STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM H. SWAN	:	DETERMINATION DTA NO. 807371
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, William H. Swan, 48 Main Street, Hampton Bays, New York 11946, 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 held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 20, 1991 at 10:45 A.M. Petitioner filed a brief on June 25, 1991. The Division of Taxation filed a brief on August 26, 1991. Petitioner filed a reply brief on September 20, 1991. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioner's sales of certain lots should be aggregated pursuant to the aggregation clause of Tax Law § 1440(7).

FINDINGS OF FACT

In 1957, Dolphin Lane Associates, a limited partnership formed under the laws of New Jersey, acquired title to various parcels of land on the Quogue-East Quogue, New York sections of the beach barrier lying between the Atlantic Ocean and Shinnecock Bay in the Town of Southhampton, New York.

The partnership agreement of Dolphin Lane Associates provided that the partnership was formed "for purposes of holding real estate for investment and such other activities as are

necessary to accomplish this basic purpose." Reference was made in the partnership agreement to a contract for purchase of beach lands which included the parcels referred to in Finding of Fact "1".

Petitioner, William H. Swan, was a limited partner in Dolphin Lane Associates. Petitioner was also one of four managers of the limited partnership.

Subsequent to the purchase by Dolphin Lane Associates of the lands referred to in Finding of Fact "1", the limited partnership conveyed a portion of said lands to petitioner and another individual (also a manager of the limited partnership), as trustees who were charged with making a division and distribution of the lands conveyed pursuant to a plan submitted to the trustees by the Dolphin Lane Associates, who were the settlors of the trust.

Pursuant to the aforementioned plan, the trustees did distribute and convey the lands in question in a checkerboard pattern to the individual members of Dolphin Lane Associates for their own personal use and enjoyment.

The plan in question (referred to above) divided some 2,000 feet of ocean-front property into a three-row, 54-lot division as shown in Appendix "A" attached hereto.

The transfers as noted above from Dolphin Lane Associates to the trustees and from the trustees to the individual members of the limited partnership were made pursuant to a single deed dated September 20, 1957.

The division of lands into 54 lots referred to above was done prior to Southhampton Town zoning and before the subsequent creation of a Planning Board and, according to the practices of that day, no map was filed. The validity of these lots as pre-existing (albeit today non-conforming) zoning entities was preserved by the checkerboard pattern. This validity has been recognized by the granting of permits for some 15 homes, cabanas, and other structures on said lots in or about the early 1960's to early 1970's by the Town of Southhampton and other governmental bodies.

Throughout approximately 25 years following the acquisition of lots by the members of the limited partnership, transfers of title to the lots were among the individual associates

(including petitioner) and their families. The lots were thus not put out for general sale during this time. Such transfers were always made in such a manner that separate ownerships were maintained in a checkerboard pattern.

Prior to entering into sales contracts in respect of the transfers at issue, petitioner owned whole or fractional interests in the following lots: 19, 21, 22 (19/20 share), 23 (½ share), 24, 25 (9/10 share), 26, 27 (9/10 share), 51 (¼ share), 52 (9/10 share), 53, 54 (9/10 share), 55 (9/10 share), 56, 57, 58, 59, 60 (¼ share), 61, 62 (½ share), 63 (19/20 share), 64 (9/10 share), 65 (¾ share) and 66. Lots 19, 24, 26, 27, 56, 57 and 58 were improved by cottages.

Petitioner subsequently did enter into contracts[1] for the

sale of his interest in the lots described above with the following purchasers:

1226 Myron Street Corp.
2006 Antigua Bay
Boynton Beach, Florida 33424

1025 Regent Street Corp.
102 Rollingwood Drive
Taylors, South Carolina 29687

3356 Lincoln Avenue Corp.
220 East Spring Meadow Boulevard
Holbrook, New York 11741

9768 Dean Street Corp.
P.O. Box 1262
Wainscott, New York 11975

2053 Garden Court Corp.
4649 Old Spartanburg Road
Taylors, South Carolina 29687

The contracts contemplated sales of petitioner's interests as described in Finding of Fact "10" to the purchasers listed above as follows:

Purchaser	Lots

[1]The contracts were not entered into the record. Therefore, the date of execution of the contracts cannot be determined. It does appear (and is concluded) that the contracts were executed, at the very least, at a point or points close in time to one other.

1226 Myron Street Corp.	21, 25 (9/10 share), 55 (9/10 share), 63 (19/20 share), 66
1025 Regent Street Corp.	26, 23 (½ share), 52 (9/10 share), 64 (9/10 share)
3356 Lincoln Avenue Corp.	19, 24, 53, 61
9768 Dean Street Corp.	56, 57, 58, 59
2053 Garden Court Corp.	27 (9/10 share), 51 (¼ share), 60 (¼ share), 62 (½ share), 65 (¾ share), 22 (19/20 share), 54 (19/20 share)

On June 24, 1987, petitioner entered into five brokerage agreements with one John G. Strong, as broker, in respect of the transfers described in Finding of Fact "12" whereby petitioner agreed to payment of commissions for the transfers.

On July 2, 1987, petitioner entered into an agreement with 9768 Dean Street Corp. for the sale of furniture and household furnishings contained in the cottages located on lots 19, 24, 26, 27, 56, 57 and 58.

On or about July 6, 1987, petitioner executed five transferor questionnaires (Form TP-580) in respect of his transfer to the five transferee-corporations set forth above. Each of said transferor questionnaires listed a date of anticipated transfer of August 25, 1987.

The transfers to the five transferee-corporations did not occur on August 25, 1987.

Petitioner subsequently entered into a liquidated damage agreement, dated October 13, 1987, with three of the transferee-corporations: 9768 Dean Street Corp., 3356 Lincoln Avenue Corp., and 1226 Myron Street Corp. This agreement made reference to the sale of lands referred to herein and also that such sale or sales did not close on August 25, 1987 (as apparently required by the contracts of sale) because of a lack of financing by the purchasers. As a result, this agreement set forth liquidated damages to be paid to petitioner as a result of the default. Specifically, 9768 Dean Street Corp. and 3356 Lincoln Avenue Corp. each agreed to pay petitioner $125,000.00. Also, 1226 Myron Street Corp. and petitioner agreed to withdraw lot 66 from the sale and said transferee-corporation agreed to pay $135,000.00 (the amount contemplated as consideration for lot 66) as liquidated damages. The liquidated damage

agreement was signed on behalf of 3356 Lincoln Avenue Corp. by a Russell Strong. The agreement was signed on behalf of 1226 Myron Street Corp. and 9768 Dean Street Corp. by a John E. Hurley, attorney-in-fact. The agreement indicated that Mr. Hurley was attorney-in-fact of a Fiona Mason, principal of 9768 Dean Street Corp. and also of a Veronica Dunn, principal of 1226 Myron Street Corp.

The transfers of land as described in Finding of Fact "12" (less lot 66) ultimately occurred on November 12, 1987. The consideration, brokerage fees and gain subject to tax in respect of the transfers were as follows:

Transferee-Corporation	Purchase Price	Brokerage Fees	Gain Subject to Tax
1226 Myron Street Corp.	$774,625.00	$82,290.00	$691,935.00
1025 Regent Street Corp.	742,375.00	67,490.00	674,885.00
3356 Lincoln Avenue Corp.	982,500.00	89,320.00	893,180.00
9768 Dean Street Corp.	950,000.00	86,370.00	863,630.00
2053 Garden Court Corp.	960,562.50	87,320.00	873,242.50

Petitioner paid gains tax totaling $399,687.25 in respect of the subject transfers at the time of the transaction and subsequently filed a claim for refund. By letter dated October 20, 1988, the Division denied petitioner's refund claim.

Petitioner submitted with his transferor questionnaires an affidavit to the effect that the subject transfers were not pursuant to an agreement or a plan to effectuate by partial or successive transfers a transfer which would otherwise be subject to gains tax. At hearing, petitioner submitted an affidavit which contained an identical statement.

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), the so-called "aggregation clause", 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).

C. The regulation promulgated pursuant to Tax Law § 1440(7) provides, in part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law...applied in the case of:
>
> (a) One transferor, 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." (20 NYCRR 590.43.)

D. This regulation's interpretation of the aggregation clause has been accepted by the courts and the Tax Appeals Tribunal (Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692; Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127; Matter of Benaquista, Polsinelli, Serafini Mgt. Corp., Tax Appeals Tribunal, February 22, 1991).

E. Upon review of the record, it is clear that petitioner has failed to prove that the subject transfers were not pursuant to a plan to avoid the tax. The Division therefore properly aggregated the consideration for each of the five subject transfers herein.

As noted, resolution of the aggregation issue depends upon petitioner's intent at the time of the transfers, "as manifested by his acts and the facts and circumstances surrounding the transfers" (20 NYCRR 590.43[a]). Here, notwithstanding petitioner's general assertion that the

transfers were not made pursuant to a plan to avoid tax, the facts and circumstances surrounding the transfers are indicative of precisely such a plan. The subject lands are contiguous and adjacent beach lands used for a common purpose, i.e., personal use and investment. The transfers involved a common broker. Although the contracts for sale were not entered into the record, it appears clear that the contracts were signed close in time to one another. The transfers all closed on the same day. A single liquidated damages agreement was executed by three of the transferees as a result of a lack of financing by the purchasers. The same individual executed said agreement as attorney-in-fact for two of the transferees. Additionally, no evidence was presented regarding the manner by which the subject property was offered for sale, i.e., whether individual lots were offered separately or whether the lots were offered in their entirety. Furthermore, the documentation submitted raises the spectre of a relationship among the transferees. Specifically, three of the transferees executed a single liquidated damages agreement which was executed on behalf of two of the transferees by the same individual. Such documentation, at the very least, raises doubts about whether the transferees acted independently or in concert in effecting the subject sales.

In sum, the evidence in the record tending to show a plan or agreement within the meaning of Tax Law § 1440(7) clearly outweighs petitioner's general assertion that the transfers at issue were not subject to such a plan (see, Executive Land Corp. v. Chu, supra; Matter of Eff & Zee Company, Tax Appeals Tribunal, April 16, 1992). Petitioner has thus failed to establish entitlement to an exemption from gains tax pursuant to Tax Law § 1443(1).

F. The petition of William H. Swan is denied and the Division's denial of petitioner's refund claim, dated October 20, 1988, is sustained.

DATED: Troy, New York
May 14, 1992

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE