

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VON-MAR REALTY CO. : DETERMINATION
for a Refund of Real Property Transfer Gains :
Tax under Article 31-B of the Tax Law for the :
Year 1989. :

Petitioner, Von-Mar Realty Co., c/o Ronald J. DeVito, Esq., 1205 Franklin Avenue, Garden City, New York 11530, filed a petition for a refund of real property transfer gains tax under Article 31-B of the Tax Law for the year 1989 (File No. 808098).

On June 28, 1991, the Division of Taxation moved for summary determination. Oral argument was heard on August 14, 1990 before Administrative Law Judge Brian L. Friedman with a written stipulation of facts, entered into by the parties, to be submitted by October 15, 1990. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation's denial of petitioner's claim for a refund of real property transfer gains tax was proper, i.e., whether the Division properly treated as a single transfer of real property the transfer of two contiguous properties sold by petitioner to one transferee on the same date for purposes of applying the one million dollar exemption provided for by Tax Law § 1443(1).

II. Whether a penalty pursuant to 20 NYCRR 3000.15 should be imposed for the filing, by petitioner, of a frivolous petition.

FINDINGS OF FACT

On June 25, 1984, two contiguous parcels of improved real property, 5 Sydney Court, North Lindenhurst, New York and 7 Sydney Court, North Lindenhurst, New York a/k/a 1130

Route 109, North Lindenhurst, New York, were conveyed to John Marin and Walter Von Rauchhaupt by Sidney S. Simowitz, Florence Bernbaum and Jean Schumer.

On October 10, 1984, John Marin and Walter Von Rauchhaupt conveyed each of the aforesaid parcels of real property to Von-Mar Realty Co. ("Von-Mar"), a New York general partnership in which the general partners were John Marin and Walter Von Rauchhaupt.

At the time of its acquisition by Mr. Marin and Mr. Rauchhaupt, 5 Sydney Court, which was improved by an industrial building, was occupied by Cee-Jay Extruders, Inc., a steel extruding business, pursuant to a lease dated October 13, 1977 between Pagus Realty Corp., as landlord, and Cee-Jay Extruders, Inc., as tenant. During the period in which Von-Mar owned the 5 Sydney Court property, Cee-Jay Extruders, Inc. continued to occupy the property and paid rent to Von-Mar.

At the time of its acquisition by Mr. Marin and Mr. Rauchhaupt, the real property at 7 Sydney Court was also improved by an industrial building. On October 12, 1990, the parties herein, executed a written stipulation, the terms of which, in pertinent part, were as follows:

a. At the time in which 5 Sydney Court and 7 Sydney Court were purchased, John Marin, Walter Von Rauchhaupt and Martin Weisenfeld were principals in several affiliated corporate entities which sold discounted merchandise to consumers. The corporate affiliates were Albro Supplies, Ltd., The County Dump, Inc. and County Liquidators, Inc. Mr. Von Rauchhaupt and Mr. Marin who were the sole partners of Von-Mar were the owners of 90 percent of the shares of stock in all of these corporate affiliates. Mr. Weisenfeld was the owner of 10 percent of the stock of these companies;

b. 7 Sydney Court was leased by Von-Mar to Albro Supplies, Ltd. to serve as the headquarters for the operation of these companies. The County Dump, Inc. and County Liquidators, Inc. also utilized space at 7 Sydney Court;

c. Between the time of purchase (by Mr. Marin and Mr. Von Rauchhaupt) and sale (by Von-Mar) of these properties, the companies conducted business only at 7 Sydney Court;

d. The lease between Von-Mar and Albro Supplies, Ltd. was oral. On occasions when

the business operation was unable to pay Von-Mar the full amount of the rent, Von-Mar forgave the portion which could not be paid;

e. When the properties were sold by Von-Mar on January 5, 1989, the aforesaid businesses continued in possession of the 7 Sydney Court property pursuant to a new lease which was entered into between these business entities and the purchaser (L.B. Realty Co.) of the properties.

On September 9, 1988, Von-Mar entered into two contracts of sale (the provisions of which were substantially the same) by which Von-Mar agreed to sell each of the properties located at 5 Sydney Court and 7 Sydney Court to L.B. Realty Co. The selling price of the 5 Sydney Court parcel was \$975,000.00 while the selling price of 7 Sydney Court was \$1,530,000.00. Both properties were actually sold by Von-Mar to L.B. Realty Co. on January 5, 1989.

The Division of Taxation treated the transfers of these parcels of real estate as a single transfer for purposes of the real property transfer gains tax and aggregated the selling price of both parcels for purposes of imposing such tax. Von-Mar paid the tax, as assessed by the Division of Taxation, under protest and, on March 3, 1989, Von-Mar filed a claim for refund of real property transfer gains tax in the amount of \$37,082.50. By letter dated April 19, 1989, the Division of Taxation denied Von-Mar's refund claim in its entirety.

The parties herein agreed, at the argument of this motion, that there are no material and triable issues of fact and that, upon the motion papers of the Division, Von-Mar's memorandum in opposition (which seeks summary determination in favor of Von-Mar), a stipulation of facts and such oral argument, no further hearing is necessary and that summary determination, in favor of one party or the other, should be granted.

SUMMARY OF THE PARTIES' POSITIONS

Von-Mar's position may be summarized as follows:

a. Contiguity does not, in and of itself, justify treating separate transfers as one; the properties must also have been used for a common or related purpose;

b. While, on the surface, both parcels appeared to have been utilized by Von-Mar as rental properties, application of the "look through" principle (which has been applied by the Division throughout the administration of the real property transfer gains tax) results in a finding that one parcel was used for investment/rental purposes (7 Sydney Court) while the other parcel was used in the taxpayer's business (5 Sydney Court) and, as such, aggregation was improper.

The Division of Taxation contends as follows:

a. One transferor (Von-Mar) transferred two contiguous properties to a single transferee on the same date. The transferor had purchased these properties, on the same date, from the same parties. Both parcels were utilized as industrial property and both generated rental income for Von-Mar;

b. The "look through" principle is inapplicable herein since such principle is utilized only for the purpose of determining ownership of the subject real estate. Ownership is not at issue in this proceeding;

c. The Division maintains that this is a well-settled area of the law and that petitioner's representative is familiar with applicable case law, statutes and regulations. Accordingly, penalty pursuant to 20 NYCRR 3000.15, for the filing of a frivolous petition, should be imposed.

CONCLUSIONS OF LAW

A. Tax Law § 1440(7) provides, in the first sentence thereof, 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, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property."

In 20 NYCRR 590.42, the Division's interpretation of the first sentence of Tax Law § 1440(7) is set forth and states, in pertinent part, as follows:

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

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

However, if the transferor establishes that the only correlation between the properties is the contiguity or adjacency itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated."

The basic issue to be determined herein involves an application of the facts to the question of whether or not the properties were used for a common or related purpose.

B. In the present matter, the general partners of Von-Mar, John Marin and Walter Von Rauchhaupt, purchased both parcels from the same grantors on the same date. Shortly thereafter, they deeded both parcels to Von-Mar (again, on the same date). When Von-Mar sold the properties, they were sold, on the same date, to a single grantee pursuant to substantially identical contracts for sale executed on the same date.

With respect to whether or not the properties were used for a common or related purpose, Von-Mar points to the fact that 7 Sydney Court was purchased for and operated as rental property while 5 Sydney Court was used by Von-Mar's principals as the headquarters for other businesses in which such principals were 90 percent shareholders.¹ It is Von-Mar, however, which is the transferor in this proceeding and, despite the fact that the lease of 5 Sydney Court was oral and that the lessee's rent payments were often forgiven by Von-Mar (presumably due to the common ownership of the lessor, Von-Mar, and the lessee, Albro Supplies, Ltd.), Von-Mar did not utilize 5 Sydney Court to carry on its business, but, as in the case of the contiguous parcel at 7 Sydney Court, held this property as investment/rental property. Use of such properties to generate rental

¹It should be noted that forms TP-580, the questionnaires filed by Von-Mar at the time of the sale of these parcels, indicated that Von-Mar paid more for 5 Sydney Court (\$580,000.00) than for 7 Sydney Court (\$470,000.00). Despite this fact, Von-Mar contends that the selling price of 5 Sydney Court (\$555,000.00 less than 7 Sydney Court) should, barring aggregation, come under the \$1 million limit for imposition of the real property transfer gains tax.

income is clearly a common or related purpose (see, Matter of Bombart v. State Tax Commn., 132 AD2d 745; Matter of Sanjaylyn v. State Tax Commn., 141 AD2d 916, appeal dismissed 72 NY2d 950; Matter of Calandra, Tax Appeals Tribunal, September 29, 1988). The "look through" principle, enumerated in certain Tax Appeals Tribunal decisions and in certain of the Division's Advisory Opinions (cited in Von-Mar's memorandum of law) is inapplicable since its purpose is, as the Division contends, to determine ownership, which is not at issue herein. Aggregation by the Division of Taxation for purposes of the real property transfer gains tax was, therefore, proper and the Division of Taxation's denial of Von-Mar's claim for refund of such tax is sustained.

C. 20 NYCRR 3000.15 provides as follows:

"If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion or on the motion of the Law Bureau, impose a penalty against such petitioner of not more than \$500. This penalty shall be in addition to any other penalty provided by law, and shall be collected and distributed in the same manner as the tax to which the penalty relates. The following are examples of frivolous positions:

- (a) that wages are not taxable as income;
- (b) that petitioner is not liable for income tax because petitioner has not exercised any privileges of government;
- (c) that the income tax system is based on voluntary compliance and petitioner therefore need not file a return;
- (d) that Federal Reserve Notes are not 'legal tender' or 'dollars,' and petitioner therefore cannot measure his or her income; and
- (e) that only states can be billed and taxed directly."

Von-Mar's petition for a refund of real property transfer gains tax, while herein denied (see, Conclusion of Law "B"), presented a justiciable issue and imposition of this penalty is unwarranted.

D. The Division of Taxation's motion for summary determination pursuant to 20 NYCRR 3000.5(c) is granted and the Division's denial of the application for refund of real property transfer gains tax by Von-Mar Realty Co. is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE