STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of VILLAGE ESTATES PARTNERSHIP 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. 812026, 812027, 812028 AND 812029
In the Matter of the Petition of IRA BLAKE 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.	:	
In the Matter of the Petition of CHARLES CAPUTO 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.	:	
In the Matter of the Petition of JEFFREY CHRISTIANA 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, Village Estates Partnership, 1037 Ardsley Road, Schenectady, New York

12308, Ira Blake, 1155 Reef Road, Vero Beach, Florida 32963, Charles Caputo, 7948 Burgoyne Avenue, Hudson Falls, New York 12839, and Jeffrey Christiana, 1037 Ardsley Road, Schenectady, New York 13208, filed separate petitions for revision of determinations 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 Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on January 25, 1994 at 9:30 A.M., with all briefs due by June 27, 1994. Petitioners, represented by Lavelle & Finn, Esqs. (Martin S. Finn, Esq., of counsel), filed a brief on April 28, 1994. The Division of Taxation, represented by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), filed a brief on June 6, 1994. Petitioners filed a reply brief on June 24, 1994.

ISSUES

I. Whether the transfer of a lot, which is contiguous and adjacent to a lot transferred in accordance with a condominium plan, should be aggregated for transfer gains tax purposes with the condominium sales.

II. Whether the Division of Taxation can raise for the first time in a post-hearing brief an argument that petitioners did not prove that the transfers of certain lots were exempt from aggregation as lots "improved with residences to transferees for use as their residences" under Tax Law § 1440(7).

III. Whether a lot distributed to two members of a partnership as part of the partnership's dissolution should be valued at the amount assigned to the lot at the time of dissolution or at the value appraised in a subsequent appraisal.

IV. Whether the transfers of property to partners as a result of the partnership's dissolution represent mere changes in identity in the ownership that are exempt from gains tax and, if so, whether those transfers are exempt from aggregation.

V. Whether the partnership, and hence individual partners, are not responsible for

payment of gains tax because the property in question was not held in the name of the partnership but in the names of the individual partners as tenants-in-common.

VI. Whether the partnership and members of the partnership are not responsible for payment of gains tax because the transfers in question occurred prior to the 1989 amendments defining persons responsible for the tax as partnerships and members of a partnership.

VII. Whether there is reasonable cause to abate the penalties imposed for failure to pay transfer gains tax.

FINDINGS OF FACT

Petitioners Ira Blake, Charles Caputo and Jeffrey Christiana were licensed real estate brokers. According to Mr. Christiana's testimony, in 1979 the three petitioners formed petitioner Village Estates Partnership ("Village Estates") for the purpose of purchasing land in Lake George, New York. Mr. Blake and Mr. Christiana each had a 40% interest in the partnership and Mr. Caputo had a 20% interest.

At hearing, Mr. Christiana testified that he and Messrs. Blake and Caputo formed a partnership with no limited partnership interests and that he was authorized to testify at the hearing on behalf of the partnership.

In January of 1979, petitioners Blake, Caputo and Christiana purchased, as tenants-in-common, real property located along the shore of Lake George. Petitioner Christiana submitted into evidence a map of the property that was purchased. The map was prepared by petitioners for the Town of Lake George's zoning approval. The purchased property consisted of lots 1 through 10, all of which were adjacent and contiguous. Lot 1 consisted of 11 cabins that had been used as rental units. Petitioners initially intended to sell this lot as a single unit to be operated as a seasonal rental business and marketed it as such. Lot 10, which bordered Lots 1 and 6 through 9, was essentially an unimproved, commercially-zoned piece of real property. Lots 2 through 9 contained a cabin on each lot.

Initially, petitioners intended to sell lots 1 through 10. They filed a subdivision map with the Warren County Clerk which was approved on December 11, 1979. When lot 1, which

contained the 11 cabins, did not sell as a single unit, petitioners decided to sell the 11 cabins as condominium units. A new map was prepared in January of 1982 only for the 11 separate condominium units and their exclusive use areas. The offering plan for Village Estates Condominium went into effect October 1, 1986 and listed petitioners Caputo, Blake and Christiana as the sponsors and selling agents. This plan listed 11 units for a total amount of $1,135,000.00 and did not include lot 10. Petitioners sold 6 of the 11 condominium units shortly after the offering plan went into effect.

Lot 10 was marketed separately as an unimproved, commercially-zoned piece of real property. At the time of the hearing, lot 10 remained unsold.

Petitioners sold lots 2, 5, 6, 7, 8, and 9 prior to March 28, 1983, the effective date of the real property transfer gains tax. After the effective date of the gains tax, the three petitioners sold lot 3 on June 17, 1983 for $60,000.00 and lot 4 on October 22, 1984 for $176,500.00.

The Division of Taxation ("Division") proposed nine findings of fact concerning the sale of lots 2 through 9. These proposed findings are adopted as findings (a) through (i) as follows:

(a) Petitioners[1] acquired the property in question from Michael A. Sinto by deed dated January 18, 1979 and recorded in the Warren County Clerk's Office on January 25, 1979 in Liber 620 of Deeds at page 1060.

(b) Petitioners sold lot 2 for $145,000.00 to Edward Mastoloni by deed dated May 15, 1981. The deed was recorded in the Warren County Clerk's Office on May 15, 1981 in Liber 639 of Deeds at page 179.

(c) Petitioners sold lot 3 for $60,000.00 to Norman G. Olsen, Barbara J. Olsen and Garry H. Olsen by deed dated June 17, 1983. The deed was recorded in the Warren County Clerk's Office on June 20, 1983 in Liber 654 of Deeds at page 129.

(d) Petitioners sold lot 4 for $176,500.00 to Honeymoon Lodge Partnership, et al. by

---

[1]The use of the term petitioners in Finding of Fact "7" refers to petitioners Blake, Caputo and Christiana only, inasmuch as the deeds described contained only their names as transferors or transferees. Village Estates was not listed on those deeds.

deed dated October 22, 1984. The deed was recorded in the Warren County Clerk's Office on October 31, 1984 in Liber 665 of Deeds at page 995.

(e) Petitioners sold lot 5 for $62,500.00 to John Winslow by deed dated August 1, 1980. The deed was recorded in the Warren County Clerk's Office on August 13, 1980 in Liber 633 of Deeds at page 923.

(f) Petitioners sold lot 6 for $35,500.00 to Robert Faulconer by deed dated August 7, 1980. The deed was recorded in the Warren County Clerk's Office on August 13, 1980 in Liber 633 of Deeds at page 920.

(g) Petitioners sold lot 7 for $30,000.00 to Jeffrey Christiana, et al. by deed dated November 11, 1980. The deed was recorded in the Warren County Clerk's Office on December 2, 1980 in Liber 636 of Deeds at page 45.

(h) Petitioners sold lot 8 for $25,000.00 to Barry D. Relyea and Yetta J. Relyea by deed dated September 15, 1980. The deed was recorded in the Warren County Clerk's Office on September 24, 1980 in Liber 634 at page 725.

(i) Petitioners sold lot 9 for $25,000.00 to Theodore Farrell by deed dated August 29, 1980. The deed was recorded in the Warren County Clerk's Office on September 2, 1980 in Liber 634 of Deeds at page 211.

Sometime in 1988, the three partners decided to dissolve the partnership and distribute the five unsold condominium units and lot 10. In December of 1988, Jeffrey Christiana received condo units 1 and 8. Petitioners valued these properties for liquidation purposes at $105,000.00 and $85,000.00, respectively. Charles Caputo received condo unit 7 which was valued at $85,000.00 and Ira Blake received condo units 2 and 10 which were valued at $105,000.00 and $85,000.00 respectively. In addition, petitioners Caputo and Christiana received lot 10 which was valued at $50,000.00. Lot 10 was transferred in March of 1989.

The Division notified Mr. Christiana by letter dated April 17, 1992 that an audit was to be conducted with respect to gains tax on the condominium project. In that letter, the Division

noted that the condominium sales might be aggregated with the lot sales made after March 28, 1983. The letter read, in relevant part, as follows:

> "Within the information submitted with the DTF-701 forms, it is indicated that other parcels have been sold that were part of the original parcel purchased. These parcels may have to be aggregated with the condominium project and be subject to tax under Article 31-B.
>
> * * *
>
> "Regarding the other parcel sales. Sales of lots after March 28, 1983, contiguous or adjacent to the condominium project may have to be aggregated to sales of the condominiums. Based on information reviewed it appears lots 3, 4 and 10 were sold after March 10, 1983. Please send a copy of the contract of sale for these parcels and any others sold after March 28, 1983. Indicate the date of sale for all parcels. Also, indicate if these parcels were sold improved with a residence."

According to the audit summary report, the Division adjusted the consideration for the sale of real property by (1) aggregating with the condominium sales the sale of lot 10 to petitioners Christiana and Caputo for $50,000.00, and (2) disallowing a claimed $16,275.00 brokerage fee on the five units sold to petitioners. Thus, the upward adjustment to consideration was $66,275.00. The Division also adjusted upward the original purchase price by $11,075.00 -- the acquisition cost allocated to lot 10. The Division's auditor accepted the consideration for the five condo transfers to the three individual petitioners because the unit prices approximated the sale prices of the other condo units and because the condos were held for two years and had not been resold. The Division did not aggregate the sale of lots 3 and 4, which were sold after the enactment of the gains tax law, with the condo sales and lot 10. In the brief the auditor prepared for a conciliation conferee, he explained that lots 2 through 9 were not subject to gains tax because they "were sold prior to the enactment of the Gains Tax and/or were improved with a residence. . . ."

The Division issued a Notice of Determination, dated August 7, 1992, to Village Estates for real property transfer gains tax due of $54,884.00, plus penalty and interest. The Division also issued to each of the petitioners Blake, Caputo and Christiana a Notice of Determination, dated August 7, 1992, for gains tax due of $25,223.00, plus penalty and interest, based on their

liability as persons responsible for the tax in relation to Village Estates.[2]

On February 8, 1993, the Division's auditor wrote a letter to petitioners' representative confirming that further adjustments were made to reflect additional brokerage amounts and that transfers to the sponsors involved a mere change in identity of ownership of those condo units. The effect of the new calculations with respect to the "change of identity" rule is reflected below:

Condo #	Total Consideration Tax With Minus Brokerage Fee	OPP	Gain	Tax on Gain	Percent Change	Partial Mere Change
3	$ 85,500.00	$ 42,553.00	$ 42,947.00	$ 4,295.00		$ 4,295.00
4	85,500.00	42,553.00	42,947.00	4,295.00		4,295.00
6	85,500.00	42,553.00	42,947.00	4,295.00		4,295.00
9	94,500.00	42,553.00	51,947.00	5,195.00		5,195.00
11	76,500.00	42,553.00	33,947.00	3,395.00		3,395.00
5	85,500.00	42,553.00	42,947.00	4,295.00		4,295.00
1	101,325.00	42,553.00	58,772.00	5,877.00	x 60%	3,526.00
2	101,325.00	42,553.00	58,772.00	5,877.00	x 60%	3,526.00
7	82,025.00	42,553.00	39,472.00	3,947.00	x 80%	3,158.00
8	82,025.00	42,553.00	39,472.00	3,947.00	x 60%	2,368.00
10	82,025.00	42,553.00	39,472.00	3,947.00	x 60%	2,368.00
lot 10	50,000.00	11,075.00	38,925.00	3,893.00	x 40%	1,557.00
Totals	$1,011,725.00	$479,158.00	$532,567.00	$53,257.00		$42,272.00

A conciliation conference was held on February 19, 1993. By Conciliation Order, dated April 9, 1993, the conferee sustained the $42,272.00 recomputation of tax due for Village Estates, plus penalty and interest. The conferee also issued a Conciliation Order for each of the petitioners Blake, Caputo and Christiana sustaining a $14,946.00 recomputation of gains tax due, plus penalty and interest.

Petitioners each filed a petition, dated June 25, 1993, alleging, inter alia, that the Division erred in (1) aggregating the transfer of the condominium units and lot 10 to the partners in liquidation of their partnership interests with the sales of the other condominium

---

[2]No explanation has been provided as to how the amount due of $25,223.00 was allocated to each of these petitioners in relation to the $54,884.00 found due from Village Estates.

units; (2) determining that the sale of the condominium units in 1987 and the transfer of the condominium units and lot 10 in 1989 were "pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be" subject to transfer gains tax; and (3) determining that the value of the vacant commercial land (lot 10) at the time of the transfer to the two partners in liquidation of their partnership interest was $50,000.00.

The Division filed four answers, dated September 14, 1993, affirmatively stating that the Division's determination was in all respects proper and correct and that petitioners bear the burden of proving, by clear and convincing evidence, that the Division erred.[3]

At hearing, petitioners submitted into the record two separate real estate appraisals of lot 10. Both appraisal reports were dated in January of 1994 and compared the property with three comparable properties in the area. The reports did not use the same comparable properties. One appraisal report concluded that the value of lot 10 as of March 2, 1989 was $32,000.00. The other report concluded that the value of lot 10 was $30,000.00.

Mr. Christiana testified that when the partners valued the properties for liquidation purposes, they did not have the property appraised at that time but assigned values based on other condo sales and what they agreed upon as an equitable distribution of each partner's respective interest in Village Estates. He stated that petitioners were overly optimistic about the $50,000.00 value placed on lot 10 but that if they had appropriately assigned a $32,000.00 value to lot 10, this change

would have affected only the values assigned to the various properties and not how the

---

[3]At the commencement of the hearing, petitioners objected to the submission of the answers on the ground that they were not filed within 60 days of the filing of the petitions. Inasmuch as petitioners have not addressed this issue in their brief, it is assumed that this argument has been abandoned. In any event, the Tax Appeals Tribunal has held that the 60-day time period imposed by 20 NYCRR 3000.4(a)(1) is directory rather than mandatory and that, absent a showing of substantial prejudice, the delay in serving the answer does not require dismissal of the agency's action (see, Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115; Matter of Festival Leasehold Co., Tax Appeals Tribunal, January 20, 1989). Petitioners have not demonstrated any prejudice as a result of the late-filed answers.

properties were actually divided among the partners. Mr. Christiana testified as follows:

> "I think all of the values were high, so I think that if we were going to drop lot 10 we would have just dropped the value on the others to just equal what we could agree to, because what we are winding up with is property, and to do it the accountant said we had to put values on it to make sure everyone was treated fairly" (tr., p. 66).

The following chart reflects the respective sale prices and percentage of common interest of the condo units that were listed in Schedule A of the original offering plan commencing October 1, 1986, the actual prices paid, and the prices assigned to units that were distributed to the three partners:

Unit	Schedule A Price	% of Common Interest	Actual Sale Price	Sale Price Assigned for Purposes of Partnership Distribution
1	$145,000.00	12.78		$105,000.00
2	145,000.00	12.77		105,000.00
3	95,000.00	8.37	$ 95,000.00	
4	95,000.00	8.37	95,000.00	
5	95,000.00	8.37	95,000.00	
6	95,000.00	8.37	95,000.00	
7	105,000.00	9.25		85,000.00
8	85,000.00	7.49		85,000.00
9	105,000.00	9.25	105,000.00	
10	85,000.00	7.49		85,000.00
11	85,000.00	7.49	85,000.00	

In its post-hearing brief, the Division conceded that the transfers of condominium units 1, 2, 7, 8 and 10 and lot 10 are exempt from transfer gains tax as a "mere change in identity" -- i.e., partnership liquidation. Thus, the Division recomputed downward the amount of gains tax to $25,770.00. The Division also agreed that penalties and interest will be recomputed and that the notices of determination of the three partners will be recomputed to reflect this revised amount of gains tax.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue for the first time in their brief that because petitioner Village Estates did not have title to any of the lots in the original subdivision as evidenced by the deeds, it could not transfer title to the real property and, therefore, could not be subject to gains tax. In addition, argue petitioners, once the assessment against the partnership fails, the individual

assessments against petitioners Blake, Caputo and Christiana as responsible persons of the partnership must also fail. In the alternative, petitioners argue that even if it is determined that petitioner Village Estates is responsible for the tax, it was not liable under the Tax Law prior to amendments to Tax Law §§ 1442(a) and 1440(8) and (9) which define a partnership as a person liable for the gains tax.

Petitioners also argue that because they abandoned the subdivision plan of 1979 by substituting a new plan for the marketing of condominium units on lot 1, which did not include lot 10, the condominium sales cannot be aggregated with the sales of lots 2 through 10. Thus, conclude petitioners, without such aggregation the condominium sales did not exceed $1,000,000.00 and therefore were not subject to gains tax.

Petitioners further contend that the $1,000,000.00 exemption applies because the value of lot 10 as of the date of the partnership's dissolution was $32,000.00 and not $50,000.00.

Petitioners argue that under Tax Law § 1443(5) the transfers of condo units 1, 2, 7, 8 and 10 and lot 10 to the three individual petitioners are totally exempt from tax because the transfers did not represent a change in beneficial ownership but only a mere change in identity in the ownership of the property from tenants-in-common to the individuals.[4] In addition, petitioners argue that the transfers to petitioners should not be aggregated with the other condo sales and that 20 NYCRR 590.50(c), which states that the $1,000,000.00 exemption is applied before the "mere change of identity" exemption, is invalid because it would make the statutory exemption under Tax Law § 1443(5) illusory.

Finally, petitioners contend that the penalties should be cancelled because petitioners reasonably viewed lots 1 and 10 as separate and distinct parcels inasmuch as the 1979 plan was abandoned and the new plan developed in 1986 included lot 1 but did not include lot 10.

With respect to petitioners' argument that the partnership never owned the property in question, the Division notes that this claim is inconsistent with Mr. Christiana's testimony and

---

[4]As noted above, in its post-hearing brief, the Division has conceded this point and indicated that it will make adjustments to the tax due as well as to the penalties and interest.

petitioners' assertion that the unsold property was distributed in accordance with the partnership dissolution. Citing to section 21 of the Partnership Law, the Division also notes that title to partnership property may be held in the names of individual partners. The Division further argues that the three partners were general partners who were liable as "persons" for the gains tax within the meaning of Tax Law § 1440(8) and (9) and that the tax liability arose after the effective date of the responsible person provision of Tax Law § 1442(a).

With respect to the aggregation argument, the Division contends that because lot 1 (which was converted to condominium units) and lot 10

were from the same large parcel that was subdivided in the initial 1979 plan, the two lots are subject to aggregation. In addition, the Division argues that even if lot 10 were not aggregated with the sales of the condominium units, the consideration from the sales of lots 2 through 9 should be aggregated for purposes of the $1,000,000.00 exemption. The Division notes that:

> "[a]lthough there is no proof in the record on the issue, even if, arguendo, the transfers of Lots 2 through 9 are looked at from the standpoint of the subdivided parcel-improved-with-residence issue, Lot #4, having been sold to the 'Honeymoon Lodge Partnership' does not appear to have been sold to a 'transferee [] for use as [a] residence []'."

The Division challenges petitioners' claim that the 1994 appraisals should be used to value the worth of lot 10 in 1988 rather than the $50,000.00 that petitioners assigned to lot 10 in determining the partnership distribution. The Division argues that the appraisals cannot be used to retroactively change the value the property was given for liquidation purposes.

In its brief the Division agreed to petitioners' "mere change in identity" argument, stating that the transfer of unsold condos and lot 10 to the three petitioners were exempt from tax, and recomputed the tax, penalties and interest accordingly. However, the Division cited 20 NYCRR 590.50(c) in support of its position that these transfers are nonetheless to be aggregated for purposes of determining whether the $1,000,000.00 threshold was reached.

Finally, with respect to the penalty issue, the Division argues that petitioners have not demonstrated reasonable cause or the absence of willful neglect to excuse them from not paying

gains tax on the transfers and not reporting the transfer of lot 10 to petitioners Caputo and Christiana.

In their reply brief, petitioners object to the Division's claim that consideration from the sales of lots 2 through 9 should be aggregated with the condo sales. Petitioners note that they did not submit proof that these lots were improved with residences for sale to transferees for use as their residences because they believed that this issue was resolved at the audit level.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property at the rate of 10% of the gain. Tax Law § 1440.3 defines "gain" as the difference between the consideration for the transfer of real property and the original purchase price. Such transfers of real property are exempt from gains tax when consideration is less than $1,000,000.00 (Tax Law § 1443.1).

The first sentence of Tax Law § 1440.7 defines a transfer of real property as "the transfer or transfers of any interest in real property by any method, including but not limited to sale . . . ." Because the definition refers to "transfer or transfers", the case law has held that the sale of more than one parcel may be treated as a single transfer of real property (Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988). In order to prevent a transferor from avoiding gains tax by subdividing or selling off portions of a piece of property for less than $1,000,000.00, Tax Law § 1440.7 also includes an "aggregation clause" which requires the aggregation of the consideration received from such multiple transfers (Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, 356, appeal dismissed 75 NY2d 946, 555 NYS2d 692). Specifically, the aggregation clause provides that:

> "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 . . . provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences . . . shall not be deemed a single transfer of real property" (emphasis added).

Petitioners argue that because they abandoned the original 1979 subdivision plan and replaced it with the new condominium plan, which did not include lot 10, the condo sales should not be aggregated with the transfer of lot 10. The Division, in turn, claims that the transfer of lot 10 should be aggregated with the condo sales because they were all part of the original 1979 subdivision plan. The Division further argues that the sales of lots 2 through 9 should also be aggregated with the condo sales. In support of this argument, the Division contends that petitioners did not offer proof that lots 2 through 9 were sold with residences to transferees for use as their residences.

B. The Division appropriately aggregated the consideration for the transfer of lot 10 with that of the condo sales. When property is subdivided pursuant to an overall subdivision plan to sell off the entire piece of property in the form of smaller parcels, those sales are subject to aggregation for gains tax purposes regardless of whether the plan was filed before or after the effective date of the tax (Matter of Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commr. of Taxation & Fin., 191 AD2d 80, 598 NYS2d 829, 831, citing Matter of Cove Hollow Farm v. State Tax Commn., 146 AD2d 49, 51-52, 539 NYS2d 127). Here, Mr. Christiana's testimony and the 1979 subdivision map indicate that petitioners always intended to sell the entire parcel of land in the form of subdivided lots. Although petitioners changed their original plan with respect to lot 1, they only changed the form by which they intended to sell that lot. According to the 1979 plan, they attempted to sell the lot with all 11 cabins as a seasonal rental business. When those attempts were unsuccessful, they decided instead to market lot 1 in accordance with a condominium plan with 11 condo units. The fact that this condominium plan did not include the sale of lot 10 is irrelevant inasmuch as the plan which invokes the aggregation clause is petitioners' plan at the time they purchased the property -- the plan to sell off the entire parcel in subdivided lots. Petitioners' change in marketing strategies did not change the fact that they intended to sell off the entire tract of land purchased. Thus, the initial plan to sell off lots 1 and 10, which are contiguous and adjacent to each other, is the controlling plan for purposes of the aggregation clause. This is not a case where petitioners established different plans for the use of

lots 1 and 10 (see, Matter of General Builders Corp., Tax Appeals Tribunal, December 24, 1992 [aggregation not required where taxpayer established that it did not have a plan to dispose of both parcels of subdivided property but intended to develop, own and operate one parcel as a mobile home park]; Matter of Armel, Tax Appeals Tribunal, July 23, 1992 [aggregation not required where taxpayers established that they intended to reserve parcels for the benefit of their children]).

C. As noted above, the only statutory exception in the aggregation clause is the sale of subdivided properties which are improved with residences to transferees for use as their residences. The Division contends that the sales of lots 2 through 9 should also be aggregated with the condo sales. The Division states that there is no proof in the record that these lots are exempt as subdivided parcels improved with residences and that it would appear that the sale of lot 4 to the "Honeymoon Lodge Partnership" was not sold to a transferee for use as a residence.

The sales of lots 2 through 9 are not to be aggregated with the condo sales and lot 10. During the audit, the Division excluded the sales of lots 2 through 9 in calculating the amount of gains tax due. In its letter of April 17, 1992 (Finding of Fact "9"), the Division requested information concerning the sales of lots 2 through 9, suggesting that those sales might be aggregated with the condo sales. However, in its final calculations of the amount of gains tax due, the sales of lots 2 through 9 were excluded. The Division's auditor noted in a brief to the conciliation conferee that those lots were excluded because they were either sold prior to the gains tax law or were sold as lots with residences (Finding of Fact "10").

Although the Division's counsel at hearing again raised the issue of whether the sales of lots 2 through 9 were to be aggregated with the condo sales, he appeared to focus on whether certain sales were made after the enactment of the gains tax law and never articulated that there was a question as to whether those lots were improved with a residence or whether the lots were sold to a transferee for use as a residence. It was reasonable for petitioners to assume from the audit report, and the fact that no tax was assessed on the sales of lots 3 and 4, that the proof offered on this issue had been examined and was satisfactory. Petitioner Christiana testified at

hearing, as verified by the 1979 subdivision map, that lots 2 through 9 were improved with cabins prior to their sale. Inasmuch as there was no issue raised prior to the hearing or at the hearing that lot 4 should be aggregated with the condo sales because the sale of that lot was not to a "transferee" who would use the improved lot as its residence, petitioners did not have notice that they were required to submit evidence on this issue. Therefore, this issue cannot be raised for the first time in a post-hearing brief (see, Matter of Clark, Tax Appeals Tribunal, September 14, 1992).

D. Petitioners next argue that even if the transfer of lot 10 is to be aggregated with the condo sales, the value of lot 10 at the time of its transfer was $32,000.00 rather than $50,000.00. Based on the $32,000.00, contend petitioners, the aggregated sales total under $1,000,000.00 and, therefore, all transfers are exempt from tax.

Tax Law § 1443.1 provides that a real property transfer is exempt from gains tax if the consideration for the property is less than $1,000,000.00. Tax Law § 1440.1(a) defines consideration as the price paid for real property "less any customary brokerage fees related to the transfer if paid by the transferor." In this case, the auditor allowed brokerage fees on the transfers of the condo units reducing the total amount of the consideration received for all the condo sales to $961,725.00 (see, Finding of Fact "12"). Including the consideration of $50,000.00 for lot 10, total consideration amounted to $1,011,725.00. If the consideration for lot 10 were reduced to $32,000.00, which petitioners claim the property was worth at the time of the partnership distribution, the $1,000,000.00 threshold would not be met and no gains tax would be due on the six condo sales.

The Tax Appeals Tribunal has rejected the use of appraisals to contradict negotiated contract prices in determining the fair market value of real property for gains tax purposes (Matter of Shareholders of Beekman Country Club, Tax Appeals Tribunal, April 16, 1992, confirmed 199 AD2d 640, 604 NYS2d 989; Matter of Bridgehampton Investors Corp., Tax Appeals Tribunal, August 11, 1988). In Beekman, the issue concerned the allocation of real property in an allocation agreement in the purchase of all the stock of a company owning the

real property. The Tribunal noted that the taxpayer failed to prove that the allocation agreement was unreasonable and did not reflect the fair market value of the real property. Citing Black's Law Dictionary (717 [4th ed 1957]), the Tribunal noted in both Beekman and Bridgehampton that the fair market value of real property is the price at which a willing seller and a willing buyer will trade.

In this case, there is no negotiated contract price or price at which a willing seller and a willing buyer will trade. Mr. Christiana testified that the values assigned to the various properties distributed to the partners were for the purpose of equitably distributing the property in accordance with the respective partnership interests, and that the value assigned to lot 10 was the result of being overly optimistic about its potential selling price. He also noted that the appraisal price would not have changed the way the property was divided among the partners, but would have changed only the values assigned to them (see, Finding of Fact "17"). Therefore, based on this testimony, it appears that the values assigned to the properties distributed to the partners were for the purpose of distributing the property in some equitable fashion. The appraisal of lot 10, as well as the fact that there appears to be no willing buyers to purchase the property at the listed price of $50,000.00, support petitioners' position that the fair market value of the property was $32,000.00 at the time of transfer. However, in order to prevail on the exemption issue, petitioners must prove not only the fair market value of lot 10 but also the fair market values of the condo units that were also transferred as part of the partnership distribution. Based on the record, the values assigned to condo units 1, 2 and 7 were substantially below the prices listed in the original offering plan, whereas every other condo unit sold at, or in the case of the other two condo units distributed, was assigned the same price listed in the original offering plan. In fact, the original offering plan listed both units 7 and 9, which had the same percentage of common interest, for $105,000.00. Unit 9 was sold to a third party at that offering price, whereas unit 7 was distributed to petitioner Caputo with the assigned value of $85,000.00. Therefore, absent proof of the fair market values of all the property distributed to the partners, there is no rational basis for using the appraised value of lot

10 alone to reduce the consideration below the $1,000,000.00 threshold.

E. Petitioners next argue that the transfers to the partners should not be aggregated with the other condo sales in determining whether the $1,000,000.00 threshold is met. According to the Division, this position is in conflict with 20 NYCRR 590.50(c) which states as follows:

> "Question: How does the mere change of identity exemption interrelate with the million-dollar exemption?
>
> Answer: The million-dollar exemption is applied to consideration first and then the mere change exemption is applied. A transfer in which the consideration is greater than $1 million will remain taxable, the mere change exemption only defers payment of tax on the portion of gain determined to be attributed to a mere change in form of ownership."

Thus, the regulation's rationale for applying the $1 million exemption first is that the change in ownership only defers payment of the tax until the real property is ultimately sold. Petitioners argue that the regulation is invalid because it would make the statutory exemption of Tax Law § 1443(5) illusory. Section 1443(5) provides that a total or partial exemption shall be allowed "[i]f a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest."

Transfers are not exempt from the aggregation rule merely because they are exempt under Tax Law § 1443(5). The mere change in ownership exemption under Tax Law § 1443(5) applies only to the tax on those transfers themselves and not to the aggregation rule of section 1440(7). The regulation is valid inasmuch as it is not inconsistent with this statutory scheme (cf., Matter of McNulty v. State Tax Commn., 70 NY2d 788, 522 NYS2d 103). This regulation recognizes that the property transfer, which reflects a mere change in identity or form of ownership, is an intervening event that does not change the taxable status of the property when it is ultimately sold.[5] A mere change in the form of ownership is not the type of transfer that is subject to tax under the gains tax law but it is also not a method to avoid gains tax on the transfer of property when it is ultimately sold. Therefore, applying the million-dollar exemption

---

[5]The property in question is still part of the original plan to sell all the individual lots. Petitioners have not presented sufficient evidence to prove that these properties are not being held for investment purposes as initially intended, as opposed to individual residences.

before applying the mere change exemption is consistent with the statute.

In any event, petitioners' exemption theory rests on the "mere change" exemption which, though no longer an issue, does not apply to these facts. In its brief, the Division has agreed to exempt from tax the transfers to the individual partners and has stated that the tax will be recomputed accordingly. If the Division's position rests on the mere change exemption, however, it appears to conflict with a recent Tribunal decision (Matter of Ader, Tax Appeals Tribunal, September 15, 1994). In Ader, the Tribunal held that the change in ownership in property from individuals to a tenancy

in common was a change in beneficial ownership because the individuals "exchanged the right to derive a profit/loss when selling their individually held co-op shares for the right to enjoy a profit or suffer a loss on the [tenancy in common's] aggregate sales of the co-op shares". Similarly, in this case, the partners exchanged their individual interests in owning all the property for an interest in owning the specific property distributed. Inasmuch as the Division has withdrawn its claim that petitioners are partially taxable for the transfers of the real property distributed to the three individual partners, tax on these transfers is no longer at issue. However, the nature of these transfers indicates that they are nonetheless subject to aggregation.

F. Petitioners argue that the partnership never had title to the property in question and, therefore, cannot be held liable for the transfer gains tax. According to petitioners, this claim is based on the fact that the deed transferring the property in 1979 indicated the purchasers to be petitioners Blake, Caputo and Christiana. Petitioners assert, therefore, that title to the property was never transferred to petitioner Village Estates Partnership but was held by petitioners as tenants-in-common. Accordingly, argue petitioners, the individual petitioners cannot be held liable for a tax that the partnership does not owe.

Petitioners' argument has no merit. Property bought with partnership funds or acquired on account of the partnership is partnership property (Partnership Law § 12[1], [2]). Title to real property may be held in the name of the partnership or in the name of one or more partners

in trust for the partnership (Partnership Law § 21). Mr. Christiana testified that the partnership was formed for the purpose of acquiring the real property in question. The fact that title to the real property was not held in the name of the partnership, but instead in the name of the three partners, does not release the partnership from liability for the transfer gains tax. Petitioners have not cited any authority for their position.

G. In the alternative, petitioners contend that because the condo transfers to the three partners occurred prior to the effective date of provisions 8 and 9 of section 1440 on April 19, 1989, the partnership is not liable for gains tax. Provision 9 defines "person liable for the tax" as a person who is "personally liable for the tax whether as a transferor or as a transferee . . . ." Provision 8 defines "person" as:

> "an individual, corporation, partnership, . . . or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform an act required under this article."

Prior to the enactment of these definitional sections, the gains tax law referred only to the "transferor" as the party liable for the tax. According to the legislative history, the purpose of the definitional provisions was to replace references to the "transferor" with that of the "person liable for the tax" in recognition that the "[c]urrent law imposes liability on the transferor, and in many cases, the transferee . . . if the transferor does not pay" (Governor's Bill Jacket, L 1989, ch 61). Although the term "person" is then defined under the 1989 amendments to include a corporation or partnership, there is nothing in this legislative history that would indicate that the term "transferor", as used prior to the amendment, did not include a corporation or partnership or that the amendments were expanding the definition of those liable for the tax to include partnerships or members of a partnership for the first time. In sum, the legislative history indicates that these amendments merely clarified the existing law. Therefore, petitioners' argument is not persuasive.

H. Finally, petitioners argue that they should not be held liable for the penalties because they reasonably viewed lots 1 and 10 as separate and distinct parcels with separate and distinct uses and that the only relationship between the lots was their contiguity. Petitioners contend

that they reasonably believed they were complying with the law and did not willfully neglect to pay gains tax.

Tax Law § 1446.2(a) permits abatement or waiver of penalty if it can be determined that a taxpayer's failure to pay the gains tax was due to reasonable cause and not due to willful neglect. The reasonableness of a taxpayer's failure to pay the tax must be evaluated in light of the Division's articulated policy (see, Matter of Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commr. of Taxation & Fin., supra) and "the extent of the taxpayer's efforts to ascertain its tax liability" (Matter of KAL Associates, Tax Appeals Tribunal, October 17, 1991). There is no record evidence that petitioners made any efforts to ascertain whether lots 1 and 10 should be aggregated in determining their tax liability. Inasmuch as both lots were part of the initial plan to sell the entire parcel purchased, petitioners should have made inquiries rather than assumed that a new marketing plan for lot 1 of the subdivided lots meant that that lot was no longer required to be aggregated with lot 10. Therefore, petitioners have shown neither reasonable cause nor the absence of willful neglect for their failure to timely pay the tax liability (see, id.; Matter of 1230 Park Associates v. Commr. of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455 [ignorance of the law does not constitute reasonable cause]).

I. The petitions of Village Estates Partnership, Ira Blake, Charles Caputo and Jeffrey Christiana are denied and the four notices of determination, dated August 7, 1992, are sustained, except as recomputed by the Division in accordance with Finding of Fact "19".

DATED: Troy, New York
December 22, 1994

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE