STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

DAN W. LUFKIN DETERMINATION

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, Dan W. Lufkin, c/o Richards, O'Neil & Allegaert, 885 Third Avenue, New York, New York 10022, 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 (File No. 65531).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 15, 1987 at 11:00 A.M., with all briefs to be submitted by May 8, 1987. Petitioner appeared by Richards, O'Neil & Allegaert, Esqs. (Jeffrey L. Coploff, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly aggregated the consideration received by petitioner upon his transfer of two contiguous properties, thereby subjecting such transfers to tax under Tax Law Article 31-B.

FINDINGS OF FACT

1. On January 17, 1978 petitioner, Dan W. Lufkin, acquired lots eight and nine as shown on a subdivision map of section "B", Southampton Quoque Beach, filed with the Suffolk County Clerks Office as Map number 272, and also acquired certain land located across Beach Road to the north of lots eight and nine.

2. On August 16, 1978 Mr. Lufkin acquired lot number ten in the same subdivision along with certain land located across Beach Road to the north of lot ten.

3. The subdivision of which lots eight, nine and ten are a part was completed on March 11, 1929, approximately fifty years prior to petitioner's acquisition of these lots. Neither petitioner nor any affiliate of petitioner was involved in the creation of the subdivision, and petitioner has never owned any lots in the subdivision other than lots eight, nine and ten.

4. Each of lots eight, nine and ten was a separate piece of real property, and there were no covenants or restrictions requiring that such lots be owned together. At no time did petitioner attempt to legally merge any of the lots with each other. The three lots are, however, physically contiguous lots.

5. Each of lots eight, nine and ten met the minimum lot size requirements of the Town of Southampton and could have been built upon individually.

6. On March 19, 1980, petitioner conveyed the lands across Beach Road to the north of lots eight, nine and ten to the Town of Southampton as a gift. These lands were wetland areas and were not suitable for building.

7. On November 6, 1981, petitioner sold lot number ten.[1]

8. In 1982 petitioner listed lots eight and nine for sale through a real estate broker.

9. In the summer of 1983, Mr. Van Greenfield offered to purchase lots eight and nine together for the purchase price of $1,147,500.00. Accordingly, a draft contract ("the Greenfield Contract") for such sale was prepared.

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1 Lot number ten was sold, as the date indicates, prior to the effective date of Tax Law Article 31-B.

10. Because the Greenfield Contract would have been entered into after the effective date of the New York State Real Property Transfer Gains Tax (the "gains tax"), and because the sale would have been for a consideration in excess of one million dollars, the Greenfield Contract contained a provision requiring petitioner's compliance with the gains tax. Petitioner was prepared to pay the gains tax that would have been due upon sale to Mr. Greenfield.

11. The Greenfield Contract was never executed. Mr. Greenfield withdrew his offer to purchase, and lots eight and nine were again offered for sale through a broker.

12. In the summer of 1984 an offer was made to purchase lots eight and nine, with title to one lot to be taken in the name of Allan V. Rose ("Rose") and the other in the name of an entity known as AVR Realty Company ("AVR"). Accordingly, two separate contracts of sale, one for lot eight, at the purchase price of $616,000.00, and one for lot nine, at the purchase price of $584,000.00, were prepared. On October 19, 1984, in connection with the submission of pre-transfer transferor and transferee questionnaires for the sales of lots eight and nine, petitioner's attorney-in-fact, one Hugh J. Freund, Esq., executed an affidavit as attorney-in-fact for petitioner stating, ~~inter alia~~, that "there was no plan or scheme to sell [lots 8 and 9] together and that lots 8 and 9 are being sold as individual lots even though such lots are being sold to affiliated parties." This affidavit was submitted to the Audit Division in connection with the submission of pre-transfer transferor and transferee questionnaires.

13. The transferee questionaires submitted in connection with the transfer of lots eight and nine were signed as to lot eight by Allan V. Rose and as to lot nine also by Allan V. Rose on behalf of the transferee, AVR Realty Company.

It is noted that AVR Realty Company is an unincorporated sole proprietorship with Allan V. Rose as the sole proprietor thereof.

14. The Audit Division determined, upon review of the questionnaires, that the sale of lots eight and nine were properly subject to aggregation and, accordingly, computed a gains tax due of $86,612.00. Petitioner has paid this tax and seeks in this proceeding a refund of the same. More specifically, petitioner has filed a Claim for Refund in the amount of $86,612.00, dated May 22, 1985. In turn the Audit Division's denial of such claim was by letter dated September 30, 1985.

15. There were simultaneous closings on lots eight and nine with both occurring on November 14, 1984.

16. At hearing petitioner's attorney-in-fact, Mr. Freund, testified as to some of the details surrounding the transaction. Mr. Freund testified that the lots were listed with the same broker and were listed individually. Mr. Freund could not recall if the lots were also listed as available jointly, nor could he recal if the initial offer for the lots specified an individual price per lot, or rather offered a lump sum for the two lots. Mr. Freund was unable to provide details as to the specifics of any negotiations concerning how the individual lot purchase prices were arrived at.

17. No evidence was adduced as to the purpose for which Mr. Rose and AVR Realty Company purchased the two lots, or as to the use to which such lots were to be put.

18. As noted there were simultaneous closings on the properties. The amounts due at closing were paid in cash, and there were no mortgages involved.

19. Petitioner asserts that aggregation is improper in this case and that a refund of $86,612.00 should be granted. Petitioner asserts that the consider-

ation with respect to each of lots eight and nine **is** less than a million dollars, that the sales of lots eight and nine were treated as separate sales through separate contracts and deeds and that neither sale was in any way contingent upon the other. Petitioner notes that the prior Greenfield Contract, with its clause whereby petitioner was prepared to pay the gains tax based on the sale of the lots through one contract, **is** evidence of petitioner's lack of intent to structure the transfers in such a manner as to avoid the imposition of gains tax. Finally, petitioner notes that petitioner's attorney-in-fact submitted a sworn affidavit to the effect that the sales were not pursuant to a plan or agreement to effectuate by partial or successive transfers a transfer that would otherwise be included in the coverage of Tax Law Article *31-B.*

20. The Audit Division asserts, by contrast, that pursuant to Tax Law § 1440(7), and 20 NYCRR *590.42* and *590.43,* the transfer of lots eight and nine were properly aggregated, the consideration received as aggregated exceeded one million dollars and that gains tax was properly due and owing by petitioner.

CONCLUSIONS OF LAW

A. That Tax Law § *1441,* which became effective March *28, 1983,* imposes a tax at the rate of *10%* upon gains derived from the transfer of real property within New York State. However, Tax Law § 1443(1) provides that no tax shall be imposed if the consideration is less than one million dollars.

B. That Tax Law § 1440(7) provides, in part, as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method.... 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...."

C. That Tax Law § 1448(1) provides as follows:

> "The tax commission shall administer and enforce the tax imposed by this article and it is authorized to make such rules and regulations, and to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article. Where the tax commission finds that the transfer of any real property or an interest therein has been so formulated that the primary purpose of such formulation is the avoidance or evasion of the tax imposed by this article, rather than for an adequate business purpose, the tax commission shall treat such transfer as subject to the tax imposed by this article." (Emphasis added.)

D. That Tax Law § 1440(7), and 20 NYCRR 590.42 and 590.43, call for aggregation in the case of transfers of contiguous properties by one transferor to one transferee unless the transferor files a sworn statement that the transfer is not pursuant to a plan or agreement whereby tax otherwise due is avoided or evaded. While the filing of a sworn statement may prevent a requirement of aggregation, the furnishing thereof will not preclude inquiry into the facts underlying a given transfer for the purpose of determining the intent surrounding the transfer and formulating a determination as to whether the transfer form was used primarily as a means to avoid or evade tax rather than for a bona fide business purpose. Such an interpretation is required when the aforementioned relevant statutory sections are read in conjunction with each other.

E. That here the Audit Division properly required aggregation of the consideration received on the transfers of lots eight and nine. As noted the lots were contiguous and the closings were simultaneous. Given that AVR Realty Company is an unincorporated sole proprietorship, the transfers were, in fact, in each case to Allan V. Rose. There has been no allegation or advancement of any particular business purpose for the method of transfer, and many of the

details as to how the transaction was arrived at, both as to its form and as to the dollar amounts offered and/or allocated with respect to each of the parcels, remain unspecified. The fact that petitioner was, in a prior situation, willing to pay gains tax where the transfer of both parcels was (similarly) to one transferee, with the only distinction being that the transfer was based upon one contract, does not support petitioner's assertion of no intent to evade or avoid gains tax. Without more, the evidence warrants an inference that, if anything, the use of two contracts was in pursuance of an intent to transfer the two lots to one transferee for a consideration shown as less than one million dollars, thereby avoiding imposition of gains tax (see, Bombart v. State Tax Comm., __ A.D.2d __ [Third Dep't., July 2, 19871).

F. That the petition of Dan W. Lufkin is hereby denied and the Audit Division's denial of Claim for Refund dated September **30,** 1985 is sustained.

DATED: Albany, New **York**

SEP 17 1987

ADMINISTRATIVE LAW JUDGE