STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :	
of :	
LION BREWERY OF NEW YORK CITY :	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. :	

Petitioner, Lion Brewery of New York City, c/o Coudert Brothers, 200 Park Avenue, New York, New York 10166, 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 Nos. 807103 and 807267).

On March 15, 1990, the Division of Taxation, by its representative William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel) moved for a summary determination. Petitioner, by its representative Coudert Brothers (Richard Horodeck, Esq., of counsel), made a cross-motion for summary determination. Upon review of the affidavits and proofs submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether two apartments transferred by petitioner qualify for the personal residence exemption from the tax on gains derived from certain real property transfers.

II. Whether, if the transfers of the apartments were not exempt from tax, the transfers were made pursuant to a plan or agreement, hence properly aggregated under section 1440.7 of the Tax Law.

FINDINGS OF FACT

Petitioner, Lion Brewery of New York City, is a New York real estate holding corporation created to own and hold certain real property located on Fifth Avenue in New York

City. Lion acquired this property in two stages. In May 1925, it purchased a parcel of land then known as 989 Fifth Avenue from the Justinian Construction Corporation. In December 1925, it purchased the parcel then known as 988 Fifth Avenue from Pauline Schmid Murray. An apartment building was constructed on this property in 1926.

Pauline Schmid Murray was the sole shareholder of the Lion Brewery and its first corporate officer. She resided in an apartment in the building built by Lion ("the Building") and was generally in charge of its management. All other apartments in the Building were rented to third parties.

Mrs. Murray died in 1931. Her shares of Lion stock passed by inheritance to her daughter, Paula Murray Coudert. At that time, Mrs. Coudert and her husband, Frederick R. Coudert, Jr., assumed the management of the Building, and for that purpose, they established their residence in the Building.

In or about 1940, Frederick R. Coudert, Jr., and Paula Murray Coudert moved into the Building's 8th floor apartment. They also took control of rooms located in the 15th floor apartment, including a maids' apartment. The 15th floor rooms were used principally to store Mr. and Mrs. Coudert's furniture. Lion did not collect rent for the 15th floor rooms which were considered part of the owner's residence.

Beginning in 1927, the Building was depreciated for Federal income tax purposes. In accordance with the common practice at that time, all expenses for the entire Building were deducted by Lion. The rental value of the apartment occupied by the Couderts was treated as a shareholder's dividend.

The original building structure was fully depreciated by 1977. Certain facts regarding the depreciation of the building remain in dispute. Petitioner claims that no depreciation expenses were taken on the original structure since 1967 and that no depreciable improvements were ever made to either the 8th floor apartment or the 15th floor rooms. The condominium offering plan states that the building structure was not fully depreciated until 1977, as was found here. Building improvements and equipment continued to be depreciated by Lion until

1981.

In 1971, Mrs. Coudert granted all of her shares in Lion to one or more trusts for the benefit of her two surviving children and their descendants. The parties submitted conflicting evidence regarding the number of trusts created. At the time she granted the shares to the family trust, it was understood by Mrs. Coudert, her children and her trustees that she would continue to occupy the 8th floor apartment and the 15th floor rooms for as long as she desired. It is not known whether this "understanding" was memorialized in writing or was included in any instrument creating a trust. It is also not known whether Mrs. Coudert or any other person or entity paid rent to Lion for her use of these properties.

In July 1979, Lion took steps to convert the Building to condominium ownership pursuant to an Offering Plan. At that time, the Building consisted of fourteen floors, with one apartment on each floor except the first. (The thirteenth floor was designated the fourteenth floor and omitted from the numbering of the floors.) The condominium sponsor (Lion) offered for sale 12 apartment units, i.e., the apartments occupying floors 2 through 12 and floor 14.

The Offering Plan states: "Mrs. Frederic R. Coudert, Jr. is a tenant of the Building, and will have voting rights like those of other individual Unit Owners if she chooses to purchase her apartment." Purchase prices were established in the Offering Plan for each of the 12 apartments offered for sale, including Mrs. Coudert's apartment on the 8th floor.

The Offering Plan identified the 15th floor unit as the "Sponsor's Retained Unit", consisting of nine maids' rooms and a terrace. It states that the sponsor's retained unit "is not being offered for purchase in this Plan." The sponsor reserved the right to convert the nine rooms and terrace into one or more apartment units suitable for residential occupancy and to sell the unit or units to third parties.

The percentage of interest allocated to the Sponsor's Retained Unit was 1.36 percent, and the sponsor accepted responsibility for paying the common charges attributable to its percentage of interest in the Building's common elements. Under the terms of the Offering Plan, the percentage of interest allocated to the 15th floor unit and its owner would increase

from 1.36 percent to 4 percent following conversion into an apartment unit. The monthly common charges of all other unit owners would then decrease proportionately, by a reduction in the percentage of interest of each in the common elements, from 8.22 percent to 8 percent. The Offering Plan contained this proviso: "[T]he conversion of the 15th floor unit is not certain at this time, and Sponsor does not guarantee that the conversion will occur and that the monthly common charges will be consequently changed".

The date of the first offering of the Offering Plan is July 23, 1979. The plan states: "This Offering Plan May Not be Used After January 23, 1982."

By the end of 1981, all of the units in the Building, other than the 8th floor apartment and the Sponsor's Retained Unit, had been sold to third parties pursuant to the Offering Plan. Mrs. Coudert continued to reside in the 8th floor apartment and to use the 15th floor rooms for storage until her death in September 1985. It is not known whether she paid rent to Lion during these years of occupancy.

The 8th floor apartment was sold on August 5, 1986 to Mr. and Mrs. John Irwin, III, for $2,900,000.00, of which $2,633,813.00 was gain. The Division of Taxation ("Division") determined a real property transfer gains tax due of $263,381.00 upon the gain realized on the sale of the 8th floor apartment. Lion paid this tax and timely filed for a refund of tax paid.

The Sponsor's Retained Unit on the 15th floor was sold without renovation on December 10, 1986 for $499,990.00. The Division aggregated the transfer of the 15th floor unit with the transfer of the 8th floor apartment and determined a real property transfer gains tax due of $47,334.00 with respect to the sale of the 15th floor unit. Lion paid this tax and timely filed for a refund of tax paid.

Lion based its claim for refund of gains tax paid on the sale of the 8th floor apartment on its claim that the apartment should be distinguished from the other units offered for sale under the Offering Plan and treated as residential property eligible for the residential property exemption found at section 1443.2 of the Tax Law. The Division denied Lion's claim, stating in its letter of denial dated August 25, 1988:

"It is the Department's position...that since the shareholders of Lion Brewery (three trusts, the beneficiaries of which are the children of Frederick R. Coudert, Jr.) do not occupy and use the eighth floor as a residence and since the property has been depreciated, the sale of the premises by the corporation would not be afforded the residential exemption from the Gains Tax as provided under Section 1443.2 of the Tax Law."

Lion based its claim for refund of gains tax paid on the sale of the 15th floor unit on two grounds. First, Lion asserted that the 15th floor rooms are also eligible for the personal residence exemption, since they were used by Mrs. Coudert as an extension of her personal residence. Second, Lion contended that the sales of the 8th floor apartment and 15th floor rooms were not subject to aggregation because the 15th floor rooms were not transferred pursuant to the Offering Plan. The Division denied Lion's refund claim by letter dated March 31, 1989. In that letter, the Division stated its position that the 15th floor rooms were sold pursuant to the Offering Plan. In addition, the Division took the position that the 8th floor apartment and 15th floor rooms are contiguous parcels in that they share outside walls of the same building and are thus subject to aggregation.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a flat 10 percent levy on gains derived from the transfer of real property within New York. Exemptions from the tax are provided for in Tax Law § 1443. Two of these are pertinent here. No tax shall be imposed (1) if the consideration is less than one million dollars (Tax Law § 1443.1) or (2) if the real property consists of premises occupied by the transferor as his residence (Tax Law § 1443.2). As is generally the case, the "statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision proves his entitlement to the exemption" (Matter of Bredero Vast Goed N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791).

Petitioner's position is that the beneficial ownership of the 8th floor apartment and the 15th floor rooms rested in Mrs. Coudert, who used these premises as her personal residence, hence the transfer of these properties qualifies for the personal residence exemption. In the alternative, petitioner argues that the 15th floor unit was not transferred pursuant to the Offering

Plan and therefore is not subject to aggregation. Both the Division and petitioner move for a summary determination based on the affidavits and proofs in the record.

B. Turning initially to petitioner's contention that the 8th floor and 15th floor units qualify for the personal residence exemption, it is noted that the statutory provision requires that the "transferor" occupy the premises as his residence. The Division's regulations interpreting the statutory language are in a question and answer format. 20 NYCRR 590.24(d) provides:

> "(d) Question: Is the sale of the premises which is owned by a corporation and occupied by its sole shareholder as his residence exempt from the gains tax pursuant to section 1443(2) of the Tax Law?
>
> Answer: No. Generally, a corporation cannot occupy premises as its residence. However, if the transferor can establish through all the facts and circumstances that the ownership and maintenance of the premises related solely to personal use and that the premises were never treated as business property (for example, it was not depreciated for Federal income tax purposes), the exemption may be allowed. The exemption will be applied strictly on a case by case basis by taking all facts and circumstances into consideration."

In accordance with the regulation, a determination of entitlement to the personal residence exemption must focus on whether, taking all the facts and circumstances into consideration, the ownership and maintenance of the real property for which the claim is made related solely to personal use. Moreover, it is not enough to simply identify the legal entity transferring the property to determine whether use of the property is for personal or business purposes; rather, application of the gains tax necessitates an inquiry which focuses through entities to determine the beneficial ownership of the real property (Matter of Robert A. Howes, Tax Appeals Tribunal, September 22, 1988, confirmed ___ AD2d ___, 552 NYS2d 972). Here, petitioner argues that, regardless of the form of ownership, the beneficial owner was Mrs. Coudert who used the premises as her personal residence. In contrast, the Division contends that Mrs. Coudert's relationship to Lion was that of a tenant.

This matter has proceeded as a motion and cross-motion for summary determination. Section 3000.5(c) of the regulations of the Tax Appeals Tribunal provide:

> "A motion [for summary determination] shall be granted if, upon all the papers and proofs submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is

presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party."

It has been said that summary judgement in a court of law is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223, 231, 413 NYS2d 141, 145). On a motion for summary judgement it is the duty of the court to determine if any question of fact exists and if so to deny the motion (Crowley's Milk Co. v. Klein, 24 AD2d 920, 264 NYS2d 680). The court has no power to decide issues of fact in ruling on a motion for summary judgement (Nestlerode v. Federal Insurance Co., 66 AD2d 504, 414 NYS2d 398, 400, lv denied 48 NY2d 604). The principles governing summary judgement in a court of law govern here and prevent the granting of a summary determination on this issue. The affidavits and exhibits offered by the parties raise certain factual issues which must be resolved before a determination of the legal issues can be reached. For instance, it is not known whether Mrs. Coudert paid rent for her use of the premises, whether business was transacted on the premises during Mrs. Coudert's occupancy, or whether Mrs. Coudert maintained her residence in the Building by the terms of the trust agreements or by some less formal understanding.

C. The second issue to be addressed is whether the transfer of the 15th floor property qualifies for the statutory exemption from the real property transfer gains tax as to transfers of property the consideration for which is less than $1,000,000.00 (Tax Law § 1443.1). The 15th floor property was sold for $499,990.00. The Division determined that the sale of the 8th floor apartment should be aggregated with the sale of the 15th floor unit, resulting in a total consideration of more than $1,000,000.00, and that, therefore, the gain realized on the sale of the 15th floor unit is subject to gains tax.

The gains tax is imposed on "transfers of real property within the state" (Tax Law § 1441). A transfer of real property is defined, in pertinent part, as "the transfer or transfers of any interest in real property by any method" (Tax Law § 1440.7). The transfer of real property includes "partial or successive transfers 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]" (Tax Law § 1440.7). Thus, the sale of parceled subdivisions of real property or of contiguous or adjacent parcels of real property may be treated as a single gains tax transaction where the transaction is found to be carried out pursuant to such a plan (see, Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950; Matter of Bombart v. Tax Commn. of State of New York, 132 AD2d 745, 516 NYS2d 989). The only exception applies to transfers of subdivided parcels improved with residences for use as the residence of the transferee. Transfers pursuant to a cooperative or condominium plan are excepted from the exclusion for residential subdivisions, hence transfers pursuant to such a plan are aggregated (Tax Law § 1440.7; 20 NYCRR 590.43[f]).

20 NYCRR 590.43(a), interpreting the "aggregation clause" of section 1440.7, provides that sales of contiguous or adjacent parcels of land by one transferor to more than one transferee are subject to aggregation where the sales are pursuant to a plan or agreement as set forth in the statutory provision. The regulation further states:

> "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."

The term "contiguous" means "being in actual contact: touching along a border or at a point" (Webster's New Collegiate Dictionary 283 [9th ed 1985]). Adjacent is defined as "1a: not distant: nearby b: having a common endpoint or border" (Webster's New Collegiate Dictionary 56, supra). There is no question that two condominium units within the same building are adjacent properties (cf., Matter of Calandra, Tax Appeals Tribunal, September 29, 1988). Two questions then remain to be answered: was the 15th floor unit sold pursuant to the condominium Offering Plan and, if not, was it sold pursuant to some other "agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of [article 31-B])"?.

Several factors indicate that the 15th floor unit was not sold pursuant to a condominium plan. The Offering Plan explicitly stated that the 15th floor unit was not being offered for

purchase in the plan, and, in fact, the 15th floor unit was sold almost four years after the Offering Plan expired and five years after all other apartments, except the one on the 8th floor, were sold. Petitioner's motivation in retaining the 15th floor unit was never clearly expressed. The Offering Plan indicates that Lion considered converting the 15th floor unit into one or more apartments before selling it, but this intention was never carried out. Moreover, petitioner clearly warned other condominium owners that it was assuming no commitment to convert the 15th floor rooms and that such conversion might never take place. In support of its position that the 15th floor unit was transferred pursuant to a condominium plan, the Division notes that the fifteenth floor space was converted to condominium ownership along with the other condominium units, and, like them, it was subject to a specific allocation of common charges and to the condominium bylaws. These are facts which are properly considered in determining whether aggregation is appropriate, and under other circumstances, they might lead to a different judgement. However, in light of express statements made in the Offering Plan and the extended passage of time between the expiration of the Offering Plan and the sale of the property, it is found here that the sale of the 15th floor unit was not pursuant to a condominium plan. It is also concluded that there was no other plan or agreement which would warrant treating the sales of the 8th floor and 15th floor units as a single gains tax transaction. The sales were made to unrelated third parties and occurred four months apart. The only relationship between the two properties, other than the common identity of the transferor, was their adjacency. This in itself does not justify aggregating the transfers and treating them as a single sale.

D. Petitioner's motion for summary determination is granted to the extent indicated in Conclusion of Law "C", and its claim for refund of gains tax paid on the sale of the 15th floor unit is granted.

E. The Division's motion and petitioner's cross-motion for summary determination with respect to transfer of the 8th floor apartment are denied, and the matter shall be scheduled for hearing.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE