STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LESTER E. TOMBACK	:	DETERMINATION DTA NO. 811010
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, Lester E. Tomback, 88 Lake Shore Drive, Eastchester, New York 10709, 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 February 26, 1993 and March 30, 1993, respectively, petitioner, Lester E. Tomback, and the Division of Taxation by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) executed a consent to have the controversy determined on submission without hearing with all briefs and documents to be submitted by June 18, 1993 which commenced the six-month period to issue this determination. After due consideration of the record, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether, upon the conveyance of an interest in real property, it was proper for the Division of Taxation to aggregate the consideration received by petitioner, who held an interest in the property as a tenant in common, with the interests of other transferors, who were also tenants in common, in order to determine the applicability of the $1,000,000.00 exemption from real property gains tax.

FINDINGS OF FACT

Petitioner, Lester E. Tomback, was a partner in a New York partnership known as Narbar Associates ("Narbar"). Narbar's sole asset was real property known as 33 Route 304, Nanuet, New York. The partnership agreement provided that the partnership would continue

until terminated by the sale of the partnership property or the written consent of the holders of 75% of the partnership interests or shares.

At the times relevant to this matter, the partners and their interests in the partnership's property, profits and losses were as follows:

Partner	Percent of Interest in Narbar
Nathan R. Schwartz	40%
Stephen D. Shapiro, individually and as Administrator of the Estate of Harold S. Shapiro	30%
Stephen D. Shapiro, individually and as Executor of the Estate of Geraldine Brandman	10%
Lester Tomback	10%
Alvin Schwartz	10%
Total	100%

Pursuant to a stipulation dated December 31, 1988 in settlement of the action Shapiro v. Schwartz (Supreme Court, Rockland County) ("Stipulation in Settlement") it was agreed that Nathan R. Schwartz would purchase the aggregate interest of Stephen Shapiro in Narbar. The stipulation provided that the aggregate interest of Stephen Shapiro in Narbar arose from the interest in Narbar previously owned by Harold S. Shapiro, which was 30%, and the interest in Narbar previously owned by Geraldine Brandman, which was 10%, which were bequeathed to Stephen Shapiro pursuant to their respective last wills and testaments. At the election of Nathan Schwartz, in lieu of purchasing the partnership interests, Stephen Shapiro agreed to transfer title to the real property owned by Narbar to all of the partners of Narbar as tenants in common, each such tenancy in common to constitute an undivided interest in the real property equal to the respective partner's beneficial interest in the real property. Upon the transfer of the real property to the partners of Narbar, Stephen Shapiro was directed to transfer his aggregate interest in the real property to Nathan Schwartz. The total purchase price for the Shapiro/Brandman-Narbar interests was $1,900,000.00.

The fourth paragraph of the Stipulation in Settlement provided that Lester E. Tomback and Alvin Schwartz each consented to the stipulation "on the condition that Schwartz purchases their partnership interests in Narbar, or in lieu thereof, their interests in Narbar's real property." Paragraph 6(a) of the stipulation set forth the following condition precedent to the obligations of Nathan Schwartz to consummate the contemplated transactions:

> "At or before the Closing, Schwartz shall have acquired all of the partnership interests in Narbar or the respective underlying interests in the real property represented by such partnership interests which are now owned by Alvin Schwartz and Lester E. Tomback, for such price and on such terms and conditions as shall be agreed upon by them. In the event of the failure to consummate either acquisition, Schwartz's obligations hereunder to purchase the Shapiro/Brandman-Narbar Interests shall be deemed terminated and of no further force and effect . . . ."

In a letter dated January 25, 1989 from Alvin Schwartz to Nathan Schwartz it was stated that Nathan Schwartz would acquire the entire 10% partnership interest of Alvin Schwartz to Narbar or, in lieu thereof, at the election of Nathan Schwartz, Alvin Schwartz's entire undivided 10% interest in the real property owned by Narbar. The letter also provided that the purchase price would be paid by delivery to Alvin Schwartz of Nathan Schwartz's promissory note in the principal amount of $350,000.00 payable to the order of Alvin Schwartz. Paragraph 5(b) of the letter agreement stated that the transaction contemplated by the letter agreement was subject to the condition precedent that all of the other transactions contemplated by the previously mentioned Stipulation in Settlement would be consummated prior to or contemporaneously with the transaction therein.

In a letter dated March 6, 1989 from petitioner to Nathan R. Schwartz it was agreed that Nathan Schwartz would acquire the entire 10% partnership interest of petitioner in Narbar or, at the election of Nathan Schwartz, petitioner's entire undivided 10% interest in the real property owned by Narbar. The letter agreement further provided that the entire purchase price would be paid by delivery to petitioner of Nathan Schwartz's promissory note in the principal amount of $350,000.00 payable to the order of petitioner. In the same manner as the letter of January 25, 1989, the letter agreement also stated that the transaction contemplated by the letter agreement was subject to the condition precedent that all of the other transactions contemplated by the

previously mentioned Stipulation in Settlement would be consummated prior to or contemporaneously with the transaction therein.

In a letter dated March 8, 1989, the attorneys for Nathan R. Schwartz explained to the Division of Taxation ("Division") that Nathan Schwartz anticipated participating in a series of transactions whereby he would acquire the sole asset of Narbar. Specifically, the letter outlined the transfers which were contemplated in the Stipulation in Settlement, the transfers anticipated by the letter agreement between Nathan Schwartz and Lester Tomback dated March 6, 1989 and the transfers contemplated by the letter agreement between Nathan Schwartz and Alvin Schwartz. The letter included, among other documents, a Transferor Questionnaire and a Transferee Questionnaire which reflected Lester Tomback, as transferor, and Nathan R. Schwartz, as transferee. With respect to the transaction between Nathan R. Schwartz and petitioner, the letter further explained that:

> "It is anticipated that this transaction will qualify for payment of the Gains Tax in installments. Accordingly, Tomback will file a Form TP-583, Supplemental Return, with the Form TP-582, Tentative Assessment and Return, received from you."

Although a complete set of deeds was not included in the record, the documents show that Narbar distributed to each partner, as tenant in common, an interest in the real property held by Narbar. After the transfer, the interest in the real property held by each partner was equal to that partner's beneficial interest in the partnership. Accordingly, after the foregoing transfer, petitioner received an undivided 10% interest in the property formerly held by Narbar.

After each partner received his respective interest in the partnership property, each partner transferred his interest, as tenant in common, to Nathan R. Schwartz, which resulted in Mr. Schwartz's acquiring an undivided fee interest in the property.

On the transfer of petitioner's interest in the real property, he received a note and mortgage in the amount of $350,000.00.

On May 8, 1989, the Rockland County Clerk's Office received a Tentative Assessment and Return from petitioner which reported, among other things, a tentative assessment of tax due of $25,191.30.

Petitioner applied to pay the gains tax due in installments and, in a letter dated June 12, 1989, the Division agreed to petitioner's request. On May 1, 1990, the Division received its first annual installment payment of $5,038.26. A letter which accompanied the payment explained that the tax was being paid under protest since petitioner believed that the assessment was erroneous.

On June 25, 1990, the Division received a Claim for Refund of Real Property Transfer Gains Tax wherein petitioner requested a refund of $5,038.26. The refund claim alleged that the transfer was only of a 10% interest in the property and was not the sale of a controlling interest. Petitioner also stated that the consideration was only $350,000.00 and that the sale was separate and apart from the other transfers.

In a letter dated July 25, 1990, the Division advised petitioner that his claim for a refund was denied. The letter explained, among other things, that Tax Law § 1440.7 and 20 NYCRR 590.43(d) provide that when several transferors own one parcel of land as tenants in common and transfer the land to one transferee, the consideration paid to each of the transferors will be aggregated.

On July 15, 1992, the Division of Tax Appeals received a petition which challenged the denial of the claim for refund. According to the petition, the amount in controversy is $25,191.30.

SUMMARY OF THE PARTIES' POSITIONS

In a letter brief, Mr. Tomback states that the 30% interest of Harold Shapiro and the 10% interest of Hyman Brandman were acquired after the death of Harold Shapiro by his son Stephen. After the deaths of Harold Shapiro and Hyman Brandman, Stephen Shapiro acquired 50% of the stock of Narbar. The other 50% was held by Nathan Schwartz.

A conflict arose between Nathan Schwartz and Stephen Shapiro with respect to the conduct of Narbar, resulting in an action by Stephen Shapiro for the dissolution of Narbar. According to petitioner, an action was also brought by Stephen Shapiro against Nathan Schwartz and petitioner as a power play without any real basis.

Petitioner asserts that Nathan Schwartz and Stephen Shapiro settled their disputes by Nathan Schwartz purchasing Stephen Shapiro's interest in Swivelier Company, Inc. ("Swivelier")[1] and his interest in the real property of Narbar. Under the terms of the deal between Nathan Schwartz and Stephen Shapiro, Nathan Schwartz was to acquire Stephen Shapiro's stock interest in Swivelier and his 40% interest in the real property.

Petitioner maintains that it is important to know that he and Alvin Schwartz had no connection with the transaction between Stephen Shapiro and Nathan Schwartz. Petitioner asserts that it was Nathan Schwartz's option to negotiate the purchase of petitioner's and Alvin Schwartz's interests. If Nathan Schwartz elected not to make the purchase, he had the option of either cancelling his buy-out agreement with Stephen Shapiro or consummating the transaction, thus acquiring all of the capital stock of Swivelier and owning 80% of the real property interests.

Petitioner's argument continues that his sale to Nathan Schwartz of his 10% interest in the real property was not part of any plan for the acquisition of a controlling interest. Petitioner notes that under Articles 2 and 8 of the partnership agreement, 75% of the partners are required for control. Therefore, by acquiring Stephen Shapiro's interest, Nathan Schwartz obtained control without petitioner or Alvin Schwartz. Petitioner

maintains that his sale to Nathan Schwartz was entirely separate and apart from the purchase by Nathan Schwartz of Stephen Shapiro's interest.

On the basis of the foregoing, petitioner submits that Tax Law § 1440(7) does not make such provision for aggregation as the Division claims, and that there is nothing in Article 31-B of the Tax Law which justifies the Division's position that the act of the purchaser triggers the tax. According to petitioner, since the consideration was less than $1,000,000.00, no gains tax is payable.

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[1]Narbar leased the land and building at 33 Route 304, Nanuet, New York to Swivelier.

In other documents or correspondence, petitioner argued that by filing a sworn statement that the transfer was not pursuant to a plan to effectuate by partial or successive transfers a transfer that would otherwise be included in the coverage of Article 31-B this transfer should be exempt from tax. It is maintained that the foregoing provision is applicable here because each interest was individually owned as a tenant in common.

Petitioner further submits that the Division misconstrued Tax Law § 1440(7) and that there is nothing in Tax Law § 1440(7) which refers to aggregation except with respect to partial or successive transfers for the purpose of evading the Tax Law. On the basis of the foregoing, petitioner argues that the regulation is contrary to law and not binding.

In response, the Division contends that petitioner's argument that his sale to Schwartz is separate and apart from the sale by Shapiro to Schwartz is contradicted by the evidence. The Division also argues that petitioner has not shown that 20 NYCRR 590.43(d) is invalid. Lastly, the Division maintains that the transfer was taxable pursuant to Tax Law § 1448(1).

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at a rate of 10% upon gains derived from the transfer of real property within New York State. Certain exemptions from the tax are provided for in Tax Law § 1443. One such exemption is that no tax shall be imposed if the consideration is less than $1,000,000.00 (Tax Law § 1443.1). Generally, statutory exemptions from tax are strictly construed, and the taxpayer must clearly establish that it is entitled to the claimed exemption (see, Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158).

B. The term "transfer of real property" is defined in Tax Law § 1440(7) which provides, in part, as follows:

> "'[t]ransfer 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).

C. The third sentence of Tax Law § 1440(7) is known as the "aggregation clause". It provides:

> "[t]ransfer 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, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property."

D. The aggregation clause has a bearing upon the application of the $1,000,000.00 exemption because when the proceeds from the transfer are treated as a single transaction, they are aggregated in order to determine whether the exemption is applicable (see, Matter of Lee, Tax Appeals Tribunal, October 15, 1992).

E. The pertinent portion of the aggregation clause is explained in the Commissioner's regulations at 20 NYCRR 590.43(d) which states:

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

F. It has been observed that the foregoing regulation sets forth the principle that when determining the applicability of the $1,000,000.00 exemption, the pertinent inquiry is the total consideration paid for the jointly-owned property (Matter of Lee, supra). A particular party's proportionate interest in the proceeds only has a bearing on that individual's liability for the gains tax due on the transaction (Matter of Lee, supra).

G. Applying the foregoing principle to the facts of this case leads to the conclusion that petitioner is liable for the gains tax in issue. As a tenant in common, petitioner is liable for the tax regardless of the amount of the consideration he received (20 NYCRR 590.43[d]). Further, since the property in issue was held as tenants in common, petitioner's argument that his transfer

to Nathan Schwartz was unrelated to the transfers by the other tenants in common has no bearing on his liability (Matter of Lee, supra). For the same reason, the presentation of a sworn statement that the transfers were 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 of the Tax Law would not have any impact upon petitioner's liability.

H. It is noted that petitioner's argument that 20 NYCRR 590.43(d) is beyond the scope of Tax Law § 1440(7) is rejected. The clear language of the aggregation clause supports the regulation relied upon by the Division.

I. In view of the foregoing, it is unnecessary to discuss the Division's argument with respect to Tax Law § 1448(1).

J. The petition of Lester E. Tomback is denied.

DATED: Troy, New York
December 9, 1993

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE