STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANCES G. MATTESON, BRENDA LEE MATTESON AND HELEN V. COHEN	:	DETERMINATION DTA NO. 807200
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, Frances G. Matteson, Brenda Lee Matteson and Helen V. Cohen, c/o Benjamin D. Russo, Esq., 38 Oak Street, P.O. Box 996, Patchogue, New York 11772, 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.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on August 26, 1991 at 9:15 A.M., and was concluded before the same Administrative Law Judge at the same location on April 1, 1992 at 1:15 P.M. Petitioners filed letters in lieu of briefs on May 29, 1992 and July 15, 1992. The Division of Taxation filed a letter in lieu of a brief on July 2, 1992. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioners' sales of certain lots should be aggregated pursuant to Tax Law § 1440(7).

FINDINGS OF FACT

The real property involved in this matter consists of three parcels of land located in Center Moriches, New York. The three parcels have frontage on one side of Old Neck Creek. Parcel III is situated in one corner of Parcel II. Parcel I, the largest of the three parcels, lies next to Parcel II and Parcel IV. Parcel IV is located behind Parcel II and is not involved in this proceeding. Parcel I is separated from Parcel II by a lot owned by an unrelated party and by a 14 to 20-foot right-of-way. A six-foot high chain link fence separates Parcel II from Parcel IV, the right-of-way and the lot. The fence contains a gate at the point where Parcels II, IV and the right-of-way meet.

John T. Matteson, the husband of petitioner Frances G. Matteson and father to petitioners Brenda Lee Matteson and Helen V. Cohen, obtained Parcel I by deed dated August 28, 1952 from Virginia T. Matteson, his mother. On May 27, 1970, John T. Matteson conveyed Parcel I to Stanley White, et al, taking back a purchase money mortgage from the purchasers. Petitioners, as executrices under the last will and testament of John T. Matteson, commenced foreclosure proceedings against the purchasers which proceeded to judgment on December 12, 1980. On January 30, 1981, the referee appointed pursuant to the foreclosure proceeding transferred Parcel I to petitioners as the highest bidders at the foreclosure sale.

On August 28, 1952, Virginia T. Matteson transferred Parcels II and III to John T. Matteson, together with an easement running from Parcel I to Parcel II over the right-of-way. Parcel III was transferred by John T. Matteson to Frances G. Matteson on December 1, 1955, and Parcel II was transferred between the same parties on February 1, 1968. This later transfer did not specifically include the easement over the right of way between Parcels I and II, but transferred Parcel II "together with the appurtenances and all the estate and rights of the party of the first part in and to said premises . . . ."

Petitioner Frances G. Matteson filed an application with the Town of Brookhaven for a change of zoning involving Parcel II in order that the Mattesons could operate a commercial marina facility on the property. The Town approved the rezoning but required that certain

restricted covenants be placed on the land. To accomplish this requirement, Frances G. Matteson entered into a Covenant of Restrictive Use of Property, dated July 31, 1968, which contained, in part, the following conditions, covenants and restrictions running with the land:

(a) the right-of-way adjacent to Parcels I and II shall not be permitted to be used by the public using the marina facilities.

(b) the property is to be used for marina and affiliated marina purposes only.

As previously noted, Parcels II and III were employed in a commercial marina business. The business was operated by Old Neck Marina, Inc. a corporation wholly-owned by Frances G. Matteson. Parcel I consisted mainly of vacant land.

On December 21, 1970, John T. Matteson executed his last will and testament. The will provided for a trust to be created having petitioners as co-trustees and Frances G. Matteson as the trust's income beneficiary. Upon the death of Frances G. Matteson, the principal of the trust and any accumulated income were to be divided equally between Brenda Lee Matteson and Helen V. Matteson (Cohen). John T. Matteson died on March 11, 1978 and on April 5, 1978 Letters of Trusteeship were granted to petitioners.

Helen V. Cohen was approached by certain realtors representing J & B Fluids, Inc., which was interested in purchasing the three parcels of property. After discussing the corporation's interest in Parcels I, II and III, the petitioners decided to sell the three parcels and to allow Ms. Cohen to negotiate the selling price with the purchasers. On or about March 21, 1985, petitioners, as sellers, entered into a contract of sale with J & B Fluids, Inc., as purchaser, for the sale of Parcels I, II and III for $1,250,000.00. Paragraph 42 of the contract provided that:

> "The obligations of the Purchaser to accept title hereunder are subject to Purchaser's title insurance company . . . insuring contiguity of Parcels I and II and Parcels II and III and that there are no strips or gores between said contiguous parcels."

On January 14, 1987, petitioners filed a transferor questionnaire indicating the transfer of Parcels I, II and III from petitioners to J & B Fluids, Inc. for a gross consideration of $1,250,000.00. On the same date, a second transferor questionnaire was filed indicating the transfer of the three parcels from J & B Fluids, Inc. to Old Neck Associates. J & B Fluids, Inc.,

on January 6, 1987, had assigned its rights as purchaser under the contract of sale dated March 21, 1985 with petitioners relating to the three parcels at issue herein.

On February 4, 1987, the closing of title occurred on the three parcels. Petitioners were represented by the same two attorneys. Petitioners, individually and as sole devisees under the Last Will and Testament of John T. Matteson, by deed dated February 4, 1987, transferred the three parcels to Old Neck Associates. The deed stated that the transfer included an easement for ingress and egress to and from Parcels I and II over a certain 14-foot right-of-way described in a certain deed from Virginia T. Matteson to John T. Matteson dated August 28, 1952. At the closing, Frances G. Matteson received all the proceeds of the sale. At the end of the year, the sales proceeds were allocated based upon the original cost basis of each parcel, resulting in the trust receiving 49%, or $571,095.00, of the proceeds and Frances G. Matteson receiving 51%, or $594,405.00, of the proceeds. Brenda Lee Matteson and Helen V. Cohen did not personally receive any of the funds of the sale. Real property transfer gains tax of $121,250.00 was forwarded to the Department of Taxation and Finance in full payment of the Tentative Assessment and Return issued on February 2, 1987.

The 1987 U.S. Individual Income Tax Return of Frances G. Matteson indicates that she reported $594,405.00 in income received on the sale of Parcels I, II and III. The 1987 U.S. Fiduciary Income Tax Return of the Estate of John Matteson Trust states that it reported $571,095.00 in income received on the sale of Parcels I, II and III. It was only after the sale of the parcels at issue and during the efforts to determine the allocation of the proceeds that the existence of the testamentary trust was discovered, that fiduciary returns were filed and that taxes were paid.

Petitioners filed a claim for refund in the amount of $121,250.00 on July 31, 1987. The basis of the claim was that aggregation of the consideration received was not appropriate because the parcels had separate transferors and the parcels were separated by a parcel owned by a third party. In response, the Division of Taxation ("Division") denied the claim for refund, stating that the properties are considered contiguous or adjacent because they are separated only

by a 20-foot right-of-way and are therefore in close proximity. In further support of aggregation of the consideration, the Division pointed to the fact that the parcels were transferred in a single transaction to a single purchaser, with one total purchase price for all three parcels.

During the course of the hearing, petitioners introduced into the record of this matter an appraisal of the property situated on Old Neck Road, Center Moriches, New York, known as Parcels I-II-III. The date of the appraisal was December 5, 1991 and the date the value applied was April 1987. The function of the appraisal report was to estimate the market value for estate taxes and to establish the weighted value attributed to each parcel of the real property. The Market Data (Direct Sales Comparison) Approach was used to determine the value of Parcel I at $793,000.00 and the value of Parcels II and III at $875,000.00.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners allege that it would be inappropriate to aggregate the transfers herein, citing specifically to 20 NYCRR 590.43(b). It is petitioners' position that aggregation is not proper where contiguous parcels are sold to one transferee and such parcels are owned by several transferors. Petitioners also maintain that the parcels were not used for a related purpose and were not contiguous, thus making aggregation inappropriate.

The Division argues, by contrast, that aggregation is proper in this matter. The Division maintains that there was an action in concert by the transferors in this case, pointing to the relations between the petitioners, the use of the property before the sale, the use of one petitioner to represent the interests of all the petitioners in negotiating and transferring the parcels involved and the use of one contract of sale, one sales price for the three parcels and one deed to transfer the parcels. The Division argues that it is clear that these petitioners were acting as a single entity for mutual gain, thus acting in concert. In addition, the Division contends that 20 NYCRR 590.43(b) is not applicable to the present case, as that regulation is concerned with the situation where several transferors are acting independently of each other in selling their respective properties to one transferee.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. However, Tax Law § 1443(1) provides that a partial or total exemption shall be allowed if the consideration is less than $1,000,000.00.

B. The term "transfer of real property" is defined in Tax Law § 1440(7) which provides, in part, as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale . . ." (emphasis added).

The third sentence of Tax Law § 1440(7) provides:

> "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 . . ." (emphasis added).

This is referred to as the "aggregation clause". The aggregation clause affects the application of the $1,000,000.00 exemption because the consideration received from multiple transfers is aggregated to determine whether the $1,000,000.00 exemption has been met (see, Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692; Cove Hollow Farm v. State of New York State Commn., 146 AD2d 49, 539 NYS2d 127). Further, Tax Law § 1440(7) has been interpreted to include the transfers of any interest in real property, indicating that transfers of more than one parcel may be treated as a single transaction (Matter of Sanjaylyn Co. v. State Tax Commn. of the State of New York, 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55; Matter of Bombart v. Tax Commission of the State of New York, 132 AD2d 745, 516 NYS2d 989).

C. Petitioners would have this matter decided in their favor based upon a strictly literal reading of 20 NYCRR 590.43(b). This regulation, put forth in question and answer form provides, in relevant part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
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> * * *

"(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."

Petitioners argue, in essence, that the Division may not ignore the existence of the individual persons separately holding title to the parcels transferred. Petitioners assert the independent status of each petitioner in arguing that aggregation is not proper. In response, the Division argues that this regulation was, and is, intended to afford exemption in cases of multiple individual transfers of contiguous or adjacent parcels by separate transferors to a common transferee where such transferors were separate in fact and were not acting in common (for example, a co-op developer acquiring an entire city block of properties owned by several separate and independent individuals and/or entities).

D. Upon examination of the facts and circumstances, it is apparent that the several transferors cannot be considered separate and independent with respect to the three parcels. Rather, the facts establish that the transferors acted together in selling the properties to one transferee. All of the facts surrounding the transfers at issue indicate a commonality of purpose, and there are no significant facts which tend to establish independence of thought, action or control of the owners of each parcel or show any separation, in fact, among the petitioners.

It is noted that petitioner Frances G. Matteson is the mother of the two remaining petitioners, Brenda Lee Matteson and Helen V. Cohen. Frances G. Matteson held title to Parcels II and III and had either a 1/3 interest or was the income beneficiary for life of Parcel I. Petitioners Brenda Lee Matteson and Helen V. Cohen each had either a 1/3 interest or were remaindermen of the principal of Parcel I.

It is not clear from the documents in the record as to the ownership interest of Parcel I. The deeds encompassing the chain of title of Parcel I make no mention of a testamentary trust taking title to such parcel. Following the action in foreclosure, the referee transferred ownership to petitioners individually, and not to a testamentary trust. Title certification

prepared by an abstract company indicated that Parcel I was owned by petitioners as devisees under the last will and testament of John T. Matteson. These facts indicate that the Parcel I was held by petitioners as tenants in common (see EPTL 6-2.2). Finally, it is noted that petitioners were unaware of the existence of the testamentary trust until after the sale was completed. Regardless of the nature of their interest, petitioners had a beneficial interest in Parcel I either as tenants in common or in conjunction with their interests under the testamentary trust (see, EPTL 7-1.9[a]; Tax Law § 1440[4]).

Factors which support the Division's position that aggregation is appropriate include the following: the relationship of the petitioners; petitioners acting in concert in deciding to sell all three parcels; the decision by two of the petitioners to allow the third to conduct the negotiations with the contract purchaser; the negotiation by one petitioner of the selling price for all three parcels as a single economic unit; the use of a single sales contract and the delivery of a single deed at the closing.

Petitioners have failed to produce sufficient evidence to establish that the transfers were conducted by several, independent parties (Matter of Sanjaylyn Co. v. State Tax Commn., supra). Therefore, petitioners are not entitled to the benefit of 20 NYCRR 590.43(b).

E. 20 NYCRR 590.43(b) addresses situations where several transferors each hold a separate parcel. This section sets forth the principle that transfers of contiguous parcels by independent parties to one transferee will not be aggregated (see, Matter of Brooks, Tax Appeals Tribunal, September 24, 1992). Also relevant is 20 NYCRR 590.43(d), which states:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
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> * * *
>
> "(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?
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> "Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is $1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property" (emphasis added).

20 NYCRR 590.43(d) sets forth the principle that, when determining the applicability of the $1 million exemption, the total consideration paid for jointly owned property is the figure to be examined. Each party's proportionate interest in the proceeds is relevant only in regard to his/her liability for the gains tax due on the transaction.

F. Petitioners claim that Parcels I and II were not contiguous because: (1) the easement between the two parcels was abandoned when it was not specifically included in the deed between John T. Matteson and Frances G. Matteson relating to Parcel II; (2) a covenant running with the land restricted access between Parcels I and II; and (3) a six-foot high chain link fence separated the two parcels.

Although the deed conveying Parcel II to Frances Matteson from John T. Matteson does not specifically refer to the easement created in the deed which transferred ownership from Virginia Matteson to John T. Matteson, it did transfer Parcel II "together with the appurtenances and all the estate and rights of the party of the first part in and to said premises . . . ." An appurtenant easement, such as the easement at issue herein, is an incident to an estate in land and passes with the land. Such an easement is embraced within a conveyance of the dominant estate (Parcel II), which though not referring specifically to the easement, or specifically describing it, purports to include and convey "appurtenances". (Mattes v. Frankel, 157 NY 603; Tabor v. Bradley, 18 NY 109; 49 NY Jur 2d, Easements § 159.) Thus, the easement running over the right-of-way was conveyed to Frances Matteson by deed from John T. Matteson.

> "In order to prove an abandonment it is necessary to establish both an intention to abandon and some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement. Moreover, acts evincing an intention to abandon must be unequivocal. They must clearly demonstrate the permanent relinquishment of all right to the easement. Thus, ordinarily, in order to establish an abandonment of an easement there must be definite, unequivocal acts shown that are declaratory of a clear purpose to cease forever any use or interest in the easement. This rule is followed strictly, since an easement is extinguished by abandonment in a much shorter period of time than adverse possession. On proof of acts clearly and unequivocally indicating an intent to abandon an easement, however, it will be deemed abandoned and extinguished." (49 NY Jur 2d, Easements § 182.)

Petitioners have not established that they abandoned the easement over the right-of-way that divided Parcels I and II. In addition, their specific conveyance of such easement to Old Neck

Associates in the deed relating to the transfer at issue is inconsistent with such a claim of abandonment. Thus, it is concluded that the easement was not abandoned.

Petitioners' claim that a covenant running with the land restricted access between Parcels I and II is not supported by the record. The Covenant of Restrictive Use of Property dated July 31, 1968 and created by Frances G. Matteson is the document relied upon by petitioner. However, this document only restricts the public using the marina facilities from utilizing the right-of-way, but does not limit access to the easement between Parcels I and II.

Petitioners' reliance on the existence of the six-foot high chain link fence to establish that the properties were not contiguous or adjacent is misplaced. The regulations of the Division do not define either term. It is a well-established maxim "that the words of statutes should be interpreted where possible in their ordinary everyday sense". (Automatique v. Bouchard, 97 AD2d 183, 470 NYS2d 791, citing Malat v. Riddell, 383 US 569; Matter of Bolden v. Blum, 68 AD2d 600, 418 NYS2d 229, affd 48 NY2d 946, 425 NYS2d 95.)

The term "contiguous" means "being in actual contact: touching along a boundary or at a point" (Webster's Ninth New Collegiate Dictionary 283 [1985]). Adjacent is defined as "1a: not distant: nearby b: having a common endpoint or border" (id. at 56). Clearly this definition of adjacent which includes "nearby" encompasses properties that may not be touching and would allow the conclusion that Parcels I and II are adjacent (Matter of Calandra, Tax Appeals Tribunal, September 29, 1988).

In addition, these properties were across from each other separated only by the right-of-way and a chain link fence with a gate. The existence of the easement across the right-of-way establishes access between the two parcels. In addition, the record does not indicate that the chain link fence and gate in any way created a barrier that would negate the conclusion that the properties existed and were transferred as a single economic unit (Matter of Calandra, supra). In fact, the gate would assist movement between Parcels I and II and may have been placed there to provide access across the easement connecting the two parcels.

G. Since the instant properties are adjacent, the question that remains is whether petitioners

have established "that the only correlation between the properties is the contiguity or adjacency itself, and the properties were not used for a common or related purpose." (20 NYCRR 590.42.)[1]

> "The use of such language is consistent with the expansive definition of 'transfer of real property' which was designed to maximize revenues (Tax Law § 1440[7]; Matter of Bombart v. Tax Commn. of the State of New York, Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234). We read this requirement in a manner consistent with this legislative intent - to comprehensively tax real property transfers - to allow separate gains tax treatment of contiguous properties only in the rare instance that the nature of the properties at issue had no kinship
>
> whatsoever, except their physical proximity" (Matter of Von-Mar Realty Co., Tax Appeals Tribunal, December 19, 1991).

Petitioner Helen V. Cohen represented petitioners in the negotiations leading to the sale of the parcels involved. The sale involved a single price, a single contract of sale and a single deed for the conveyance of the three parcels. One Real Property Transfer Gains Tax Transferor Questionnaire was filed by petitioners, covering Parcels I, II and III. The entire receipts from the subject transfer were received by petitioner Frances G. Matteson, whose account was used throughout 1987 to pay the estimated taxes of the trust. Petitioners were unaware of the existence of the trust until after the sale had been concluded and tax returns were being prepared. As previously discussed, Parcels I and II were separated by a right-of-way over which petitioners and the previous owners held an easement. Although a fence surrounded Parcel II, it appears that a gate existed which allowed access between the two parcels. Given these facts, it is concluded that petitioners have not established that the only correlation between the properties was their contiguity or adjacency (Matter of Albany Public Markets, Tax Appeals Tribunal, August 27, 1992; Matter of 307 McKibbon Street Realty Corp., Tax Appeals

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

Tribunal, October 14, 1988), and, therefore, petitioners properly treated the sale as a transfer of one economic unit.

H. The petition of Frances G. Matteson, Brenda Lee Matteson and Helen V. Cohen is denied.

DATED: Troy, New York
April 8, 1993

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE