

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BENNIE C. AYLWEN : DETERMINATION
 : DTA No. 815677
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, Bennie C. Alywen, The Pink House, 38 Trevor Square, London SW 7, England, 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 hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 10, 1997 at 10:00 A.M., with all briefs to be submitted by July 31, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared by Bernard Schulman, Esq. and Jay N. Mailman, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

I. Whether petitioner has established entitlement to the personal residence exemption from the real property transfer gains tax pursuant to Tax Law § 1443(2).

II. Whether the real property transfer gains tax asserted to be due should be reduced by the tax imposed by Tax Law § 1402-a.

III. Whether penalties should be abated.

FINDINGS OF FACT

1. In 1978 petitioner, Bennie C. Alywen, married Axel Alywen, who was a British subject. After the marriage, petitioner began spending the summer months in England.

2. In the 1980s, Axel Alywen operated a publishing business in the Far East. He also wrote a book which was published in England but was rejected by publishers in the United States. During this period of time, Mr. Alywen's mother resided in a townhouse at 39 Green Street, London, England. The townhouse had five stories and 6,000 square feet. There was a garden in the back of the house.

3. In the spring of 1981, petitioner purchased and began residing in a cooperative apartment located at 765 Park Avenue in New York City. Petitioner's husband and two daughters also resided in the apartment. Following his birth in 1983, petitioner's son also lived in the apartment. The apartment consisted of 15 rooms, of which 6 were bedrooms, and occupied the first and second floors of the building.

4. In or about 1986, petitioner decided that she and her minor children should live in England. Several factors led to this decision. First, it became evident to petitioner that her husband was spending an increasing amount of time abroad while she and her children were in New York. Therefore, residing in England would help keep the family together. In addition, she felt that the children should stay at home because they had become sick from traveling.

Petitioner was also of the opinion that her husband had greater business opportunities in England because that is where his book was published. Lastly, petitioner's mother-in-law required assistance because she had broken her hip and was unable to walk. An immediate need for cash also led to the decision that the Park Avenue apartment should be sold. Petitioner's oldest child decided to remain in New York and live in a separate apartment rather than move to England.

5. When petitioner went to England, she helped her husband care for his mother and provided assistance with his business interests. Among other things, she examined the balance sheets and tried to help him transform his company into a publicly traded company.

6. The cooperative apartment was first listed for sale at the end of May 1986. This was an exclusive listing for six months with Bird and Company. The listing was terminated early, and thereafter, the apartment was placed on an open listing. Ultimately, petitioner located a prospective purchaser for the apartment and, on June 30, 1987, she entered into a contract for the sale of the apartment to Gilbert W. and Shelley D. Harrison for \$3,750,000.00. However, in a letter dated September 29, 1987, an escrow agent was advised that Mr. Harrison's offer to purchase the apartment was turned down by the board of directors of the cooperative corporation.

7. Petitioner felt that she had no choice but to go to England despite the rejection of the offer by the board of directors. At this juncture, petitioner's mother-in-law was residing in a nursing home and her husband had begun to effect repairs on the Green Street home. In order to pay for the repairs, Mr. Alywen obtained a mortgage on the Green Street property. As a result, petitioner's husband was required to make large mortgage payments.

8. When petitioner departed for England she did not think she would be away from the United States for as long as she was. However, she believed that the best possibility for her husband to overcome his financial difficulties was in England. Petitioner also felt that it would have been selfish of her to stay in the United States with her children while her husband was working hard in England.

9. Petitioner had to purchase certain furnishings, such as beds, for her children in order to live in the house on Green Street. The furnishings of petitioner's mother-in-law had either been placed in storage or been sold.

10. After the rejection of the contract for the sale of the apartment by the board of directors, petitioner decided it was best to attempt to sell the apartment to someone else. However, certain factors were present which made it difficult to sell the apartment. First, there had been a stock market crash which, in turn, led to poor market conditions for the sale of a cooperative apartment. People were not buying apartments and prices were falling. Second, there was a change in the tax laws in 1986 which precipitated a decrease in the market value of real property in New York City. A third impediment to selling the Park Avenue apartment was that the building was considered a “social register building.” In other words, only certain individuals were regarded as suitable residents by the board of directors. Finally, the board of directors had a rule which prohibited a party from mortgaging his or her home. Therefore, a prospective purchaser was required to purchase the apartment for cash.

11. Not long after the rejection of the offer by Mr. Harrison, petitioner received a proposal from an agent for a couple who were interested in leasing the apartment. The apartment had not been offered for rent and petitioner responded that she did not think that a rental would be acceptable to the board of directors. However, the agent explained that leasing was a possibility. Petitioner told the agent that she would have to know about the prospective tenants because they would have to go through the same type of approval process as though they were purchasing the apartment. Petitioner then ascertained that the husband was engaged in publishing which was regarded by the board as a respectable profession.

12. In or about late October 1987, petitioner entered into a sublease agreement with Ursula Ingersoll for a term of 20 months beginning November 4, 1987 and ending July 4, 1989. The sublease agreement provided for a monthly rental of \$32,000.00 and a security deposit of \$64,000.00. In determining the amount of the monthly rent, petitioner took into consideration the

expenses which were being incurred by her and her husband. These expenses included the \$3,800.00 a month maintenance expense on the Park Avenue apartment and the mortgage on petitioner's husband's family home in London which, depending on the prevailing rate of interest, could be as high as \$20,000.00 a month. There were also expenses associated with maintaining petitioner's mother-in-law in a nursing home. In addition, petitioner took into account the fact that the sublease agreement included her furniture and pictures. The sublease agreement had a provision which gave the tenants a right of first refusal in the event a buyer for the apartment was located.

13. The board of directors of the cooperative approved the terms of the sublease. During the period of the sublease, petitioner lived in England and her minor children attended school in London. However, petitioner returned to New York and, when doing so, stayed with friends. During the period of the sublease, petitioner's oldest daughter, Antoinette, decided to remain in New York and reside in a rented apartment in Manhattan.

14. Petitioner was very pleased to enter into the sublease because the income it generated raised the possibility of not selling the Park Avenue apartment. She had not wanted to sell the Park Avenue apartment, but felt compelled to do so.

15. Initially, the Ingersolls paid petitioner directly for the sublease. Later, petitioner decided that the payments should be made directly to the Boston Safe Deposit and Trust Company ("Boston Safe") because this company held the mortgage on the Green Street house. Petitioner never received the money that was sent directly to Boston Safe.

16. During the term of the sublease, the Green Street house was offered for sale. A buyer came forward and put down a deposit; however, he was unable to complete the financing. When the buyer was unable to complete the sale, he sued to have his deposit returned. The lawsuit was

resolved a couple of years later. Nevertheless, while the lawsuit was pending, the property could not be sold. Petitioner was hopeful that the Green Street house would be sold because its sale might alleviate the pressure to sell the Park Avenue apartment. The Green Street house was subsequently sold in a foreclosure proceeding, and petitioner was forced to vacate the house in June 1993 when the bank took possession of the house.

17. When the term of the sublease was near its conclusion, the Ingersolls requested that it be extended for an additional 12 months. Petitioner's husband conveyed this request to the cooperative corporation's board of directors in a letter dated April 12, 1989. The letter stated, in part:

I am here on a very short visit to New York, where I met briefly with the Ingersolls. They have requested to extend the lease on our apartment for a further year.

I originally returned to London 18 months ago to look after my ailing mother's affairs. Sadly she passed away two weeks ago, and as the only child, it will be necessary for me to remain in London for a further period during the probate of the will. After settling my affairs in England it is my wish to resume residence at 765 Park Ave. (Division's exhibit "G.")

18. In a letter dated April 21, 1989 petitioner was advised that the board of directors of the cooperative corporation agreed to extend the sublease arrangements which petitioner had with Mrs. Ingersoll to July 4, 1990. The Board also adopted a resolution requiring tenant shareholders to pay to the corporation, in advance, 10 percent of the annual payments to be received when permission to lease is granted. In or about May 1989, petitioner signed a letter agreeing to extend the term of the sublease to July 4, 1990.

19. During the period of the sublease, all of petitioner's clothing, except for certain items which would fit into a suitcase, and her furniture were stored at the Park Avenue apartment. Petitioner left her personal effects at the apartment because she planned on returning.

20. The Park Avenue apartment was taken off the market during the period of the sublease.

21. At the time the sublease terminated, July 4, 1990, petitioner was experiencing financial problems. Petitioner and her husband could not sell the house in England, a business interest in Indonesia was suffering financial difficulties, Mr. Alywen's publishing business in Bangkok went bankrupt and a number of loans were due. After July 4, 1990, petitioner resumed her efforts to sell the Park Avenue apartment because of the need to raise money.

22. Petitioner's daughter, Antoinette, moved back into the Park Avenue apartment when the sublease expired. At or about this time, Antoinette started seeing someone whom she eventually married. The wedding was held on October 20, 1990, and the wedding reception was held in the Park Avenue apartment and paid for by petitioner. Approximately 150 guests attended the reception. After the wedding, Antoinette's husband, Carl Feer, moved into the Park Avenue apartment. Mr. Feer's family visited the Park Avenue apartment and, on one occasion, his sister visited for a week. After the sublease terminated, Antoinette and her husband were the only individuals living at the Park Avenue apartment most of the year.

23. Based on an analysis of air travel, petitioner spent 185 days in New York City during the years 1990 through 1993 as follows:

Period	Days in New York
3/23/90 - 3/29/90	7
6/13/90 - 6/19/90	7
9/16/90 - 9/21/90	6
10/19/90 - 10/26/90	8
3/17/91 - 3/22/91	6

Period	Days in New York
9/16/91 - 9/26/91	10
10/30/91 - 11/14/91	6
11/25/91 - 11/30/91	6
12/13/91 - 1/9/92	7
1/15/92 - 1/23/92	9
4/3/92 - 4/15/92	13
4/23/92 - 4/29/92	7
7/13/92 - 8/10/92	5
10/2/92 - 11/19/92	47
11/28/92 - 1/21/93	41

24. While petitioner was in New York, she stayed in her apartment. Petitioner's husband also came to New York when the opportunity arose and petitioner's children came to New York when they were out of school. While they were in New York, petitioner's family also stayed in the Park Avenue apartment.

25. After the sublease terminated, Mr. and Mrs. Alywen frequently entertained their friends in the Park Avenue apartment. Petitioner's children also entertained their friends in the Park Avenue apartment.

26. Petitioner and her husband occupied a particular bedroom in the apartment. Similarly, Antoinette had her own room which she used except during the period of the sublease. The appearance of the interior of the Park Avenue apartment was the same after the trip to England as before the trip. From July 4, 1990 through the date of the sale, all of the expenses of the apartment, such as for electricity or repairs, were paid for by petitioner.

27. By June 1992, the mortgage payments on the house in England were in arrears and petitioner was facing the threat of eviction. Eventually, the house was foreclosed upon.

28. The poor real estate market in 1992 led petitioner's real estate broker to ask petitioner to lower the price of the apartment. However, the board of directors of the cooperative corporation would not accept a buyer if it believed that the price for the apartment was too low.

29. During the period of the sublease, petitioner reported the income and expenses associated with the rental of the Park Avenue apartment on her income tax returns. The reported expenses included commissions, taxes, maintenance charges and depreciation. No expenses were claimed for the Park Avenue apartment on petitioner's income tax returns after the sublease expired.

30. On January 20, 1993, petitioner conveyed the Park Avenue apartment to Abby R. Simpson. Petitioner filed a Combined Real Property Transfer Gains Tax Affidavit, Real Estate Transfer Tax Return, Credit Line Mortgage Certificate which reported the transaction but claimed an exemption from the real property transfer gains tax on the basis that the premises were occupied and used by the transferor exclusively as her residence. A letter accompanying the return reveals that Mr. Shulman of the law firm of Eisen, Hershcopf & Shulman remitted an attorney's escrow account check for \$13,983.52 in payment of the real property transfer tax due and a certified check for \$34,958.80 in payment of the additional tax due on the conveyance of real property for \$1,000,000.00 or more.

31. The Division of Taxation ("Division") issued a Notice of Determination, dated August 7, 1995, to petitioner which asserted a deficiency of real property gains tax in the amount of \$349,588.00 plus interest in the amount of \$76,257.26 and penalty in the amount of \$122,355.80 for a current balance due of \$548,201.06. An attachment to the notice explained that the asserted

deficiency of tax was based on the denial of a residential exemption from real property gains tax following the transfer of an apartment because: (1) petitioner had not resided in the apartment since 1987, the apartment had been listed for sale since 1987 and petitioner claimed rent, depreciation and other expenses on the apartment for the years 1987 through 1990, (2) sufficient evidence was not presented to substantiate petitioner's claim that her daughter had established permanent residency in the apartment from June 1990 until the sale in January 1993 and further, since the apartment was listed for sale continuously since 1987, petitioner's daughter could not have maintained a permanent residence in the apartment and, (3) on the basis of *Matter of Melomo* (Tax Appeals Tribunal, August 20, 1992) petitioner was not entitled to the residential exemption since she did not occupy and use the premises as her residence.

32. Following a conciliation conference conducted by the Bureau of Conciliation and Mediation Services, a Conciliation Order was issued which reduced the asserted deficiency of tax to \$227,085.00 plus penalty and interest computed at the applicable rate. The amount of tax due was computed as follows:

Consideration	\$3,400,000.00
Brokerage	203,400.00
Purchase price	900,000.00
Legal expenses	25,000.00
Architectural expenses	<u>750.00</u>
Gain	\$2,270,850.00
Tax at 10 percent	\$227,085.00

33. Eventually, most of the furnishings of the New York City apartment were sold at auction. Some are still in storage if petitioner should return to live in New York.

34. On the basis of documentation submitted by petitioner, the Division determined that the allowable original purchase price is \$1,225,566.31.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposed a tax at a rate of 10 per cent on the gain from the transfer of real property located in New York State.¹ The tax was imposed unless the transferor could establish entitlement to a total or partial exemption therefrom pursuant to Tax Law § 1443. The exemption relevant to this proceeding is Tax Law § 1443(2) which provided for an exemption “[i]f the real property consists of premises occupied by the transferor as his personal residence (but only with respect to that portion of the premises actually occupied and used for such purposes).”

B. Initially, petitioner argues that she and her family occupied and resided in the apartment as their personal residence at the time of the sale and for a continuous period of two and one half

¹The real property gains tax was repealed by chapter 309 of the laws of 1996, applicable to transfers occurring on or after June 15, 1996.

years immediately prior thereto. In the alternative, petitioner contends that the Park Avenue apartment was petitioner's personal residence from the date it was purchased until the date it was sold. Petitioner also contends that the Division did not prove the allegations set forth in the Notice of Determination. In response, the Division submits that the move to London was never intended to be temporary. The Division further asserts that the sale of the Green Street property would not have cured the financial problems faced by Mr. Alywen, and the Park Avenue apartment would have had to have been sold even if the Green Street property was sold. According to the Division, petitioner used the Park Avenue apartment after July 4, 1990 as an "owner/visitor," not as a residence. The Division posits that leaving the furniture in New York did not evidence an intent to return because leaving the furniture was part of the sublease and because the Green Street home had its own furniture. The Division also contends that "[t]he fact that the petitioner remained in London after the Green Street property was foreclosed and that her two youngest children remained in school in London show that London was where the petitioner wanted to be and that she had no intention of resuming residence at the 765 Park Avenue apartment once she put it up for sale (Tr. 100)." (Division's brief, p. 7.) According to the Division, petitioner's visits to 765 Park Avenue after the termination of the sublease could have simply been to visit her daughter. The Division submits that "[t]he fact that the property was depreciated by petitioner on her federal income tax returns, that she realized a significant profit on the rental of the Park Avenue and that the property was not listed for sale during the sublease (Tr. 93-94) all serve to make the petitioner's burden of showing that the 765 Park Avenue property was entitled to the residential exemption an impossibly difficult burden." (Division's brief, p. 8.)

In response to the foregoing, petitioner contends that: she and her husband occupied two personal residences; the Park Avenue apartment was placed on the market because of the illness

of petitioner's mother-in-law and because of the financial difficulties caused by the payments due on the mortgage debt owed on the Green Street home; petitioner always intended that her stay in London would be temporary; petitioner established the number of days she spent in New York; and for two and one-half years prior to its sale, the Park Avenue apartment was occupied as petitioner's personal residence.

C. The weight of the evidence supports petitioner's contention that she and her family resided in the Park Avenue apartment as their personal residence at the time of the sale and for a period of approximately two and one-half years prior thereto. Initially, it is observed that from November 12, 1980 until the apartment was rented in November 1987, the Park Avenue apartment was the primary residence of petitioner and her family. Until petitioner and her younger children joined Mr. Alywen in England, London was a seasonal location for petitioner where petitioner and her family went for vacations or to visit Mr. Alywen's mother. As pointed out by petitioner, in 1986 petitioner's husband was required to spend a substantial period of time in England in order to care for his mother. Petitioner decided that she and her younger children should join her husband in order to keep her family together. At the time, petitioner believed that the move would be temporary and that she would be returning to the apartment. The Division's argument that leaving the furniture in New York did not evidence an intent to return to New York because the furniture was not needed in London, overlooks the fact that the furnishings of petitioner's mother-in-law had either been placed in storage or been sold. It also overlooks the additional fact that, during the period of the rental, all of petitioner's clothing, except for the amount of clothing that would fit into one suitcase, was left at the Park Avenue apartment. Additional evidence of the intent of petitioner and her husband can be found in the letter written by petitioner's husband on April 12, 1989 to the board of directors of the cooperative corporation.

At that time, petitioner's husband explained that, after settling his affairs in England, he wished to resume his residence at the Park Avenue apartment.

D. The evidence also shows that the sublease of the 765 Park Avenue apartment was temporary in nature. The board of directors of the cooperative building granted permission to rent the apartment only for a limited period of time. After the sublease terminated on July 4, 1990, petitioner's adult daughter resumed her residence at the Park Avenue apartment and continued to reside there without paying rent until its sale on January 20, 1993. The evidence also shows that after the sublease of the apartment concluded, petitioner, along with her husband and her minor children, occupied and used the apartment as a personal residence. Among other things, petitioner and her family entertained their respective friends at the Park Avenue apartment and petitioner hosted her daughter's wedding reception at the apartment.

E. There is no requirement that the residence that is transferred be the transferor's primary residence in order to be eligible for the for the exemption (20 NYCRR 590.25[b]). Therefore, the fact that petitioner resided primarily in London after the sublease terminated does not disqualify her from the exemption. Here, the conclusion that petitioner treated the Park Avenue apartment as a second residence is supported by the facts described above as well as the number and duration of petitioner's trips to New York following which petitioner stayed in the Park Avenue apartment.

F. The Division contends that the depreciation of the apartment, the fact that petitioner realized a significant profit on the rental of the apartment and that the apartment was not listed for sale during the period of the sublease shows that it was not intended to be a personal residence. Under the particular facts presented here, none of the foregoing arguments have merit. With respect to the rental, the facts show that the apartment had not been offered for rent and that petitioner did not think that a rental would be acceptable to the board of directors. At the time the

offer for the rental was received, the only offer to purchase the apartment had been rejected by the board of directors. Petitioner was under tremendous financial pressure and a series of factors made it unlikely that another buyer would be found quickly. Under these circumstances, it is concluded that the rental was necessitated by the exigencies of the real estate market and was ancillary to petitioner's sales efforts (*see, Clapham v. Commr.*, 63 TC 505 [1975]).

G. The Division's regulations at 20 NYCRR 590.26(b) provide as follows:

Question: Will the renting out of a personal residence prior to its sale disqualify the transfer from the residential exemption?

Answer: Yes. However, if the transferor can establish that the personal residence was only temporarily rented while it was offered for sale the residential exemption may still apply. The department will look at all of the facts and circumstances in each case to determine the taxability of the transaction. Generally, it will be the transferor's intent as manifested through his actions that determines the character of the property.

In order to support a claim for personal residence exemption where the property has been rented while offered for sale, the transferor must prove that the property was used as his residence.

The following facts will support the conclusion that the property retained its residential character, even though such property was temporarily rented:

- (1) The property was not depreciated for Federal income tax purposes.
- (2) The property was only rented as a last resort due to the transferor's inability to sell the property because of market conditions.
- (3) The terms of the lease are in accord with the transferor's intention to sell, *e.g.*, the lease allows the property to be shown to prospective purchasers.
- (4) No significant profit was realized from the rental.
- (5) No bona fide reasonable offers to buy have been received.

H. Petitioner argues that the foregoing regulation has no bearing on this case because the apartment was used exclusively as a personal residence for over two and one-half years before it was sold. This argument is persuasive. The question which the foregoing regulation helps to resolve is whether a particular piece of property has retained its residential character despite its

having been rented or depreciated. The salient point here is that the apartment was not rented or depreciated for more than two and one-half years before it was sold. During the same period of time, petitioner used the apartment as her residence and reported neither rental income nor depreciation on her income tax returns. Therefore, even if one assumed that the property had lost its residential character during the period it was rented, the facts support the conclusion that the Park Avenue apartment had regained its residential character prior to its sale.

I. The Division's reliance upon *Matter of Carey v. Tax Appeals Tribunal* (208 AD2d 996, 617 NYS2d 215, *lv denied*, 84 NY2d 813, 623 NYS2d 181), *Matter of Lion Brewery of New York City* (Tax Appeals Tribunal, May 2, 1991, *confirmed* 217 AD2d 811, 629 NYS2d 540) and *Matter of Elene De Saint Phalle* (Tax Appeals Tribunal, October 29, 1992) is misplaced. In each of these cases, the petitioner was either renting the premises at the time of the sale or not occupying the premises at all in the year of the sale.² In contrast, in this case petitioner used the apartment as her personal residence for more than two and one-half years prior to its transfer. In view of the foregoing, petitioner has established that she is entitled to the personal residence exemption from the real property transfer gains tax pursuant to Tax Law § 1443(2).

J. Petitioner's remaining arguments are that in the event that real property gains tax is due, the amount of the tax should be offset by the mansion tax imposed by Tax Law § 1402-a. Petitioner also argues that the penalties should be abated for lack of willful neglect. Since it has been concluded that petitioner is entitled to an exemption from the real property transfer gains tax, the remaining arguments are academic and will not be addressed.

²The same distinction applies to *Matter of Melomo* (Tax Appeals Tribunal, August 20, 1992), *confirmed* 195 AD2d 803, 600 NYS2d 391) which was mentioned in the attachment to the Notice of Determination.

K. The petition of Bennie C. Alywen is granted and the Notice of Determination, dated August 7, 1995, is canceled.

DATED: Troy, New York
January 28, 1999

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE