STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of DEL LERTNAC, INC. 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.	:	DETERMINATION DTA NOS. 810929 AND 810930
In the Matter of the Petition of GRANDVIEW ACRES, INC. 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 Del Lertnac, Inc., 38 Abbey Street, Massapequa Park, New York 11762-3013, 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.

Petitioner Grandview Acres, Inc., P.O. Box 777, Hancock, New York 13783-0777, 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 consolidated hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 13, 1993 at 9:15 A.M., with all briefs filed by November 4, 1993. Petitioner Del Lertnac, Inc. appeared by James M. Hayes, Esq. and petitioner Grandview Acres, Inc. appeared byFrederick A. Griffen, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly aggregated the sales of property pursuant to Tax Law § 1440.7 by the two petitioner corporations, thus denying petitioners the exemption from real property gains tax under Tax Law § 1443.1 and subjecting certain of their sales of real property during the period in issue to the tax imposed by Tax Law § 1441.

FINDINGS OF FACT

The following Findings of Fact incorporate the two stipulations executed by the parties on July 13, 1993 and some of the proposed findings of fact submitted by petitioners. Proposed findings of petitioners 1 through 32, 34, 35, 41, 42, 43, 45 through 48, and proposed findings 33, 36, 37 and 40 as modified by the Division of Taxation ("Division") have been incorporated into this determination. Proposed findings 23, 38, 39 and petitioners' "ultimate finding of fact" have been modified or omitted because they were irrelevant, immaterial, conclusory or were not found in the record. The Division's sole proposed finding has been incorporated herein.

Del Lertnac, Inc. ("Del Lertnac") is a New York corporation, formed under a Certificate of Incorporation dated March 14, 1985, prepared by Attorney F. Gerald Mackin, of Hancock, New York, and filed with the New York Secretary of State on May 2, 1985.

Grandview Acres, Inc. ("Grandview") is a New York corporation, formed under a Certificate of Incorporation dated April 30, 1985, prepared by Attorney Dwight R. Ball, of Binghamton, New York, and filed with the New York Secretary of State on May 9, 1985.

Joan Baldassano was the sole shareholder of Del Lertnac at all times during the period from 1985 through 1989, which includes the period involved in these proceedings. The corporation's name spelled backwards is CANTRELL (ED).

Edward R. Cantrell was the sole shareholder of Grandview at all times during the period from 1985 to 1989, which includes the period involved in these proceedings.

Joan Baldassano and Edward R. Cantrell were at no time legally related by marriage. However, they were involved in a romantic relationship and at one time shared a residence in Hancock, New York.

Joan Baldassano and Edward R. Cantrell were each officers and directors of Grandview

and Del Lertnac and were authorized by their positions to execute legal documents on behalf of both corporations.

On May 12, 1985, Del Lertnac entered into a contract to purchase a parcel of vacant land in the Town of Hancock, Delaware County, New York, from Paul Segerdahl and Arthur Marks for the sum of $250,000.00.[1]

Joan Baldassano contributed cash capital and loans to Del Lertnac for the purpose of funding the downpayment and closing expenses for the property purchased by Del Lertnac, and Edward R. Cantrell contributed cash capital and loans to Grandview for the purpose of funding the downpayment and closing costs for the property purchased by Grandview.

Prior to the closing of the sale, the two corporations ordered, obtained and paid for surveys of the respective parcels each corporation was purchasing. Said surveys were completed by Gary Packer, licensed land surveyor of Honesdale, Pennsylvania, and combined into a single survey map.

Del Lertnac purchased its parcel for $173,024.00, of which $27,684.52 was paid at closing.

Grandview purchased its parcel for $76,976.00, of which $12,316.48 was paid at closing.

Del Lertnac and Grandview each gave back a purchase money mortgage, secured by the parcel each had purchased, to the sellers. The sellers required as a condition of taking back the mortgages that the entire property secure repayment of the entire balance of each purchase. As a result, the mortgages were drawn so that Del Lertnac's property secured both corporations' obligations, and Grandview's property did likewise. This was a condition imposed by the sellers, and not the two corporations. Sellers also demanded a collateral security mortgage on

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[1]Sometime between the signing of the contract and the closing, petitioners elected to divide the property into parcels with each corporation purchasing a separate parcel. There is no evidence in the record describing the legal means (i.e., new contract, assignment, etc.) used to accomplish this.

both transfers in the sum of $210,000.00 which was given by RQM, Inc., a corporation controlled by Ed Cantrell, secured by property owned by RQM, Inc.

Del Lertnac paid the recording expense, title insurance premiums and mortgage tax for the property it acquired, and Grandview Acres, Inc. did the same for the property it acquired.

The two corporations cooperated in the development of the land, including retaining one contractor to design and construct the roads serving the subdivided lots in the two parcels.

A separate accounting was kept of all of the expenses incurred by the two corporations in common, and each of the corporations paid the same fractional share of those expenses as their fractional share of the total acreage of the two parcels by adjustments and payments between the corporations.

Each of the corporations kept separate financial books and records, paid all of its own expenses or reimbursed the other corporation when such other corporation paid more than its fractional share of an expense, and retained the profit from the sale of all of the individual lots from its respective parcels.

Each corporation filed separate Federal and State income tax returns each year.

Each sale of an individual lot was made by the corporation which owned the lot, and that corporation received the proceeds of sale or took back a purchase money mortgage for the unpaid portion of the purchase price.

Joan Baldassano was president of both Del Lertnac and Grandview in order that, among other things, she could handle contracts for Grandview as well as her own corporation because Edward R. Cantrell spent a substantial portion of his time out of state and was not available to sign documents.

The two corporations cooperated in the development of the property, the payment of the cost of development and the cost of sale of individual lots, resulting in a decrease in the cost of development and sale of the individual lots.

The two corporations paid disproportionate amounts of the operating expense and the costs associated with the acquisition of the parcels between 1985 and 1989, and adjustments

were made between the two corporations for these differences. Attached to the stipulation of the parties are statements prepared from the records of the two corporations showing the amounts paid by each of the corporations for the costs of the property showing a balance due to Del Lertnac from Grandview of $15,027.56, and a statement of payment of common operating expenses between 1985 and 1988 by the two corporations over and above their respective shares, showing a net amount due Grandview from Del Lertnac for payment of expenses in the sum of $783.00.

Del Lertnac and Grandview prepared and filed separate U.S. corporate income tax returns for the years 1985 through 1989.

Del Lertnac received a gross sale price of $884,929.00 and Grandview a gross sale price of $606,732.00 for all of their lots sold.

Loans were made by Del Lertnac to Grandview in 1985 and 1986, which were repaid with interest, either by Grandview or by RQM Inc., another corporation owned by Edward R. Cantrell.

Grandview and Del Lertnac each filed a TP-580, Real Property Transfer Gains Tax Questionnaire, in July 1989, setting forth the separate amount of gross consideration, purchase price and the acquisition cost incurred by each of them, indicating that the consideration received was less than $1,000,000.00 by each corporation. Said questionnaire did not list the cost of capital improvements or the allowable selling expenses incurred by each of the corporations.

Following the filing of the TP-580's, the matter was referred to an auditor in the Division, who reached the conclusion that the sales of parcels made by the two corporations should be aggregated for purposes of application of the real property transfer gains tax, which recommendation was controverted by the two corporations. Notices of determination were issued to both corporations on June 18, 1990 for the years 1987, 1988 and 1989. Grandview was assessed gains tax in the sum of $32,909.44, plus penalty and interest. Del Lertnac was assessed gains tax of $56,035.03, plus penalty and interest.

The issue was then referred to a conferee in the Bureau of Conciliation and Mediation Services, and a conference was held on August 14, 1991.

On February 13, 1992, the conferee, William J. Proefrock, issued his decision, finding that the sales of the parcels by the two corporations should be aggregated for purposes of application of the real property transfer gains tax.

In orders dated March 27, 1992, the conferee computed the deficiency due from Del Lertnac in the amount of $56,035.03, and from Grandview in the amount of $32,909.44. Penalties and additional interest in excess of the minimum were cancelled.

Petitions dated June 23, 1992 by both corporations to the Division of Tax Appeals requested a redetermination of the decision of the conferee aggregating the two corporations and their properties for the purpose of application of Article 31-B of the Tax Law.

Joan Baldassano ("Baldassano") first met Edward Cantrell ("Cantrell") in 1984 in regard to a real estate advertisement. Cantrell was actively involved in real estate activities.

As a result of Baldassano's meeting with Cantrell, she, through her corporation (petitioner Del Lertnac), purchased property from a party known as Doyon. The property was subdivided and sold. Cantrell was not involved.

Purchase of the Doyon property was the reason Del Lertnac was formed. Del Lertnac is Ed Cantrell spelled backwards. The reason this name was selected was because of information regarding corporate names given to her by her attorney indicating that if a name was rejected, a delay in incorporation would occur "and it also was kind of thank-you [to Cantrell]."

The real estate involved in the instant case was discovered by Gary Packer, surveyor, who called it to the attention of Cantrell. Cantrell asked Baldassano if she was interested in a purchase.

Separate parcels making up the total parcel to be sold were purchased by Del Lertnac and Grandview in their names. The parcels were split between the two corporations based on the capital invested and the time involved.

Baldassano selected the parcel for her corporation based on what she thought would be

first to sell.

Baldassano made the decision to purchase the Segerdahl and Marks property through Del Lertnac rather than by just forming another corporation with Cantrell and purchasing the entire parcel as one piece because she did not know Cantrell that well at that time and did not trust him.

There were no formal written agreements regarding joint development of the property or joint venture or partnership agreement regarding the same. However, when surveyor Gary Packer approached Cantrell in April of 1985 to see if he was interested in purchasing the parcels in issue, Cantrell went to Baldassano and asked if she would be interested in buying part of the land. The land appeared to be good for development and Cantrell and Baldassano walked the property a couple of times. Since neither Baldassano nor Cantrell could develop the land themselves -- Cantrell because he lacked the capital and Baldassano because she lacked the knowledge of land development -- they agreed to purchase the parcel together in the names of their respective corporations, petitioners herein.

No subdivision surveys of lots were done when they purchased the property and began to develop it. Five-acre parcels were surveyed, lots staked and sold and the lot surveys paid for when the lots were sold.

Three surveys were prepared and filed for Del Lertnac parcels and one for the Grandview parcel. No local law required a subdivision map at the time Baldassano commenced her investment in the property. Later, a complete subdivision map was prepared. Each corporation paid for the surveys of its individual lots as they were sold.

Ed Cantrell expired in August 1990.

Baldassano never heard of a gains tax regarding real estate sales in excess of $1,000,000.00 until sometime in 1988 or 1989 when her attorney made an inquiry.

Each parcel purchased by Baldassano's and Cantrell's corporations could be developed independent of each other.

A list of the sales of lots by the corporations, attached to Attorney R. Dwight Ball's

("Ball") affidavit in evidence, was prepared by him from his files. Ball was Cantrell's attorney, performing various legal services for him prior to May 1985.

Attorney Ball, by his own knowledge, knew it was the intent of the parties that the two parcels could be best developed and marketed together and therefore each stockholder was made an officer of each corporation. Protection was inserted in the bylaws to protect an individual's ownership.

Mr. Melvin Koenig ("Koenig"), a public accountant, prepared petitioners' corporate tax returns; conversed with both owners regarding books and records of each corporation; examined the corporate books and records; signed the corporate tax returns as preparer; prepared the respective expenses of each corporation and determined any reimbursements due from one to another; and determined gross proceeds reportable by each corporation.

Transfers of the parcels purchased by Del Lertnac and Grandview were by separate deeds and their respective sales and mortgages taken back in regard to sales to third parties of the individual parcels sold were in the name of the corporation selling its lots.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. Tax Law § 1443(1) provides that a partial or total exemption shall be allowed if the consideration is less than $1,000,000.00. As a general rule, statutes which provide for exemptions from tax must be strictly construed, and the taxpayer must clearly demonstrate that it is entitled to the exemption (see, Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158).

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 "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).

The aggregation clause affects the application of the $1,000,000.00 exemption because the proceeds from the transfers that are treated as a single transfer are aggregated to determine the applicability of the exemption.

However, the aggregation clause is not applied in certain situations (see, 20 NYCRR 590.42 and 590.43). Petitioners assert that the facts of this case warrant a finding of no additional real property gains tax due. Although none of the regulations promulgated pursuant to Tax Law § 1440(7) is on point, petitioners argue that 20 NYCRR 590.43(b), (c) and (d) lend support to their position. These regulations provide, in relevant part, as follows:

"Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:

* * *

"(b) Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?

"Answer: The consideration is not aggregated, even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors.

"(c) Several transferors, each owning a separate interest in a parcel of land (i.e., a leasehold and the fee interest), transferring their interest to a single transferee?

"Answer: Provided that the transferors are not related to each other, the consideration for the interests will not be aggregated.

"(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?

"Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is $1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property."

Petitioners argue that 20 NYCRR 590.43(b) demonstrates that there can be two or more transferors and that aggregation is prohibited when separately owned parcels are involved. Petitioners also contend that 20 NYCRR 590.43(c), which prohibits aggregation where there are

more than one unrelated transferors each owning a different interest in the same parcel of property, supports its position that there can be situations with multiple transferors conveying separate interests where aggregation is prohibited.

The regulation at 20 NYCRR 590.43(d) was distinguished because the circumstances in the regulation deal with several transferors owning one parcel as joint tenants, tenants in common or as tenants by the entirety and one transferee. Aggregation was permitted under these circumstances.

However, if the situation involved one transferor and several transferees, contiguous or adjacent parcels, where the sales are pursuant to a plan or agreement, then the sales would be subject to aggregation (20 NYCRR 590.43[a]). Although petitioners argue most strenuously that they are independent, legal entities and acted consistently therewith, the facts demonstrate otherwise. It has been recognized as an established principle of the gains tax that beneficial ownership of real property may be determined by looking through entities (see, Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Howes v. Tax Appeals Tribunal, 159 AD2d 813, 552 NYS2d 972). The principle of focusing on the economic reality of the transaction has also been accepted by the courts and applied to corporate entities (see, Matter of Bredero Vast Goed, N.V. v. Tax Commn., 138 Misc 27, 523 NYS2d 754, affd 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105).

In Matter of B. V. Brooks (Tax Appeals Tribunal, September 24, 1992, confirmed ___ AD2d ___, March 10, 1994), in analyzing circumstances analogous to those in the instant matter, the Tribunal stated:

> "In our view, the purpose behind 20 NYCRR 590.43(b) is to clarify that aggregation of contiguous or adjacent lots owned by separate and distinct transferors is not warranted merely because such lots were sold to a single transferee. However, where contiguous properties are beneficially owned by the same individual through wholly owned corporations (see, Matter of 307 McKibbon St. Realty Corp., supra), or where one transferor is controlling the acts of another transferor, such transferors are not separate transferors and are not intended to be treated as such by the regulations. To interpret the regulations as petitioners urge would provide a loophole which would effectively nullify the gains tax law. Petitioners' literal reading of 20 NYCRR 590.43(b) would allow a taxpayer to avoid the gains tax by transferring parcels of property to a corporation or corporations he controls, and then have these entities transfer the property to the

> intended transferee. Each transfer could be designed to fall below the $1,000,000.00 threshold, and would be insulated from aggregation by 20 NYCRR 590.43(b). Obviously, this was not the intent behind the gains tax law or the regulations.
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> "Based on this analysis, we reject petitioners' interpretation of 20 NYCRR 590.43(b) and conclude that aggregation is not avoided here simply because four entities and one individual made the transfers. Instead, we believe that the question is properly resolved based on the relations among the beneficial owners of the property." (Emphasis added.)

The relationship between Joan Baldassano/Del Lertnac, Inc. and Edward R. Cantrell/Grandview Acres, Inc. is critical in determining whether the sales by the two corporate entities should be aggregated. Although the issue is strictly not one of "control" as it was in Brooks, it is one of beneficial ownership by the two corporations which existed and operated in a symbiotic form. To accept petitioners' portrayal of the facts, as governed by a literal reading of 20 NYCRR 590.43(b), would frustrate the intent behind the gains tax law, regulations and existing case law (see, Matter of B. V. Brooks, supra).

In focusing on the economic reality of the transactions in issue, at the very least, petitioners' development of the Segerdahl and Marks property was accomplished through their establishment of a joint venture, to which they ceded control.

> "When determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the company, whether there was a sharing of the profits as well as a sharing of the losses and whether there was a combination of property, skill, or knowledge (citation omitted). 'The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit'" (Mendelson v. Feinman, 143 AD2d 76, 531 NYS2d 326, 328).

It is indisputable that petitioners were separate legal entities with different sole shareholders and which made their corporate tax filings as separate corporations. However, that appears to be the extent of their independence. In April of 1985, before either of the corporations filed their certificates of incorporation with the New York Secretary of State's office, Joan Baldassano and Edward Cantrell were negotiating to purchase the Segerdahl and Marks real property. At that time, they intended to pool their resources and skills (her money

and his development expertise) to develop the parcel. Neither could develop the parcel on his/her own and, after walking the property a few times, they decided it would be a good development. They had the land divided by surveyor Gary Packer largely based on relative capital contributions and then created the corporations which purchased those parcels. Mrs. Baldassano's testimony established that the creation of the corporate entities was to protect her investment, i.e., limit her exposure. She did not testify, nor does the record reflect, that she and Mr. Cantrell had not planned to develop the Segerdahl and Marks property jointly.

It was more than coincidental that Joan Baldassano and Edward Cantrell were officers and directors of each other's corporations, making decisions on behalf of both corporations such as whether they would join with another company in the purchase and development of property; that they were authorized to execute legal documents for each other's corporations; that each was authorized to sell lots on behalf of the other corporation out of the same (only) sales office and that Joan Baldassano performed most of the sales work for both corporations, signing most deeds; that the purchase money mortgages given by each corporation when purchasing its respective parcel essentially encumbered both parcels, and both corporations' debts were further secured by a $210,000.00 collateral security mortgage on property owned by RQM Inc., controlled by Edward Cantrell; that the two corporations planned and then cooperated in the development of the property and the costs of development which resulted in the overall decrease in the cost of development and the sale of individual lots; that the two corporations used the same contractor to design and construct the roads serving the lots in the two parcels; that the corporations used the same surveyor and attorney; and that the two corporations paid disproportionate amounts of operating expenses and costs associated with the acquisition of the parcels between 1985 and 1989 on the basis of which company had the current funds to pay the expenses, and then made adjustments to account for these differences.

Given this relationship between the parties and the description of a joint venture in Mendelson (supra), it is determined that the two corporations were carrying on business as a joint venture, jointly holding beneficial ownership of the entire Segerdahl and Marks property,

despite the title held in the names of Grandview and Del Lertnac.

Petitioners argue that it is an indispensable essential of a contract for a joint venture that the parties agree to share in the profits and submit to the burden of making good the losses (citing Matter of Steinbeck v. Gerosa, 4 NY2d 302, 175 NYS2d 1, appeal dismissed 358 US 39, 3 L Ed 2d 45; see also, Mendelson v. Feinman, supra) and that said element was missing herein.

But a specific agreement to share the losses may be unnecessary to establish a joint venture where the law will supply the provision that losses by the parties will be apportioned in the same manner as the profits (16 NY Jur 2d, Business Relationships §§ 1586, 1587). In fact, it has been held that it is not indispensably essential to the existence of a joint venture that there be an agreement for the sharing of losses between the parties. However, in the absence of an express agreement for the sharing of losses, it will be presumed to have been intended to be in the same proportion as they share the profits (Mariani v. Summers, 3 Misc 2d 534, 52 NYS2d 750, affd 269 App Div 890, 56 NYS2d 537).

Petitioners herein did not have a written or otherwise express agreement. However, their share in the profits and losses of the development was dictated by their capital investments, which provided the ratio by which they shared proportionately. Therefore, petitioners satisfied this requirement for the finding of a joint venture.

Based upon the "look through" doctrine set forth in Matter of Howes (supra) and the principle of acknowledging economic reality (Matter of Bredero Vast Goed, N.V. v. Tax Commn., supra), coupled with petitioners' intent to establish, and the actual formation of, a joint venture to develop the Segerdahl and Marks property, it is determined that the Division properly aggregated the sales in issue.

B. The petitions of Del Lertnac, Inc. and Grandview Acres, Inc. are denied and the notices of determination, dated June 18, 1990, as modified by the conciliation orders, dated March 27, 1992, are sustained.

DATED: Troy, New York
April 28, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE