

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| ESTHER HARRIS | : | DETERMINATION |
| | : | ON REMAND |
| | : | DTA NO. 809497 |
| 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, Esther Harris, 83 Third Street, New City, New York 10956-5948, 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 Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 19, 1992 at 10:45 A.M. The Administrative Law Judge issued a determination dated March 11, 1993 granting the petition and cancelling the Notice of Determination dated December 11, 1989. On exception by the Division of Taxation ("Division"), the Tax Appeals Tribunal, in its decision dated December 30, 1993, reversed the determination of the Administrative Law Judge and remanded for a further determination by the Administrative Law Judge. The parties were provided an opportunity to submit additional briefs by March 18, 1994. Petitioner filed a brief on the issues remanded to the Administrative Law Judge on January 28, 1994. The Division responded with a submission received on February 4, 1994. Petitioner's reply was received on February 18, 1994. Petitioner appeared by Julius Y. Oestreicher, Esq. The Division appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE¹

¹The Tax Appeals Tribunal also remanded this matter for resolution of the issue of whether interest begins to accrue at the time the \$1,000,000.00 threshold was met or from the earlier date when petitioner sold her shares of stock. The Division, in its submission received on

Whether petitioner has produced adequate evidence to establish, as a holder of 50% of the stock, that the gain subject to tax should be reduced by 50% of the cash on hand in the corporation at the time she sold her shares.

FINDINGS OF FACT

The 13 Findings of Fact made by the Administrative Law Judge in his original determination dated March 11, 1993 were accepted verbatim by the Tax Appeals Tribunal.

Finding of Fact "12", which is relevant to the issue at hand, was as follows:

"12. As of April 30, 1985, Jackline Realty Corp. had cash on hand of \$69,730.00. Petitioner was unable to obtain a copy of the income tax return of Jackline Realty Corp. for the fiscal year ending April 30, 1986. However, in an affidavit dated July 1, 1992, petitioner calculated the corporation's cash on hand as of the date of sale of her interest to be \$31,362.50. This affidavit was submitted after the hearing, and the Division had no opportunity to question petitioner concerning the calculation, which was extremely complex."

For purposes of this determination on remand, the following additional Findings of Fact are made:

At the hearing on June 19, 1992, the Administrative Law Judge indicated, just before the parties made their closing arguments, that he wanted "to make certain on the record that the parties have submitted into the record all the evidence they want me to consider because once the

hearing is concluded today I do not accept any additional evidence, only the briefs in the matter" (tr., p. 79). The parties responded to the admonition as follows:

Attorney Lefebvre: "It's not my evidence. I am not sure what to say. I am prepared to extend to the petitioner additional time if they feel they can find the 1986 tax return [of Jackline Realty Corp.]. I don't have it. It's not in my possession. I don't believe the 1985 return is useful. If you want to hold the record open for that I would be glad to look at it if it were submitted to me but I have no other evidence."

Administrative Law Judge: "Thank you, Mr. Lefebvre. Mr. Oestreicher, would you want to request some time to try and find the tax return for that later

February 18, 1994, agreed with petitioner that interest begins to accrue at the time the \$1,000,000.00 threshold was met.

year?"

Attorney Oestreicher: "Yes, Your Honor. But what I think I need is if I can go through Mrs. Harris' returns. I don't have much hope of finding that return at all but I do believe that her individual return for that year will indicate whether or not she received a dividend and if she did not receive a dividend you can draw a conclusion that the cash on hand was substantially there at the time of her sale and that she did not participate in it."

Administrative Law Judge: "That would be Mrs. Harris' personal income tax return for the year 1986?"

Attorney Oestreicher: "1985, Your Honor."

Administrative Law Judge: "And how much time would you need to submit that return in to me?"

Attorney Oestreicher: "I believe one week, Your Honor."

Administrative Law Judge: "Why don't I give you two weeks to be on the safe side and we will say the record will be left open until July 3rd for the submission of either or both the tax return of Jackline Realty Corporation for the fiscal year ending 1986, April 30, 1986, or the personal income tax return of Mrs. Harris for 1985."

Attorney Lefebvre: "Since the sale occurred in February 1986 I would think you would want both."

Attorney Oestreicher: "Both years, Your Honor."

Administrative Law Judge: "1985 and 1986 and you may have until that date to submit them to me. Okay. Other than those returns, tax returns, I will not accept anything further in the nature of evidence, only the briefs. Having that [sic] said that, Mr. Oestreicher, anything further?"

Attorney Oestreicher: "Yes, Your Honor. In advance of this hearing I prepared a stipulation. Hopefully Mr. Lefebvre and I can get together to execute that stipulation and I think that would obviate a lot of the other material you have in the file and present a clear picture of what the legal issues are and what the factual issues are."

Attorney Lefebvre: "I am certain there are things in the stipulation we can agree to. I think you can submit that with your brief."

Attorney Oestreicher: "That would be fine."

Administrative Law Judge: "I have no objection to that procedure. That's agreeable to me. With your brief you can submit any stipulation you reach with the State. Other than that, Mr. Oestreicher, anything further in the nature of evidence?"

Attorney Oestreicher: "No, Your Honor, thank you." (Tr., pp. 79-82.)

On July 3, 1992, petitioner submitted an affidavit of petitioner, Esther Harris, dated

July 1, 1992, which the Administrative Law Judge accepted into the record as petitioner's Exhibit "7".² Mrs. Harris stated in her affidavit that it "is submitted in support of the effort to show that Jackline Realty Corporation has substantial assets other than the real estate." As noted in Finding of Fact "12", petitioner in this affidavit calculated the corporation's cash on hand as of the date of sale of her interest to be \$31,362.50. The affidavit provided the following details concerning this calculation:

"[A] tax return of the Corporation for the year ended April 30, 1985 . . . in evidence as Plaintiff's [sic] Exhibit 6 indicated that on May 1, 1984 the Corporation had cash on hand of \$97,268.00 and a mortgage escrow account of \$12,121.00 or a total

of \$109,389.00. The tax return further indicates that on April 30, 1985 it held cash of \$69,730.00 and a mortgage escrow balance of \$11,897.00 or a total of \$81,627.00. I have reviewed my own records for the period from April 30, 1985 (the date of the tax return) through the date of my sale on February 4, 1986. During that period I received a dividend on July 22, 1989 of \$25,000.00. I was the owner of fifty (50%) percent of the shares and so the total dividend would have been in the amount of \$50,000.00. A copy of my deposit ticket³ in the amount of \$25,000.00 is attached hereto and made a part hereof.

"4. The tax return for April 30, 1985 indicated taxable income of \$41,001.00. That figure reflects the non-cash deductions of amortization in the amount of \$5,008.00 and depreciation of \$2,530.00 [sic] or a total of \$7,538.00. If that \$7,538.00 is added to the taxable income there will be a total of cash received in the amount of \$48,539.00. The return also indicates that there were taxes paid of \$7,075.00 and the deduction of that figure from the cash received indicates a cash flow for the year ending April 30, 1985 of \$41,464.00. The income for the year ending April 30, 1986 was equal to or greater than that for the year ending April 30, 1985. There were some rent increases and there were no abnormal expenses and at least the amount of \$41,464.00 was received. My sale was made on February 4, 1986 and if the income were reduced to reflect the nine months there would be a net income of \$31,097.97.

²The record had been left open for the submission of tax returns which were not submitted. Mrs. Harris noted in her affidavit that her "efforts to obtain tax returns or corporate records were fruitless." However, no mention was made why her personal income tax returns were not available or why they were not being submitted.

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Attached to the affidavit is a photocopy of a deposit ticket for a Nanuet National Bank account in petitioner's name which notes a deposit of \$42,780.00 made up of two items, \$25,000.00 described as "Jackline" with an unreadable word next to it and \$17,780.00 described as "Levison div".

"A calculation of the cash on hand as of the date of my sale follows:

| | | |
|--------------------------------|-------------------------|------------------------|
| As per Tax Return (Exhibit 6) | <u>5/1/84</u> | <u>4/30/85</u> |
| Cash | \$ 97,268.00 | \$ 69,730.00 |
| Mortgage escrow | <u>12,121.00</u> | <u>11,897.00</u> |
| | \$109,389.00 | \$81,627.00 |
| Taxable income year ended | | |
| 4/30/85 (as per Exhibit 6 of | | |
| Petitioner) | | \$ 41,001.00 |
| Add non-cash deductions taken: | | |
| Amortization (Exhibit 6) | \$ 5,008.00 | |
| Depreciation (Exhibit 6) | <u>2,530.00</u> | <u>7,538.00</u> |

| | |
|---|---------------------------|
| Cash received | 48,539.00 |
| Less: Taxes paid (Exhibit 6) | <u>7,075.00</u> |
| Cash flow from year ended 4/20/85 | \$ 41,464.00 |
| Projections 5/1/85 to 2/1/86 (9 mos. at rate of \$41,464 per year) | \$ 31,098.00 |
| Cash on hand 4/30/85 | \$ 81,627.00 |
| Cash received | <u>31,098.00</u> |
| | \$112,725.00 |
| Dividends paid (100%) | <u>50,000.00</u> |
| Cash on hand 2/1/86 | \$ 62,725.00 |
| 50% (Esther Harris interest) | \$ 31,362.50 " |

It is observed that a Conciliation Order dated March 8, 1991 reduced tax asserted due against petitioner from \$41,829.00 to \$39,278.75 and cancelled penalties. The basis for the reduction in tax is not known.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that her affidavit established that Jackline Realty Corp. had substantial assets other than the real estate, namely cash on hand of \$62,725.00, at the time of her sale of stock. Therefore, as a 50% shareholder, the gain subject to tax should be reduced by \$31,362.50, 50% of \$62,725.00. The computation detailed in Finding of Fact "15", according to petitioner, is a reasonable reconstruction of cash on hand.

The Division counters that petitioner's calculation of the corporation's cash on hand was based on "conjecture and supposition." According to the Division, petitioner failed to prove with clear and convincing evidence what, if any, assets other than realty were part of the transfer.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1440(1)(c), petitioner would be entitled to a reduction in the amount of consideration subject to gains tax if she could establish that part of the sales price she received for her 50% interest in Jackline Realty Corp. was allocable to other assets of the corporation, specifically cash on hand.

B. Petitioner, as noted in Finding of Fact "15", sought to establish that Jackline Realty

Corp. at the time of her stock sale had cash on hand of \$62,725.00 so that the sales price she received for her shares was not for her interest in the realty only, but also for a 50% share of such cash on hand.

The transcript of the hearing on June 19, 1992 was quoted at some length in Finding of Fact "14" in order to indicate that petitioner obtained permission to submit copies of tax returns after the close of the hearing. In fact, attorney Lefebvre raised the matter that petitioner be allowed to introduce the corporate tax returns for 1986 or her personal income tax returns⁴ for 1985 and 1986 so that a reduction in the deficiency might be calculated for cash on hand in the corporation at the time petitioner sold her shares. As noted in footnote "2", petitioner indicated that she was unable "to obtain tax returns or corporate records." Instead, she submitted an affidavit with the calculation noted in Finding of Fact "15".

C. However, the calculation set forth in the affidavit can be given little weight. First, the Division lacked an opportunity to cross-examine petitioner concerning such calculation (cf., Alvarado v. State of New York Dept. of State, Div. of State Athletic Commn., 110 AD2d 583, 488 NYS2d

177). Moreover, the affidavit was submitted without prior permission from the Administrative Law Judge (cf., Matter of Knott Hotels Corp., Tax Appeals Tribunal, October 7, 1993; cf., Matter of A & J Auto Repair Corp., Tax Appeals Tribunal, May 6, 1993). Finally, petitioner did not explain why her personal income tax returns were not submitted. These returns would have shown any dividends received from the corporation, and such returns would have been much better evidence of dividends received from Jackline Realty Corp. than a photocopy of a hard-to-read deposit ticket. For that matter, a checking account statement would have been better proof of an actual deposit than just a photocopy of a deposit slip. In short, no reduction in consideration may be made to account for possible cash on hand of the corporation at the time

⁴Presumably, these returns might contain some information on dividends received from Jackline Realty Corp. by petitioner.

petitioner sold her 50% interest based upon petitioner's submission of her affidavit dated July 1, 1992.

D. The petition of Esther Harris is granted to the extent of the agreement of the parties with regard to the interest calculation as noted in footnote "1", and the Notice of Determination dated December 11, 1989 is to be modified to so conform, as well as to conform to the Conciliation Order noted in Finding of Fact "16", but, in all other respects, the petition is denied.

DATED: Troy, New York
May 12, 1994

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE