STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OSCAR W. PUTTICK, ROBERT W. PUTTICK AND PATRICIA A. RENKE	:	DETERMINATION DTA NO. 810786
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, Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke, c/o Leonard Weber, Esq., 100 Crossways Park West, Woodbury, New York 11797, 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.

On June 28, 1993 and July 2, 1993, respectively, petitioners, by their representative, Howard M. Koff, Esq., and the Division of Taxation, by William F. Collins, Esq. (David C. Gannon, Esq., of counsel), signed consents to have this controversy determined on submission without a hearing, with all documents and briefs to be submitted by January 15, 1994. A stipulation of facts entered into by the parties was signed by petitioners' representative on November 2, 1993, and by the Division of Taxation on November 4, 1993. A short brief was received from petitioners on October 28, 1993. The Division of Taxation filed a letter brief on November 5, 1993. A letter in reply was received from petitioners on November 12, 1993. The Division of Taxation submitted additional documentson July 20, 1993. Petitioners submitted no additional documents.[1] Based on all of the information in the record, Frank W. Barrie, Administrative

[1]Although petitioners did not submit additional documents to the Division of Tax Appeals following the filing of their petition, the Division of Taxation submitted the documents petitioners had attached to their refund claim and other documents petitioners had filed with the Division of Taxation shortly following that. These documents are detailed, infra, in the Findings of Fact.

Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly found the two parcels at issue to be "adjacent" pursuant to Tax Law § 1440(7) and 20 NYCRR 590.42 for purposes of aggregating the consideration received by petitioners upon the transfer of the parcels.

FINDINGS OF FACT

The facts stipulated to by the parties have been substantially incorporated in the following Findings of Fact. Several supplementary facts have been added where necessary to more accurately reflect the record.

1. Petitioners, Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke, as transferors and tenants in common, entered into two contracts of sale on March 16, 1990 for two parcels of property with David F. Rapp as the purchaser. The consideration paid for the parcel at 2 Jericho Turnpike was $323,800.00, and the consideration paid for the parcel at 383 Jericho Turnpike was $1,676,200.00.

2. The two parcels are separated by Jericho Turnpike, a six-lane highway, with two lanes of traffic in each direction and an additional parking lane on each side. The highway is approximately 120 feet wide with

a concrete median strip a few inches in height dividing the east and west bound lanes. The median is broken at every intersection.

3. The two properties were used by the transferors as an automobile dealership; the lot on one side of Jericho Turnpike was improved with a building used as a showroom and offices and the lot on the other side was used to display and park the automobiles.

4. Photographs of the relevant portion of Jericho Turnpike reveal that: (1) the two parcels in question are on the same block of Jericho Turnpike, albeit on opposite sides; (2) the parcels are almost directly across the street from each other, with the parcels beginning at approximately

the same point along Jericho Turnpike at or near an intersection with a traffic light, with the parcel containing the automobile lot extending further down Jericho Turnpike (away from the intersection) than the parcel containing the showroom and offices;[2] and (3) there are curb cuts at the street corners by the car lot parcel, making the corners accessible to the disabled.

5. Petitioners filed a refund claim in the amount of $32,380.00 on or about January 15, 1991. Attached to the refund claim was: (1) a brief statement to the effect that the parcels in question are not subject to

aggregation pursuant to 20 NYCRR 590.43(e) because the parcels are non-contiguous, i.e., they are separated by a major highway and are not "nearby" as that word is construed in Matter of Calandra (Tax Appeals Tribunal, September 29, 1988); (2) an affidavit of Robert W. Puttick wherein the affiant states that the parcels are 120 feet apart from each other and are not contiguous; (3) a map of the area with the two lots in question highlighted; and (4) powers of attorney for the three petitioners.

6. On or about May 7, 1991, Karen Galarneau, a Tax Technician for the Real Property Transfer Gains Tax Unit of the Division of Taxation ("Division") wrote to petitioners' representative denying the refund claim. In this letter, Ms. Galarneau stated that a February 19, 1991 letter was sent to Mr. Koff requesting additional information and documentation, that in response to this letter, Mr. Koff asked for and was granted an extension of time (until April 5, 1991) to submit the information, that as of May 7, 1991, no additional information or documentation was submitted by petitioners, and that based on the information on file, the

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[2]Although it would have been helpful to use more specific designations here, such as "the parcel on the north side of Jericho Turnpike," such characterizations are impossible to make since, although petitioners' map (see, infra) and transferor questionnaires taken together clarify that 2 Jericho Turnpike was on the south side and 383 Jericho Turnpike was on the north side of the highway, neither party provided information as to which of the two parcels (i.e., the showroom or the car lot parcel) was number 2 and which was number 383. Because it is impossible to know from the photographs which side of the highway was north and which was south, it is also indeterminable which lane of traffic runs east and which west.

refund claim must be denied. The letter also informed petitioners' representative that the denial would become final and irrevocable unless petitioners filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") or a petition for a tax appeals hearing with the Division of Tax Appeals within 90 days of the date of the denial letter.

7. On January 31, 1992, petitioners forwarded to the Division a set of eight photographs (detailed, supra) of the portion of Jericho Turnpike featuring the two parcels in question. These photographs, taken as a whole, reveal that the parcels in question are, as noted, almost directly across the street from each other, with the car lot parcel extending beyond the length of the showroom parcel.

8. A conciliation conference was held on February 4, 1992 and by conciliation order (CMS No. 114442) dated April 3, 1992, petitioners' request was denied and the refund denial sustained.

9. Petitioners' petition, seeking a refund of taxes paid in the amount of $32,380.00, was filed with the Division of Tax Appeals on May 5, 1992. In their petition, petitioners allege that the subject parcels should not have been aggregated because they are not contiguous or adjacent, nor are they nearby or in close proximity, being separated by Jericho Turnpike, a "major four-lane highway" with "heavy traffic" which "hindered intercourse between the two properties and constituted a barrier between them that would negate the conclusion that they existed and were transferred as a single economic unit."

10. The Division, in its answer, denies all of petitioners' allegations and affirmatively states that the transfers of the subject properties constituted a transfer of contiguous or adjacent parcels to a single transferee within the meaning of 20 NYCRR 590.42, or, in the alternative, that the transfers were partial or successive transfers pursuant to an agreement or plan within the meaning of Tax Law § 1440.7. The Division affirmatively states that, therefore, the transfers were properly aggregated and the refund claim properly denied. Finally, the Division affirmatively states that petitioners bear the burden of proving that the Division acted erroneously or improperly.

11. Transferor questionnaires on file for both of the properties reveal that petitioners' original purchase price for 2 Jericho Turnpike (which sold for $323,800.00) was $53,589.00, for a gain subject to tax of $270,211.00 (notwithstanding the possibility of a statutory exemption pursuant to Tax Law § 1443[1]), and for 383 Jericho Turnpike (which sold for $1,676,200.00) was $360,070.00, for a gain subject to tax of $1,316,130.00.

CONCLUSIONS OF LAW

A. It is undisputed that this controversy depends on the meaning of "adjacent" in the Division's regulation at 20 NYCRR 590.42. 20 NYCRR 590.42 interprets the first sentence of the definition of "transfer of real property" set forth at Tax Law § 1440(7) (i.e., that "transfer of real property" means the transfer or transfers of any interest in real property by any method . . .") (see, Matter of Calandra, supra, citing Matter of Iveli, Tax Appeals Tribunal, February 25, 1988, confirmed Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708; 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. State Tax Commn., 132 AD2d 745, 516 NYS2d 989). This regulation provides that the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property used for a common or related purpose to one transferee is to be added together for purposes of applying the $1,000,000.00 exemption under Tax Law § 1443(1). To wit, 20 NYCRR 590.42 provides, in pertinent part:

> "Question: Is the consideration received by a transferor[3] for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the $1 million exemption?
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> "Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean 'the transfer or
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> 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

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[3] The result is not different in the case, as here, of multiple transferors transferring one (or more) parcel(s) to one transferee (see, 20 NYCRR 590.43[d]; Matter of Calandra, supra).

> 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.
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> "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 . . ." (20 NYCRR 590.42).

B. In Matter of Calandra (supra), the Tax Appeals Tribunal was faced with the question of whether properties separated by a public way could be said to be "contiguous" or "adjacent". In adopting the "ordinary, everyday" meaning of "adjacent", the Tribunal concluded that while "contiguous" inferred "being in actual contact," "adjacent" included properties that were nearby, but not touching. Thus, in Calandra, the properties in question, although separated by a two-lane country roadway and its shoulders, were determined to be adjacent to each other within the meaning of 20 NYCRR 590.42. It should be noted, of course, that the properties in Calandra were directly across the street from each other, and that there was no evidence in the record to indicate that the public roadway in any way "hindered intercourse between the two properties or in any way created a barrier between them that would negate the conclusion that the properties existed and were transferred as a single economic unit" (Matter of Calandra, supra).[4]

C. In the present matter, much like in Calandra, the two parcels, used for a common or related purpose, are almost directly across a public way from each other. The only difference here is that the public way is not a two-lane country roadway (with parking lanes), but a highly trafficked four-lane major highway (with parking lanes).

Petitioners, citing Matter of Minzer (Tax Appeals Tribunal, May 20, 1993), assert that the Tribunal in that case rejected an expansive reading of Calandra, and that, therefore, it would be improper to expand Calandra here to allow parcels on opposite sides of a four-lane highway to be considered adjacent for purposes of aggregation. Petitioners contend that Jericho Turnpike

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[4]In Calandra, the Tribunal found, in addition, that the properties in question were used for a common or related purpose. That is not at issue here, as apparently petitioners have conceded that the two parcels were used by the transferors as an automobile dealership, with one lot used as a showroom and offices and the other lot used to display and park the automobiles.

more closely resembles the Long Island Expressway ("L.I.E.") than the two-lane roadway in Calandra, and insist that properties situated on opposite sides of the L.I.E. would not be considered "nearby" each other.

Petitioners' reasoning here is faulty. First, the fact that the Tribunal did not expand on Calandra in Matter of Minzer has no affect on the ability to expand on Calandra here, where, unlike Matter of Minzer, the facts are extremely similar to those in Calandra. Matter of Minzer involved the transfer of seven condominium units contained in three condominium buildings. The seven condominium units (with two exceptions) were physically separated from each other by other privately-owned condominium units. In affirming the administrative law judge's determination in Minzer, the Tribunal held that the fact that the owner of a condominium unit has an undivided interest in, and the right in common to use, the common elements of the condominium buildings housing the units was not a sufficient basis for finding the physically separated units adjacent or existing as a single economic unit.

The present matter, unlike Matter of Minzer, provides a fact pattern so similar to Calandra that to find the properties to be adjacent and a single economic unit would be a logical extension of Calandra. The only significant difference between the public way separating the two properties here and the public way separating them in Calandra is, as noted, that the public way here is wider and more trafficked than the one in Calandra. Under the circumstances, to expand Calandra to fit these facts would be consistent with the rationale behind Calandra. Proof of this may be found in the Calandra decision itself, where, in a footnote, the Tribunal cited as support for its ruling two eminent domain proceedings which demonstrate the principle in eminent domain law that properties separated by a highway are valued as a single entity if there is a unity of use, control and ownership of the properties (Matter of Calandra, supra, citing Red Apple Rest. v. State of New York, 46 Misc 2d 623, 260 NYS2d 206, affd 27 AD2d 417, 280 NYS2d 229; Boldt v. State of New York, 34 Misc 2d 784, 230 NYS2d 597), as in the present situation.

Turning to petitioners' other argument, I reject petitioners' comparison of Jericho Turnpike to

the L.I.E. for several reasons: (1) Jericho Turnpike is a commercial strip with parking lanes, stop lights and crosswalks, allowing for pedestrian traffic to flow back and forth from either side of the Turnpike so that stores along the commercial strip may be patronized, whereas a typical expressway, such as the L.I.E., is without parking lanes, stop lights or cross walks, and with stops possible only by exiting at designated numbered exit points; (2) the cement "barrier" along the relevant portion of Jericho Turnpike is, as noted in the Findings of Fact, only a few inches in height, and it ceases altogether at the crosswalks (i.e., it does not hinder intercourse between the two properties, nor does it create a barrier between them), whereas the significant guard rail and/or cement barriers dividing the two directions of traffic on an expressway are usually waist-high and present a barrier to travel from one side to the other; furthermore, there is no way to cross from one side of the typical expressway to the other without exiting off the expressway and reentering on the other side. In short, Jericho Turnpike is more akin to the two-lane country roadway in Calandra than it is to a major expressway.

D. In consideration of the many noted comparisons of the present situation to that in Matter of Calandra (supra) (i.e., two properties almost directly across the street from each other with the public way between them posing no "hinder[ance to] intercourse between the two properties . . . [and no] barrier between them that would negate the conclusion that the properties existed and were transferred as a single economic unit" [Matter of Calandra, supra]), I conclude that 2 Jericho Turnpike and 383 Jericho Turnpike are adjacent to each other within the meaning of 20 NYCRR 590.42.

In view of this adjacency and the undisputed fact that the two properties were used for a common or related purpose, the transfer of these properties from petitioners to the transferee were properly treated as a single transfer, with consideration aggregated to determine the appropriate amount of gains tax due (barring the application of an exemption under Tax Law § 1443.1).

E. The petition of Oscar W. Puttick, Robert W. Puttick and Patricia A. Renke is denied, and petitioners' refund claim is denied.

DATED: Troy, New York
July 7, 1994

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE