

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Louis Bombart :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Real Property :  
Transfer Gains Tax under Article 31-B of the Tax :  
Law for the Period August 1983. :  
:

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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Louis Bombart, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis Bombart  
46 Bacon Road  
Old Westbury, New York 11568

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
13th day of December, 1985.



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Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

**AFFIDAVIT OF MAILING**

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

December 13, 1985

Louis Bombart  
46 Bacon Road  
Old Westbury, New York 11568

Dear Mr. Bombart:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1444 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Marc L. Zoldessy  
Simon, Uncyk & Borenkind  
1180 Avenue of the Americas  
New York, NY 10036  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
LOUIS BOMBART	:	DECISION
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.	:	

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Petitioner, Louis Bombart, 48 Bacon Road, Old Westbury, New York, 11568, 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. 54798).

A formal 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 May 20, 1985 at 1:15 P.M., with all briefs to be submitted by August 26, 1985. Petitioner appeared by Simon, Uncyk & Borenkind, Esqs. (Marc L. Zoldessy, Esq. of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq. of counsel).

#### ISSUES

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

II. Whether, since original purchase price (as defined) rather than fair market value as of the enactment date of Article 31-B is used as the basis for computing gain subject to tax, Article 31-B has a retroactive effect violative of the due process clause of the United States Constitution.

FINDINGS OF FACT

1. Petitioner, Louis Bombart, was the owner of three separate apartment buildings, contiguous to each other and located in New York City. These premises, commonly known as 55 Tiemann Place ("55"), 69 Tiemann Place ("69"), and 550 Riverside Drive ("550"), are collectively referred to herein as the properties. Petitioner acquired title to the properties from Shenk Realty and Construction Company ("Shenk") by a single deed, dated February 4, 1980 and recorded February 14, 1980. Although title to all three parcels passed to petitioner under a single instrument, such instrument provided that :

"Parcels A, B, and C are conveyed separately subject to a purchase money mortgage separately conveying each parcel..."

2. In support of the assertion that each of the properties was held and operated on an independent basis from the others, petitioner offered the following facts:

a) At the time that petitioner acquired title to each parcel, separate mortgages affected the individual parcels and petitioner took title subject thereto. These mortgages were held as follows:

- On 55        - New York Bank for Savings under an extension agreement dated May 10, 1976 for \$53,643.
- On 69        - Empire Savings Bank under an extension agreement dated August 1, 1978 for \$76,136.
- On 550      - Empire Savings Bank under an extension agreement dated February 1, 1978 for \$42,856.

b) Petitioner acquired title to the properties in his own individual name. The parcels are improved by apartment buildings which are neither physically connected nor share party walls or common entrances. In addition to the existing mortgages, petitioner granted second mortgages secured by each of the properties, and executed three independent mortgages and mortgage notes.

Payment of the purchase price for each parcel was further secured by separate security agreements and UCC-1 Financing Statements when petitioner acquired the properties.

c) When petitioner purchased the properties, separate letters were sent by Shenk to the tenants of each of the three parcels advising of the transfer of title. The content of each letter was, however, identical. Three separate bank accounts had been maintained for tenant security deposits by Shenk. Each was independently adjusted when petitioner acquired the properties. Thereafter, petitioner also established three separate bank accounts for the tenant security deposits for each parcel.

d) Independent tenant ledgers and tenant rent rolls were maintained by petitioner for each of the properties. Independent records were maintained for each of the properties to calculate retroactive rent increases resulting from an increase in fuel consumption for each parcel, and each parcel was separately registered with the Rent Stabilization Association of New York City.

e) Tax abatements based on Senior Citizen Rent Increase Exemptions were independently applied for on each parcel and separate tax abatement certificates were issued. Each parcel had its own lot designation and had a separate and independent assessed valuation for real property tax purposes. Separate applications were made for each parcel for reductions of such assessments, which reductions were granted.

f) Escrow deficiencies for real estate, water and sewer taxes were calculated independently for each of the properties.

g) Each parcel had its own superintendent and there were separate Union contracts for the superintendent of each parcel. Dues were paid separately for each parcel for membership in the Realty Advisory Board on Labor Relations.

Supplies were ordered and repairs were performed and billed separately for each parcel.

h) Separate applications were made for each parcel to the City of New York, Office of Rent and Housing Maintenance, Rent Control Division, for increases in base rents. Applications to increase rent, predicated upon major capital improvements ("MCI"), were made separately for each of the properties. Maintenance of separate records is required by New York City in order to apply for and receive such rent increases.

i) Each of the properties had its own heating system, separate oil burner, fuel tank and electric meter. Each parcel was billed separately for fuel oil deliveries and for electricity. Bills were paid for each parcel from funds derived from the rents from that building and, while rents were deposited in a single checking account for convenience, separate ledgers and rent rolls were maintained for each parcel and check book stubs separately stated disbursements made for each parcel.

j) Each of the properties received its own certificate from the New York City Department of Housing Preservation and Development in regard to its independent heating system. Each of the properties was issued its own electrical inspection certificate by the City of New York, Department of General Services, Division of Public Structures, Bureau of Gas and Electricity, and its own Certificate of Operation by the City of New York, Department of Environmental Protection and Air Resources. Each parcel had its own laundry room and was issued an individual Certificate of Occupancy.

k) Notices of Tax Due were issued separately for each of the properties by the City of New York, Department of Finance, Tax Review Division.

1) The City of New York, for purposes of its Real Property Transfer Tax, treated the sale of each property as separate and independent from the others.

m) Insurance and real estate appraisals made during the period of petitioner's ownership reflected valuations for each parcel different from the valuation of the others.

3. On April 8, 1983, petitioner entered into three separate contracts of sale, one for each of the parcels. The selling price for each parcel was \$700,000.00. Each contract was in the name of Infinity Corporation, as contract purchaser, and each contract provided that the purchaser had the right to assign the contract, without limitation.

4. On August 10, 1983, Infinity Corporation, the purchaser in each contract, assigned each of the three contracts for the properties to three different entities and, on the same date, title to 550 Riverside Drive was conveyed to 550 Riverside Owners Corp., title to 69 Tieman Place was conveyed to 69 Tieman Place Owners Corp. and title to Property 55 Tieman Place was conveyed to 55 Tieman Place Owners Corp. Each purchaser planned to convert each of the buildings to cooperative ownership, pursuant to three co-op plans. There was to be a different sponsor for each conversion. Each purchaser had its own separate employer identification number.

5. Independent title searches were conducted for each parcel and petitioner executed separate deeds for each parcel. Petitioner took back a separate mortgage for each parcel to secure payment of the purchase price, and none of the parcels secured the mortgage debt of any other parcel. Petitioner assigned tenant security deposits from each parcel separately to each purchaser.



6. Petitioner filed for clearance under the Real Property Transfer Gains Tax ("Gains Tax") imposed by Tax Law Article 31-B, and the Audit Division notified petitioner of a tentative assessment on each parcel. On August 10, 1983, the date of the sale of each parcel, petitioner executed the tentative assessment and paid the tax thereon.

7. Petitioner alleges that the action of the Audit Division in aggregating and assessing a tax upon the transfers was arbitrary, capricious and unjust and that each transaction should be viewed as a "non-taxable" transaction below the \$1,000,000.00 gains tax threshold.

8. Submitted in evidence were copies of three standard form contracts of sale, one for each of the properties, indicating Infinity Corporation as the purchaser in each instance and, in each instance, indicating that reference was to be made to a "rider". The riders were attached to the aforementioned contracts and contained the following heading and first paragraph (interlineations as in original):

"RIDER TO CONTRACT COVERING PREMISES:

550 Riverside Drive  
~~69-Tiemann-Place-and-55-Tiemann-Place~~  
New York City  
SELLER: Louis Bombart  
PURCHASER:  
Dated: April 8, 1983

The price is ~~Two-Million-One-Hundred~~ Seven Hundred Thousand  
~~(\$2,100,000.00)~~ 700,000.00 Dollars, payable as follows:..."

Each rider reflected the name of one of the properties, with the other two respective properties' names lined out. Also, payment of the purchase price, as broken down to specific component parts in each rider, reflected that the originally typed-in amounts were crossed out, with handwritten interlineations

of amounts equal to one-third of such original amounts inserted, as consistent with the first (above-quoted) paragraph of the rider (see Exhibits "C", "D" and "E").

9. Each written assignment from Infinity Corporation to the respective individual purchasers were signed on behalf of Infinity Corporation and on behalf of each of the named assignees by the same individual, namely Mark Greenburg, under the title of Secretary. Infinity Corporation and the three assignees all list the same principle place of business, namely 40 Railroad Avenue, Glenhead, New York.

10. Petitioner testified that the contracts and riders were "marked up" (see Finding of Fact "8"), as well as signed on April 8, 1983.

#### CONCLUSIONS OF LAW

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

B. That Tax Law section 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 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 the evidence warrants the conclusion that the transactions were properly aggregated and subjected to gains tax by the Audit Division. Each of the properties was operated for the common purpose of generating rental income. Moreover, notwithstanding petitioner's maintenance of separate records and the method of separately operating the three properties, it appears that the steps taken in structuring the transfers on April 8, 1983 were aimed at avoiding the

one million dollar gains tax threshold. Although insurance and real estate appraisals as well as real property tax assessments indicated different valuations for each of the parcels, each contract of sale was drawn for an identical selling price of \$700,000.00. More specifically, in light of Finding of Fact "8", it appears that prior negotiations had resulted in a "package" sale of the three properties to one purchaser for \$2,100,000.00, that such was the intent of the parties and that the creation and use of three separate contracts each marked up consistently as described to one-third of the \$2,100,000.00 price and executed approximately two weeks after the effective date of Article 31-B was for the purpose of arriving at selling prices below the one million dollar threshold. Such structuring being among the ends sought to be avoided by the language of Tax Law section 1440(7), there was proper imposition of the gains tax.

D. That constitutionality of the laws is presumed at the administrative level and thus this Commission is without authority to pass upon the constitutional issue raised by petitioner.


E. That the petition of Louis Bombart is hereby denied and the denial of claim for refund is sustained.

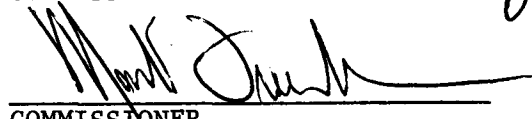
DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER