STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DIMITRI AND TAISA BALABANOW	:	DETERMINATION ON REMAND DTA NO. 808898
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, Dimitri and Taisa Balabanow, 3002 Trinity Street, Oceanside, New York 11572, 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 Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 1, 1991 at 1:15 P.M. Petitioners filed their brief on December 7, 1991 and their reply brief on March 12, 1992. The Division of Taxation filed its brief on February 21, 1992. Petitioners appeared by Herbert Garfinkel, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

On August 19, 1993, the Tax Appeals Tribunal remanded the case to the same Administrative Law Judge for further analysis of the issue set forth below.

ISSUE

Whether petitioners' sales of certain properties should be aggregated pursuant to Tax Law § 1440.7.

FINDINGS OF FACT

Petitioners, Dimitri and Taisa Balabanow, were married in Argentina in 1957. Dimitri Balabanow came to the United States in 1962, followed by his wife, Taisa, in 1965. While employed in the construction business, Mr. Balabanow began to purchase, renovate and sell apartment buildings on Long Island. When Taisa Balabanow arrived in this country, petitioners purchased the buildings as husband and wife, thereby establishing their ownership interest as tenants by the entirety. However, in 1978, petitioners started purchasing apartment buildings individually or as tenants in common. In the same year, they also began to execute deeds which altered their ownership interests in properties they owned as husband and wife to that of tenants in common.

According to the testimony of Mrs. Balabanow, the decision to purchase properties individually and to recast petitioners' ownership interests in various properties from tenants by the entirety to tenants in common was based on several factors. These included attempting to protect the children's beneficiary interest in her property should she predecease her husband, providing for her own financial needs should petitioners divorce and the overall desire to be financially independent of her husband. Mrs. Balabanow wished to insure that the two children would receive their fair share of her investments upon her death. Mrs. Balabanow also explained that owning the investments by herself, individually or as a tenant in common, provided her with a degree of independence as well as a sense of financial security should petitioners divorce.

During the years 1965 through 1973 and 1975 through 1979, petitioners earned the following salaries:

	Dimitri	Taisa
1965	$ 4,949.00	$ 702.00
1966	4,800.00	6,476.00
1967	5,280.00	8,720.00
1968	5,938.00	10,515.00
1969	8,047.00	11,342.00
1970	8,130.00	13,571.00
1971	8,709.00	7,722.00
1972	9,001.00	10,865.00

1973	8,991.00	16,140.00
1975	10,012.00	9,530.00
1976		23,606.00
1977		24,366.00
1978		27,887.00
1979		15,992.00

Petitioners were unable to produce salary information for the year 1974. In addition, Mrs. Balabanow testified that following 1975, the majority of Mr. Balabanow's income was from real estate. Mrs. Balabanow's salary income derived from her employment as a chemist for and later director of research and development of a pharmaceutical company located in Inwood, New York. She had earned her degree in pharmacy while residing in Argentina.

During the years 1975 through 1987, petitioners maintained both individual and joint bank accounts. The interest income earned from these accounts was (in rounded amounts) as follows:

	Dimitri	Taisa	Joint
1975	$	$ 111.00	$
1976		21.00	
1977		510.00	759.00
1978		765.00	1,009.00
1979	69.00	492.00	1,862.00
1980	222.00	238.00	1,999.00
1981	928.00	735.00	4,237.00
1982	1,940.00	1,914.00	5,343.00
1983	16,565.00	14,289.00	9,685.00
1984	7,774.00	19,647.00	5,289.00
1985	3,237.00	6,384.00	6,136.00
1986	14,800.00	16,847.00	6,068.00
1987	8,084.00	10,545.00	6,496.00

On April 20, 1979, petitioners entered into a contract of sale to purchase three lots located at 215, 225 and 235 West Broadway, Long Beach, New York. The three parcels of property were adjacent, with Lot 225 having a common boundary with both Lots 215 and 235. All three buildings were used as rental property, with the building on Lot 215 having 25 apartments and the buildings situated on Lots 225 and 235 having 12 apartments each. At the time of the sale, Lot 215 was owned by Sea Island Apartments, Inc. and Lots 225 and 235 were owned by Louis Katz. Louis Katz represented Sea Island Apartments, Inc. in the negotiations and executed the contracts of sale on behalf of the corporation. The purchase price of the three

lots was $425,000.00, which included a note secured by a purchase money first mortgage in the amount of $300,000.00. The contract of sale provided that, at the time of closing, the sellers would execute three deeds to the premises. Lot 215 was to be conveyed to petitioners, Lot 225 to Dimitri Balabanow and Lot 235 to Taisa Balabanow. Petitioners wished to have the ownership interests in the three buildings set up along these lines to avoid the imposition of rent stabilization, which, according to the testimony of Mrs. Balabanow, was imposed by the Village of Long Beach on an individual or entity which owned more than 25 apartment units. In addition, petitioners were required to prepare three separate mortgage instruments covering the three parcels not to exceed in the aggregate $300,000.00. The contract further provided that in the event the sellers were unable to convey title to any of the three parcels, petitioners had the absolute right to terminate the contract. Both petitioners participated in the negotiations which resulted in the purchase of the three buildings.

On June 30, 1979, petitioners executed a note and purchase money first mortgage payable to Sea Island Apartments, Inc. in the amount of $75,000.00, relating to the sale of Lot 215. On the same date, Taisa Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 225. Finally, on the same date, Dimitri Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 235.

The three parcels were transferred to petitioners on June 28, 1979. The remaining portion of the purchase price was paid by a promissory note in the amount of $25,000.00, signed by Dimitri Balabanow, a cash payment of $10,000.00, made by Taisa Balabanow, and several bank checks, the source of which was funds obtained by petitioners through the remortgaging of certain of their properties.

Following the purchases, petitioners continued to use the buildings on the three lots as rental properties. Petitioners created a management company to collect the rents, to pay all debts, including the mortgages, and to take care of the maintenance and repairs relating to the three buildings. Any extra money in the management company account was divided equally

between Taisa and Dimitri Balabanow.

On December 20, 1985, petitioners entered into a contract of sale to sell the Lot 215 property to Stewart Dickler for $934,000.00. The contract provided that petitioners would take back from the purchaser a purchase money note and mortgage in the amount of $675,000.00. On the same date, Taisa Balabanow contracted to sell the Lot 225 property to Fred Pilevsky for $490,000.00. The contract provided that petitioner Taisa Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $320,000.00. On the same December 20, 1985 date, petitioner Dimitri Balabanow entered a contract of sale to sell the Lot 235 property to Allen Pilevsky for $635,000.00. The contract of sale provided that Dimitri Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $464,000.00. Both petitioners participated in the negotiations and discussions with the buyers concerning the sale price of the three buildings.

The process of selling the properties commenced when petitioners were approached by a broker familiar with the lots at issue. Prior to contact by the broker, petitioners had not offered the properties for sale. In fact, the purchase contracts for each of the properties in issue call for the purchasers to pay the brokerage commission.

Each of the contracts of sale contained a provision which stated that the purchasers could assign the contract on or before the closing of title. Immediately prior to the closing of title on June 25, 1986, the purchasers assigned the three contracts of sale to Herbert Tessler. Petitioners then transferred title to Lots 215, 225 and 235 to Herbert Tessler on the same June 25, 1986 date. At the closing, petitioner Dimitri Balabanow was represented by Robert S. Breitbart, Esq., while petitioner Taisa Balabanow was represented by Saul S. Le Vine, Esq. At the time of the closing, the office address for both attorneys was 287 Northern Boulevard, Great Neck, New York 11021.

The proceeds from the sale of the three lots were deposited into the individual accounts of each petitioner as follows:

Petitioner	Amount	Source (Lot)

Dimitri	$ 30,000.00	235
Dimitri	59,500.00	235
Dimitri	50,000.00	215
Taisa	30,000.00	225
Taisa	58,500.00	225
Taisa	168,000.00	215

Proceeds from the sale which had been placed in escrow and paid to petitioners at the time of closing were paid out of special accounts of both Mr. Le Vine and Mr. Breitbart. Mr. Le Vine's special account was the source of funds paid to Taisa Balabanow, while the special accounts of both attorneys were used to transfer funds to Dimitri Balabanow.

On March 23, 1987, Herbert Tessler satisfied the three purchase money notes and mortgages executed at the time of the sale of the property in issue. The proceeds relating to Lot 235 were paid to, and deposited in an account of, Dimitri Balabanow. The proceeds relating to the mortgage on Lot 225 were paid to, and deposited in an account of, Taisa Balabanow. Finally, the proceeds relating to the mortgage on Lot 215 were paid in equal amounts to each petitioner and deposited in their respective accounts.

Petitioners filed New York State resident income tax returns for the years 1985 and 1986 on a married filing separately on one return basis. For Federal purposes, petitioners filed jointly for the same two years.

On the 1985 New York State Resident Income Tax Return, petitioners divided the income earned from capital gain and rents and the losses incurred from partnerships equally between husband and wife. Petitioners combined on the Federal Schedule E, Supplemental Income Schedule, the rents, expenses, depreciation and resulting income arising from all of the properties owned by petitioners as tenants in common as well as the individually owned properties. The Schedule E also included two partnerships whose combined losses were split equally between Dimitri and Taisa Balabanow.

Accompanying petitioners' 1986 New York State Resident Income Tax Return were three Federal Schedule D's, Capital Gains and Losses. The first indicated the combined capital gains and losses of petitioners. The second and third related to the individual assets of each petitioner. Under Long Term Capital Gains and Losses, the sale of the lots in issue was

summarized, with the sales price, cost or other basis and gain realized split equally between Dimitri and Taisa Balabanow. On the attached Federal Schedule E, all of the properties which petitioners owned as tenants in common and individually were listed as one entry. The rents, expenses and depreciation from all petitioners' rental properties were combined and the resulting income split equally between petitioners. In addition, the losses from two partnerships and a subchapter S corporation were evenly divided between husband and wife.

On March 30, 1989, the Division of Taxation issued to petitioners a notice of determination asserting real property gains tax due in the amount of $205,900.00, plus penalty and interest. In its Conciliation Order dated August 31, 1990, the Bureau of Conciliation and Mediation Services recomputed the amount of tax due to $159,796.80, plus penalty and interest.

ADDITIONAL FINDINGS OF FACT ON REMAND

Petitioners' prior accountant shared an office with a real estate broker. During visits to the accountant's office, Mrs. Balabanow would often talk with the broker about her various properties, including the three lots located in Long Beach. Following one of their discussions, the accountant called to advise Mrs. Balabanow that the broker had someone interested in purchasing the Long Beach property.

The individual that the broker sent to Mrs. Balabanow was Stewart Dickler, the initial transferee of the Lot 215 property. Mr. Dickler discussed the sale of the Long Beach property with Mrs. Balabanow. A few weeks later, Mr. Dickler, accompanied by one of the Pilevskys, had further discussions about purchasing the three lots. Subsequently, Mr. Pilevsky's father was also brought into the discussions. When the purchasers had decided which lot they each wished to purchase, negotiations

commenced between the purchasers and the Balabanows. Eventually, the parties entered into three separate contracts which were not contingent upon each other. As noted above, all three contracts were executed on December 20, 1985.

On June 4, 1986, the purchasers' attorneys advised petitioners' attorneys that the

contracts of sale had been assigned to Mr. Herbert Tessler. Prior to the assignment and closing, petitioners did not know Mr. Tessler, were not aware of him and had not had any business dealings with him. In addition, prior to becoming aware of the assignments, petitioners believed they were going to sell the three lots to Messrs. Dickler, Pilevsky and Pilevsky.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State. Tax Law § 1443(1) provides for an exemption from gains tax when the consideration is less than the $1,000,000.00 threshold.

B. Tax Law § 1440(7) defines "transfer of real property" to encompass an array of transactions 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 transfer or acquisition of a controlling interest in any entity with an interest in real property." (Emphasis added.)

The emphasized term, "transfers", indicates that "the sale of more than one parcel may be treated as a single transaction" (Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, 235, lv denied 73 NY2d 708). Furthermore, the definition of "transfer of real property" goes on to include the following under the 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 . . . ." (Tax Law § 1440[7].)

C. The regulations distinguish between transfers of contiguous parcels to one transferee (20 NYCRR 590.42) and transfers of contiguous or adjacent parcels to more than one transferee (20 NYCRR 590.43) which are subject to aggregation. 20 NYCRR 590.42 provides 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.

"When the transfer is to more than one transferee, whether the amount paid for each deed transfer is added together depends on whether the transferor is subject to the aggregation clause for partial or successive transfers. (See section 590.43 of this Part.)"

20 NYCRR 590.43 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."

D. In Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), the Tribunal emphasized the distinction between the regulation at 20 NYCRR 590.42, supra, which treats as a single transfer the transfers by one transferor to one transferee of certain adjacent or contiguous properties, and 20 NYCRR 590.43 which interprets the so-called "aggregation clause" of Tax Law § 1440.7:

"As we held in Matter of Thomas Iveli and Robert Sigmund [Tax Appeals Tribunal, February 23, 1988], the interpretation set forth at section 590.42 of the regulation that the transfer by one transferor to one transferee of contiguous or adjacent properties used for a common or related purpose is well within the statutory language of the first sentence of section 1440.7. Applications of this interpretation have been sustained in Matter of Sanjalyn v. State Tax Commn., [141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950] and Matter of

Bombart v. State Tax Commn., 132 AD2d 745 [516 NYS2d 989].

> "Accordingly, we need not address what additional authority the Commissioner of Taxation may have pursuant to section 1448.1 to treat as taxable transfers primarily formulated to evade or avoid gains tax. Nor need we address the language of the aggregation clause that treats as a single transfer partial or successive transfers made pursuant to a plan or agreement [20 NYCRR 590.43]."

E. In addressing situations where there are initial contracts for sale by the transferor to multiple transferees and the assignment of those contracts to the ultimate purchaser,

> "the focus of the analysis [of whether a transaction is subject to the gains tax] is on the economic reality of the transactions (Matter of Bredero Vast Goed, N. V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105 [where the court sustained looking through two tiers of entities to find a transfer of real property]). This requires examining the circumstances surrounding the entire transaction including, of course, events which may have occurred many months before the actual closing of title to the property (Matter of Bredero Vast Goed, N. V. v. Tax Commn., supra). In order to analyze whether a taxable transaction has occurred, previous cases have looked at the entire transaction to determine such things as the identity of the transferors or transferees (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 522 NYS2d 972; Matter of Brooks, Tax Appeals Tribunal, September 24, 1992; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988) or whether adjacent or contiguous parcels are related (Matter of Albany Pub. Mkts., Tax Appeals Tribunal, August 27, 1992; Matter of Armel, Tax Appeals Tribunal, July 23, 1992; Matter of Eff & Zee Co., Tax Appeals Tribunal, April 16, 1992)" (Matter of General Builders Corp., Tax Appeals Tribunal, December 24, 1992).

In General Builders, the Tax Appeals Tribunal concluded that in a case involving transfers via contracts of sale by a transferor to multiple transferees and a subsequent assignment of those contracts to the ultimate purchaser, the determination of the taxability under 20 NYCRR 590.42 depends upon whether the transferor intended to transfer the properties to the single transferee.

Applying these principles to the facts herein, it is determined that petitioners have established that it was not their intention to transfer the three parcels of property in one transaction to one transferee. Beginning with the discussions with Mr. Dickler, continuing through the negotiations and the executions of the contracts, and concluding at the point of being informed of the assignments, petitioners intended to make separate transfers to three transferees. Prior to the assignment and closing, petitioners had had no business dealings with Mr. Tessler, had never met him and were not even aware of him. After entering into the contracts of sale, petitioners could do nothing to prevent the property from being transferred to a

different transferee. Further, there is nothing in the record that suggests that petitioners in any way participated in the assignment of the contracts (Matter of General Builders Corp., supra).

F. The next issue to be decided is whether the three contiguous properties were conveyed as part of a plan or agreement, requiring the consideration to be aggregated under the third sentence of Tax Law § 1440(7), which treats partial or successive transfers made pursuant to a plan or agreement as a single transfer, even if the transfers are to different transferees (20 NYCRR 590.43). The determination of whether petitioners had a plan to dispose of all three parcels of property is to be made at the point that petitioners signed with the purchaser the first of the three contracts of sale (Matter of General Builders, supra; Matter of Armel, Tax Appeals Tribunal, July 23, 1992).

Under the circumstances herein, it is clear that petitioners had a plan or agreement to dispose of the Long Beach property, which would have been subject to the real property transfer gains tax, but for the structuring of the disposal of the property into partial or successive transfers. From the point in time that Mr. Dickler began discussions with Mrs. Balabanow, it was evident that petitioners were prepared to sell all three lots. This intention to sell the three lots is also evident by the concurrent negotiations between the Balabanows and the contract purchasers and, most importantly, by the Balabanows and the initial transferees executing the contracts of sale for the three lots all on the same day, December 20, 1985. Unlike the General Builders situation, where the seller intended to retain the second parcel at the time of signing the contract of sale for the first, the petitioners herein intended to sell all three parcels at the time of their initial discussions with Mr. Dickler and this intention continued right up to the time when the three contracts were executed. Under these circumstances, petitioners had a plan or agreement to avoid the gains tax by partial or successive transfers of the three contiguous lots and, therefore, the consideration received from the sale of the lots is properly aggregated (Matter of General Builders, supra; Matter of Armel, supra; 20 NYCRR 590.43).

G. The petition of Dimitri and Taisa Balabanow is denied and the notice of determination dated March 30, 1989 is sustained.

DATED: Troy, New York
November 4, 1993

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE