of land?
>
> Answer. When the sales are pursuant to a plan or agreement, the consideration for each parcel is to be aggregated in determining whether the consideration is $1 million or more.
>
> A transferor may furnish, along with his questionnaire, a sworn statement that the sales 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 article 31-B.
>
> Whether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers to ensure the transfers should not be aggregated.
>
> (b) Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?
>
> Answer. The consideration is not aggregated, even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors.
>
> (c) Several transferors each owning a separate interest in a parcel of land i.e. a leasehold and the fee interest) transferring their interest to a single transferee?
>
> Answer. Provided that the transferors are not related to each other, the consideration for the interests will not be aggregated.
>
> * * *
>
> (e) The transfer of 'related property' (chain-type franchises) which are noncontiguous or nonadjacent parcels of land by one transferor or by joint owners?
>
> Answer. The consideration for the sale of noncontiguous or nonadjacent parcels of land, whether or not related by use, is not to be aggregated. Therefore, the transfer of related, noncontiguous or nonadjacent parcels is taxable only if the consideration received for a particular parcel is $1 million or more." (Emphasis added.)

D. Initially, petitioners' argument that the notice of determination was invalid because it was issued without a rational basis must be rejected. The auditor's aggregation of the consideration received by Helen Armel, Jack Armel and/or Jack and Helen Armel on the transfers of the 36 undeveloped lots, all located in a geographic area known as Knoll Spring Park, cannot be deemed irrational in the first instance. This is especially so given the lack of a response by Jack Armel to the auditor's letter dated March 25, 1987, as noted in Finding of Fact "4", supra.

E. Petitioners' additional argument that Helen Armel's rights were violated because the auditor issued the notice of determination without any attempts to communicate with her must

also be rejected. There is no doubt that it would have been preferable if the auditor's letters were directed to both Jack Armel and Helen Armel, rather than to Jack Armel only. As noted in the listing of transfers in the Appendix, infra, two of the transfers at issue were made by Helen Armel and seven were made by Jack Armel and Helen Armel, so that Helen Armel should not have been ignored during the audit. It is observed, however, that, as noted in Finding of Fact "3", supra, Jack Armel's letter dated February 16, 1987, in response to the auditor's first communication used the pronoun "we", not merely "I". It is unknown whether the auditor assumed that Jack Armel, as a husband, communicated or would communicate with his wife, Helen Armel, concerning the audit. Nonetheless, there is no constitutional basis or legal or regulatory basis for cancelling the assessment against Helen Armel based upon petitioner's argument that her right to be heard during the audit was ignored. The cases cited by petitioners in support of this position (United States v. Heffner, 420 F2d 809; United States v. Leahey, 434 F2d 7) concern due process rights in the context of a criminal tax fraud investigation and are inapposite.

F. The Tax Appeals Tribunal in its recent decision, Matter of Benacquista, Polsinelli & Serafini Management Corp. (February 22, 1991), set forth a standard for determining whether transfers of unimproved land should be aggregated:

> "Based on Cove Hollow Farm [Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127], we conclude that the only inquiry that must be made here is whether the transfers of the property were made pursuant to a plan or agreement to make partial or successive transfers of the property within the meaning and intent of section 1440(7) of the Tax Law. Since the transfers at issue here were made pursuant to a subdivision plan, we agree with the Administrative Law Judge that they were made pursuant to a plan and properly treated as a single transfer under section 1440(7) (see, Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692)."

In Executive Land Corp. v. Chu, supra, the court determined that the taxpayer was subject to gains tax because a common purpose (the development of "cohesive integrated industrial complexes") was "the operative factor in all of the transfers and that tax avoidance was the ultimate goal" (id. at 357). The Tribunal in Benacquista (supra) also noted that an inquiry into whether the lots were adjacent or contiguous was not necessary because the transfers of lots

were made pursuant to a subdivision plan to effectuate the transfer of an entire parcel by successive transfers.

G. As noted in Finding of Fact "12", supra, petitioners presented the testimony of Paul L. Tommell, a licensed surveyor, who was qualified as "an expert on surveys, lot size, location and configuration of property." Mr. Tommell gave his opinion that the three subdivision plans for Knoll Spring Park Section 1, Section 2 and Section 3, represented separate and distinct subdivisions. However, it cannot be so concluded with regard to Section 2 and Section 3. As noted in Finding of Fact "10", supra, the subdivision plan for Section 3 also revised eight lots previously included in the subdivision plan for Section 2. Road access to the nine newly-created lots in Section 3 would not have been possible without such revisions to lots in Section 2. Furthermore, a review of Appendix "A", infra, shows that (i) sales of lots in Section 3 were being sold at the same time as sale of lots in Section 2, (ii) sales of lots in Section 2 and Section 3 were made to the same purchaser, GWR Construction, and (iii) Jack Armel had an ownership interest in the lots being sold in both sections, as sole owner of Section 2 lots and as joint owner with Helen Armel in Section 3 lots. In sum, it was proper for the Division of Taxation to aggregate the sales of lots in Sections 2 and 3 because a common purpose, the development of a cohesive integrated residential subdivision, was the operative factor in all of the transfers of lots in Section 2 and Section 3.

H. However, the result is different with reference to the aggregation of the sales of lots in Section 1 with the other lot sales. The Section 1 subdivision plan dated July 19, 1973 predates the Section 2 plan by approximately 6 years. Except for the special circumstances surrounding the sale of the lots described as HA and 2 Harris Road, which were shown on the 1973 subdivision plan, sales of lots in Section 1 were not made at the same time as sales of lots in Section 2 and Section 3. In addition, the Section 1 subdivision plan required no revisions in order to proceed with Sections 2 and 3. Furthermore, the development of a residential subdivision was not the operative factor for the transfer of these two lots.

I. Petitioners' argument that Helen Armel and Jack Armel subdivided and sold land

independently of the other should, nonetheless, be addressed especially in light of the numerous proposed findings of fact submitted by petitioners with regard to this particular factual matter. As separate transferors, they contend that the consideration received by Helen Armel on the sale of lot 2 to Gary Stone and the HA lot to GWR Construction should not be aggregated with the other 34 transfers of land.

J. Proposed finding of fact "48", which was not accepted, included the statement that Helen Armel undertook the sale of a portion of the land acquired from Jack Armel independently of Jack. As detailed in Finding of Fact "13", supra, petitioners attempted to prove that Jack Armel and Helen Armel acted independently of each other in developing land that was owned in his or her name only. Excerpts of the direct testimony of Helen Armel, Jack Armel, the surveyor, Paul Tommell, and petitioners' real estate lawyer, John Carusone, were quoted at length. Each witness responded in the same way to very similar questions concerning one petitioner's alleged independence from the other petitioner. However, this line of questioning was unpersuasive. Although extensive, it was also leading. It is difficult to imagine any of the four witnesses responding other than the way that was signalled by the nature of the leading questions. Although each petitioner can be described as an educated and assertive individual, it cannot be found that one acted independently and without concern for the other's opinion or influence. Moreover, as noted in Footnote "2", supra, Jack Armel was shown as "owner and developer" on the subdivision plan which was prepared by Richard Danskin, a surveyor who Helen Armel testified she hired and, as noted in Finding of Fact "9", supra, Jack and Helen Armel were described as the "owners and developers" on the subdivision plan dated February 28, 1979 for Section 2. These crucial details were left unexplained by petitioners. It is also observed that Jack Armel frequently used the pronoun "we" instead of "I" in describing the subdividing and sale of lots. Furthermore, petitioners utilized the same professionals for assistance in the sale of lots, and each sat in on meetings concerned with land held in the other's name. Nonetheless, in light of Conclusion of Law "H", supra, the consideration received by Helen Armel for the transfer of the two lots owned in her name only should not be included in

the aggregation.

K. In addition, the consideration received by Jack Armel for the sale of a portion of the land he retained for petitioners' residence should also be excluded from the aggregation. Petitioners have sustained their burden of proving that this sale was not made pursuant to a plan "to effectuate by...successive transfers a transfer which would otherwise be included in the coverage of article 31-b" (20 NYCRR 590.43). Rather, as noted in Finding of Fact "8", this land, although shown on the plan for the Section 1 subdivision, was not marketed for sale as part of such subdivision nor was it one of the subdivided lots shown on such plan. The development of a residential subdivision was not the operative factor in its transfer by Jack Armel to Herbert and Arlene Schwartz.

L. It is observed that the Court of Appeals upheld the constitutionality of the gains tax law (Trump v. Chu, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915) against an equal protection challenge. Although petitioners' constitutional challenge is based upon an argument that the law should be voided for vagueness, it also appears to lack merit. In any event, the Division of Tax Appeals is without authority to declare an act of the Legislature unconstitutional on its face (Matter of Goldome Capital Investment, Inc., Tax Appeals Tribunal, May 16, 1991).

Petitioners' argument that the gains tax law "is unconstitutionally retrospective in application" because "[i]t measures liability by ownership and property rights established prior to its enactment" is rejected. In Bombart v. Tax Commn., (132 AD2d 745, 516 NYS2d 989), the Appellate Division rejected the taxpayer's argument that his substantive due process rights were violated because the gain subjected to the gains tax included "the enhanced value of the property before the adoption of the tax".

M. Since the two lots sold by Helen Armel and the lot sold by Jack Armel to Herbert and Arlene Schwartz are properly excluded from the aggregation, as noted in Conclusions of Law "H" and "K", supra, the total consideration received on the remaining 33 transfers was $917,000.00, an amount less than the $1,000,000.00 threshold for the imposition of gains tax.

N. The petition of Jack Armel and Helen Armel is granted, and the Notice of Determination of Tax Due under Gains Tax Law dated May 7, 1987 is cancelled.

DATED: Troy, New York

_____
ADMINISTRATIVE LAW JUDGE

APPENDIX "A"

Date Transfer Recorded	Lot	Consideration	Grantor	Grantee
06/15/83	27	$ 31,000	Jack Armel	G.W.R. Construction Co., Inc.
06/15/83	24	25,000	Jack Armel	G.W.R. Construction Co., Inc.
07/18/83	23	25,500	Jack Armel	G.W.R. Construction Co., Inc.
10/11/83	25	25,500	Jack Armel	G.W.R. Construction Co., Inc.
10/26/83	21	25,500	Jack Armel	G.W.R. Construction Co., Inc.
11/04/83	14	26,500	Jack Armel	Frank W. & Judith A. Bartkowski
11/28/83	22	24,000	Jack Armel	G.W.R. Construction Co., Inc.
02/06/84	43	20,000	Jack Armel	G.W.R. Construction Co., Inc.
04/17/84	42		Jack Armel	G.W.R. Construction

Co., Inc.	26,000		
05/16/84	32	Jack Armel	G.W.R. Construction
Co., Inc.	25,000		
05/17/84	Corrall & Estate	Jack Armel	Herbert T. & Arlene
Schwartz	75,000		
05/23/84	34	Jack Armel	Gerald W. &
Kathleen M. Robusto		33,500	
06/19/84	36	Jack Armel	G.W.R. Construction
Co., Inc.	27,500		
07/06/84	33	Jack Armel	Paul J. & Lynda W.
Ferrigan	34,500		
07/23/84	35	Jack Armel	Merton A. & Edith F.
Carlston	27,500		
08/07/84	39	Jack Armel	Merton A. & Edith F.
Carlston	26,000		
08/08/84	37	Jack Armel	Merton A. & Edith F.
Carlston	27,500		
09/21/84	26R[6]	Jack Armel	G.W.R. Construction
Co., Inc.	33,000		
09/21/84	41	Jack Armel	Merton A. & Edith F.
Carlston	27,500		
10/17/84	59	Jack & Helen Armel	Knoll Spring Park
	30,000		

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[6] As noted in Finding of Fact "10", supra, the subdivision plan dated December 29, 1982 revised lots 23 through 27 and 34 through 36, which were first shown on the subdivision plan dated February 28, 1979. On petitioners' Exhibit "6", the only lot designated with an "R" following the number was lot 26R. However, it would seem that lots 23, 24, 25, 27, 34, 35 and 36 should also have an "R" following the number since they too were revised by the subdivision plan dated December 29, 1982.

Date Recorded	Lot	Grantor	Grantee	Consideration
10/17/84	53	Jack & Helen Armel	G.W.R. Construction Co., Inc.	31,000
11/27/84	31	Jack Armel	G.W.R. Construction Co., Inc.	33,000
12/18/84	40	Jack Armel	G.W.R. Construction Co., Inc.	26,000
01/07/85	58	Jack & Helen Armel	G.W.R. Construction Co., Inc.	36,000
01/16/85	55	Jack & Helen Armel	Barry & Melissa N. Goldberg	15,000
01/16/85	56	Jack & Helen Armel	G.W.R. Construction Co., Inc.	32,500
04/05/85	38	Jack Armel	G.W.R. Construction Co., Inc.	25,500
06/17/85	47	Jack Armel	G.W.R. Construction Co., Inc.	29,500
07/01/85	57	Jack & Helen Armel	G.W.R. Construction Co., Inc.	36,500
11/04/85	44	Jack Armel	G.W.R. Construction	

Co., Inc.	30,500		
11/18/85	2 Harris Road	Helen Armel	Gary E. Stone
27,000			
11/25/85	46	Jack Armel	G.W.R. Construction
Co., Inc.	34,500		
01/14/86	50	Jack Armel	G.W.R. Construction
Co., Inc.	31,000		
03/24/86	HA	Helen Armel	G.W.R. Construction
Co., Inc.	30,000[7]		
09/09/86	54	Jack & Helen Armel	Barry & Melissa N.
Goldberg	20,000		
10/06/86	45	Jack Armel	Anna DiMateo
15,000			
		Total	$1,049,000

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[7] Petitioners assert that the consideration received by Helen Armel on this transfer was only $26,700.00. Helen Armel testified that she probably has the contract for this lot, whose purchase price is in dispute, but it was not offered into evidence.