

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SIDAN REALTY CORP.	:	DETERMINATION
for Revision of a Determination or for Refund of Tax on	:	DTA NO. 814949
Gains Derived from Certain Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

Petitioner, Sidan Realty Corp., 8101 Avenue L., Brooklyn, New York 11236-4707, 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 10, 1997 and February 21, 1997, respectively, petitioner by its representative Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel), and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by October 6, 1997, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation has taken a position which is inconsistent with a position advanced in a related prior administrative proceeding involving this petitioner and the same transaction.

II. Whether petitioner has established that the Division of Taxation erred in assessing real property gains tax on the basis that petitioner failed to file the required transferee questionnaires on its acquisition of two parcels of real property.

FINDINGS OF FACT

1. On or about September 10, 1986, petitioner, Sidan Realty Corp., purchased real property located at 8102 Avenue L (Block 8058, Lots 1-3) Brooklyn, New York from 8060 Property Partnership for a gross consideration of \$210,000.00 ("Parcel A").

2. On or about September 10, 1986, petitioner also purchased real property located at 8102 Avenue L (Block 8058, Lots 4-10) Brooklyn, New York from Abe Maibach for a gross consideration of \$490,000.00 ("Parcel B").

3. On or about September 10, 1986, petitioner also purchased real property located at 8102 Avenue L (Block 8060, Lot 1) Brooklyn, New York from 8060 Property Partnership for a gross consideration of \$1,300,000.00 ("Parcel C").

4. On or about September 10, 1986, petitioner also purchased the "property and business" of Brook Sun & Swim Club, Inc. ("Swim Club") via an agreement with its president, Mr. Abe Maibach, for a purchase price of \$1,500,000.00. The Swim Club was formerly located at 8102 Avenue L, Brooklyn, New York. In the agreement, the property sold was described as follows:

"The swimming club, pool, recreation center and the business operated in connection therewith, *including all of the structures, improvements and erections thereon*, including pool, restaurant, locker rooms and showers, office building and auditorium located thereat and all machinery, fixtures and equipment which are part of the structures, *improvements and erections at said premises, together with the good will* and telephone service, *excluding however* the real property and all personal property and moveable equipment utilized in connection with such operation, consisting of lockers, benches, chairs, tables, beach umbrellas, play and athletic equipment, beach chairs, chaise lounges, mats, office furniture, equipment and desks . . ." (emphasis added).

A rider was attached to the agreement which referred to contracts and agreements between Brook Sun & Swim Club, Inc., Abe Maibach, 8060 Property Partnership and Sidan Realty Corp.

The twelfth paragraph of the rider to the contract stated:

“The contacts [sic] and agreements referred to herein are a group of four (4) in number and cover three lots in Block 8058, seven lots in Block 8058 and one lot in Block 8060 . . . and the business of Brook Sun & Swim Club, Inc.”

5. 8060 Property Partnership is an entity whose beneficial and/or sole owner is Abe Maibach (general partner).

6. All of the three foregoing parcels of real property are contiguous or adjacent and were used as a single business concern (Swim Club) prior to their being transferred to petitioner.

7. Petitioner purchased the foregoing parcels of real property in order to convert the property into condominium housing.

8. A pre-transfer filing (forms TP-580 and TP-581) was made for the transfer of Parcel C on or about June 16, 1986.

9. On or about July 16, 1986, a Tentative Assessment and Return was issued to 8060 Property Partnership for Parcel C. This assessment was subsequently paid in full by 8060 Property Partnership.

10. In late 1990 or early 1991, the Division of Taxation (“Division”) learned that petitioner's condominium conversion project had reached 74% sell-out, but that petitioner had failed to file a 50% update. As a result, the Division conducted a post-transfer desk audit to verify petitioner's acquisition costs. (By the time this audit was completed, it was a 75% update audit.)

11. During the course of the aforementioned audit, the auditor discovered that none of the statutory pre-transfer filings had been made, or tentative assessments issued, with respect to the

acquisition of Parcels A and B by petitioner. As a result, this matter was referred to the Transaction and Transfer Tax Bureau ("TTTB") of the Real Property Transfer Gains Tax Unit for further investigation.

12. The aforementioned audit resulted in a Notice of Determination being issued to petitioner which assessed additional gains tax, penalty and interest. Following petitioner's protest of that assessment, a hearing was held before the Division of Tax Appeals on September 13, 1994. The hearing led to the issuance of a determination which prompted petitioner and the Division to file an exception with the Tax Appeals Tribunal. One of the issues presented by the parties on the exception was whether the \$1,500,000.00 purchase price for the Swim Club should be included as part of the original purchase price. The \$1,500,000.00 was disallowed by the Division because the Division felt that this expense was incurred in order to acquire the business goodwill or the business itself and not to acquire the real estate. The Tribunal's decision notes that the Administrative Law Judge examined petitioner's contention that the contract for the sale of the swim club established that the parties intended to sell real property and not the business or goodwill and the Division's countervailing argument that there were two contracts pertaining to the sale of the swim club, one providing for the sale of the land and a second contract pertaining to the sale of the Swim Club business. In response to these arguments, the Tribunal noted that the Administrative Law Judge held, among other things, that part of the \$1,500,000.00 purchase price was for real property related to the business and that a portion of the \$1,500,000.00 was for the business which may not be included in original purchase price. The Administrative Law Judge also determined that no adjustment could be made to the \$1,500,000.00 disallowance because there was no basis to determine the value of the business as opposed to the value of any

real property sold in the contract. In its decision, the Tribunal upheld this portion of the determination of the Administrative Law Judge for the reasons stated therein.

13. After the hearing before the Administrative Law Judge was concluded, the auditor made a second referral to TTTB for further investigation of petitioner's acquisition of the various parcels that comprise the condominium conversion project. No action was taken by TTTB at the time of the first referral due to the ongoing audit. Once the Notice of Determination had been issued at the conclusion of the audit, TTTB did not conduct any additional investigation, since the foregoing notice was erroneously believed to have included an assessment for petitioner's failure to file the necessary forms upon its acquisition of Parcels A and B. The auditor's second referral alerted TTTB to the fact that its interpretation of events had been incorrect and an investigation was thereafter undertaken by TTTB staff.

14. TTTB sent a letter to petitioner, dated September 27, 1994, which outlined the statutory provisions relating to the acquisition of parcels and petitioner's obligation to file certain returns pursuant to the gains tax law. This letter also enclosed blank copies of the real property transfer gains tax questionnaires along with a request that such forms be filed within 20 days.

15. After petitioner failed to respond to the Division's September 27, 1994 letter, the Division sent a follow-up request for the information in a letter dated October 24, 1994.

16. When petitioner again failed to provide the requested information and forms, the Division issued two statements of proposed audit changes on November 18, 1994. These audit

changes indicated that petitioner was to be assessed as follows:

	L-009836109-6	L-009836233-4
	(Parcel A)	(Parcel B)
Gross Consideration	\$210,000.00	\$490,000.00
Original Purchase Price	-0-	-0-
Gain Subject to Tax	210,000.00	490,000.00
Tax Due at 10%	21,000.00	49,000.00
Total amount due including interest	43,267.98	100,958.61

17. The statements of proposed audit changes listed the original purchase price for both transfers as \$0.00 due to the fact that a search of the Division's records failed to produce any documentation regarding the transferor's original purchase price for Parcels A and B.

18. The audit changes were based, in part, on the provisions of Tax Law former §§ 1444(1) and 1447(3). Tax Law former § 1444(1) provided that if a form required by Article 31-B is not filed, the amount of tax due shall be determined by the Commissioner of Taxation and Finance from such records or information as may be obtainable. Tax Law former § 1447(3) provided that "in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire or the transferee supplies willfully false or fraudulent information the transferee shall be personally liable for the taxes stated to be due in a notice of determination."

19. Petitioner's representative submitted a letter dated November 29, 1994 protesting the statements of audit changes. This letter alleged that petitioner had filed the necessary forms with respect to these transfers and that the amounts listed as due were in error because the Division failed to give petitioner credit for any of the transferor's original purchase price.

20. The Division acknowledged petitioner's protest by a letter dated December 8, 1994. This correspondence also requested that petitioner provide copies of the transferee questionnaires alleged to have been filed, along with documentation which would verify that such forms had been filed (i.e., proof of mailing). The Division also requested that petitioner provide a schedule of the original purchase price.

21. After petitioner failed to respond to the Division's December 8, 1994 letter, the Division sent a follow-up request for the information in a letter dated January 9, 1995.

22. After petitioner failed to respond to the Division's January 9, 1995 letter, the Division sent petitioner two notices of assessment resolution, dated February 6, 1995, wherein petitioner was informed that no adjustments would be made to either of the assessments.

23. Thereafter, the Division issued two notices of determination to petitioner dated March 6, 1995 for assessments #L-009836109-6 and #L-009836233-4, wherein petitioner was assessed a total of \$70,000.00 in additional gains tax, plus interest as follows:

	L- 009836109-6	L-009836233-4
	(Parcel A)	(Parcel B)
Tax	\$21,000.00	\$ 49,000.00
Interest	23,227.88	54,198.38
Balance due	44,227.88	103,198.38

24. A conciliation conference was conducted with respect to the two aforementioned notices of determination on November 14, 1995.

25. The conferee subsequently revised the notices of determination by order dated March 8, 1996. Based upon information provided by petitioner following the conference, the

conferee recomputed the assessments as follows:

	L-009836109-6	L-009836233-4
Tax	\$18,668.00	\$47,440.00
Penalty	-0-	-0-
Interest	-0-	-0-

26. The assessments were revised by the conferee, with the agreement of the Division, in order to (a) give petitioner credit for some original purchase price costs of the transferor that it was able to substantiate in the form of deeds containing deed stamps, and (b) cancel the interest assessed based upon the fact that the transfers occurred in 1986, prior to the 1989 change in section 1446(1) and (2) of the Tax Law pertaining to the assessment of interest against a transferee.

27. In accordance with State Administrative Procedure Act § 307(5), the Division's proposed findings of fact have been generally accepted and included herein. Additional findings of fact were also made.

SUMMARY OF THE PARTIES' POSITIONS

28. Petitioner argues that it entered into a General Agreement of General Sale with four subsidiary agreements pursuant to which it purchased 11 lots relating to the Brook Sun & Swim Club, Inc. Petitioner states that the General Agreement provided: ““that contracts (sic) and Agreements referred to herein are a group of four (4) in number and cover three (3) lots in Block 8058, seven (7) lots in Block (8058) and one lot in Block 8060 . . . and the business of Brook Sun and [sic] Swim Club Inc.”” (Petitioner’s letter brief, p.1.) Petitioner submits that the individual contracts referred to by the General Contract provided for the sale of Block 8060, lot 1 for a consideration of \$1,300,000.00; Block 8058, lots 1, 2, and 3 for a consideration of \$210,000.00

and Block 8058, lots 4 through 10, inclusive, for a consideration of \$490,000.00. Petitioner then states that regardless of the language of the individual sub-contracts, the general contract provided that \$1,500,00.00 was paid for the business of the Swim Club.

Petitioner posits that in the prior proceeding (*see*, Finding of Fact “12”) it took the position that it was not acquiring any part of the business of the Swim Club and that it should be given credit for \$1,500,000.00 as part of the consideration because this amount was not attributable to the purchase of real property. In contrast, the Division argued that petitioner was not entitled to credit for the \$1,500,000.00 because this amount was attributable to the purchase of the business. Petitioner contends that it was subsequently determined that the \$1,500,000.00 was for the purchase of the goodwill of the business and not the purchase of property and therefore this amount should not be included in original purchase price.

Petitioner maintains that it purchased a business and real estate. According to petitioner, it purchased the subject property for \$1,300,000.00 for which it filed a gains tax questionnaire and that the stated consideration of the other parcels relate to the sale of the business. Petitioner submits that the Division should not be allowed to take an inconsistent position between this case and the prior case so as to subject petitioner to additional consideration under the same set of facts.

29. In response to the foregoing, the Division maintains that its position is consistent with the position taken in the previously adjudicated matter involving the condominium conversion project. The Division also contends that petitioner failed to establish that the assessments were erroneous. It further submitted that petitioner failed to file the required transferee questionnaires regarding its acquisitions on September 10, 1986 and that there is no evidence in the record which substantiates petitioner's claims.

30. In a reply brief, petitioner argues that only \$500,000.00 of the purchase price is attributable to real property and that petitioner paid a gains tax in excess of the difference between the overall purchase price of \$2,000,000.00 and the \$1,500,000.00 allocable to goodwill. Therefore, petitioner posits that it is entitled to a refund of the excess gains tax paid. Petitioner further submits that it did not purchase the property for \$3,500,000.00. According to petitioner, the General Agreement was merely a method of allocating \$1,500,000.00 of the overall purchase price of \$2,000,000.00 for the goodwill of the business.

CONCLUSIONS OF LAW

A. Initially, it is noted that the references in petitioner's brief to a determination of an Administrative Law Judge are misplaced. Determinations issued by Administrative Law Judges may not be cited or considered as precedent (Tax Law § 2010[5]). On the other hand, the findings of fact and opinion of the Tax Appeals Tribunal in a particular case may be relied upon to the extent applicable (*see, e.g., Matter of Jarwood*, Tax Appeals Tribunal, January 25, 1996).

B. *Matter of Sidan Realty Corp.* (Tax Appeals Tribunal, May 16, 1996) involved the same real estate transaction at issue here. In that case, the Tribunal noted that on January 2, 1986 petitioner entered into an agreement with Brook Sun & Swim Club, Inc. for the sale of "property and business located at premises 8102 Avenue L, Brooklyn, New York." (*See*, Finding of Fact "4".) The purchase price was \$1,500,000.00. The Tribunal pointed out that a rider to the agreement provided at paragraph 12 that:

“The contacts [sic] and agreements referred to herein are a group of four (4) in number and cover three lots in Block 8058, seven lots in Block 8058 and one lot in Block 8060 . . . and the business of Brook Sun & Swim Club, Inc.”

The Tribunal further noted that there were three remaining contracts pertaining to the sale of the property. One contract was for the sale of one lot upon which the Brook Sun & Swim

Club, Inc. was located for the sum of \$1,300,000.00 (*see*, Finding of Fact “3”). A second contract was for the sale of three lots of unimproved real estate that had been operated as a parking lot. The purchase price was \$210,00.00 (*see*, Finding of Fact “1”). The last contract was for the sale of seven lots of unimproved land which was also operated as a parking lot. The sale price of this parcel was \$490,000.00 (*see*, Finding of Fact “2”).

One of the central issues in the prior proceeding was whether the \$1,500,000.00 purchase price for the Swim Club should be included as part of the original purchase price for the real property. The Division had disallowed the \$1,500,000.00 purchase price for the Swim Club because the Division felt that the amount was for the acquisition of the business’s goodwill or the business itself and not for the acquisition of the real estate. The Tribunal began its opinion by summarizing the findings and decision of the Administrative Law Judge as follows:

“The Administrative Law Judge . . . reviewed in great length:

(1) petitioners’s contention that the sale contract makes it clear that the intent of the parties was to sell real property, including the pool, buildings and structures owned by the swim club, and not the business or goodwill; and

(2) the Division’s contention that there were two contracts relating to the swim club, one providing for the sale of the land, including all buildings and improvements thereon, and a second contract providing for the sale of the business of the swim club.

“As to these two contentions, the Administrative Law Judge, after discussing pertinent Tribunal decisions and court cases, held that:

(1) ‘it would have been helpful to have evidence concerning the relationship between the two apparently different but related sellers in these two contracts’;

(2) ‘given the greater specificity of the swim club contract, which identified the improvements and structures sold, it would appear that part of the \$1,500,000.00 purchase price was for real property related to the business’;

(3) ‘there is insufficient evidence to draw any conclusion as to how to apportion the amount paid for the real property sold in the swim club contract (e.g., buildings, pool, etc.) and the amount paid for the business (including goodwill)’;

(4) ‘[t]he swim club contract does not make any apportionments and Mr. Steinberg’s testimony was insufficient to establish how this apportionment should be made’;

(5) ‘[t]he \$1,500,000.00 paid in accordance with the terms of the swim club contract included payment for the business which may not be included in the original purchase price’; and

(6) ‘[i]nasmuch as there is no basis upon which to determine the value of that business versus the value of any real property sold in that contract, no adjustment can be made to the \$1,500,000.00 disallowance’ (Determination, conclusion of law “A”).”

On exception, petitioner argued, among other things, that it should be entitled to include the \$1,500,000.00 paid for the Swim Club as part of the original purchase price of the property.

In response to this argument, the Tribunal stated:

“We first address petitioner’s request for changes to the findings of fact and conclusions of law and its exception relating to the \$1,500,000.00 paid in accordance with the terms of the swim club contract. We find that the Administrative Law Judge correctly analyzed and weighed all the evidence presented on this matter, accurately found the facts as established by the record and correctly decided the issue. Therefore, we uphold the determination of the Administrative Law Judge on this issue for the reasons stated therein.”

C. Petitioner’s argument that the Division has taken inconsistent positions in related proceedings is without merit. Contrary to the assertion in petitioner’s brief, the documents in the record show that on or about September 10, 1986, petitioner entered into four contracts. Three of the contracts were for the sale of real property for a total price of \$2,000,000.00 (Parcel A for \$210,000.00, Parcel B for \$490,000.00, and Parcel C for \$1,300,000.00). In addition, there was a fourth contract for the sale of the Swim Club for \$1,500,000.00. A central issue in the prior

proceeding was whether the \$1,500,000.00 was includible in the original purchase price of the property.

In the present matter, in the course of a post-transfer desk audit it was discovered that pre-transfer filings had not been made and tentative assessments had not been issued with respect to the acquisition of Parcels A and B. As a result, this matter was referred to TTTB. Following a second referral and an investigation, the Division ascertained that the pre-transfer filings had not been made and tentative assessments had not been issued with respect to Parcels A and B. Consequently, the Division issued two assessments to petitioner which were subsequently reduced following a conference. The purchase of the Swim Club had no bearing on the assessments at issue here and therefore the argument that the Division has taken an inconsistent position is specious.

D. Tax Law former § 1441(1)¹ imposed a tax at a rate of ten percent on gains derived from the transfer of real property within New York State. The term “gain” was defined by Tax Law former § 1440(3) as the “difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.” The “transfer of real property” included the transfer or transfers of any interest in real property by any method including sale (Tax Law former § 1440[7]).

At the time of the transfers in issue, Tax Law former § 1447(1)(a) required each transferor and transferee to file forms prescribed by the Commissioner of Taxation and Finance. The Tax Law directed the transferee to set forth on the form the consideration paid to the transferor and the amount of any brokerage fees he is to pay (Tax Law former § 1447[1][c]).

¹Article 31-B of the Tax Law was repealed by chapter 309 of the Laws of 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996.

Tax Law former § 1444(1) provided, in part, that if a form required by Article 31-B of the Tax Law is not filed, the amount of tax due shall be determined from such information as may be obtainable. Paragraph (a) of subdivision (3) of former section 1447 of the Tax Law stated, in part:

“in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire, . . . the transferee shall be personally liable for the taxes stated to be due in a notice of determination”

E. The record shows that there were simultaneous transfers of three contiguous parcels, that were previously used for the common or related purpose of a swim club, to petitioner for the common or related purpose of a condominium conversion project. These transfers were subject to aggregation (*see, e.g., Matter of Von Mar Realty Co.*, Tax Appeals Tribunal, December 19, 1991, *confirmed* 191 AD2d 753, 594 NYS2d 414, *lv denied* 82 NY2d 655, 602 NYS2d 803; *Matter of Sanjaylyn Co.*, 141 AD2d 916, 528 NYS2d 948, *appeal dismissed* 72 NY2d 950, 533 NYS2d 55). It is also concluded that the transfers were subject to real property gains tax because the aggregate sales price of the transfers exceeded \$1,000,000.00 (Tax Law § 1443[1]). Therefore, petitioner was required to file a Transferee Questionnaire regarding its acquisitions of Parcel A and Parcel B no later than September 10, 1986.

F. Petitioner did not file a Transferee Questionnaire with respect to its acquisition of either Parcel A or Parcel B. The only reason advanced by petitioner for not filing the Transferee Questionnaires is the position that the remaining transfers related to the sale of the business and not the transfer of real property and, therefore, it was not required to file a Transferee Questionnaire for either Parcel A or Parcel B. However, as noted earlier, this argument is rejected because it is contrary to the evidence in the record. Therefore, it is concluded that the notices of determination, as modified by the conciliation conferee, should be sustained.

G. The petition of Sidan Realty Corp. is denied.

DATED: Troy, New York
March 26, 1998

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE