STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JACK ARMEL AND HELEN ARMEL	:	DECISION DTA No. 804703
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	:	
	:	

Both the Division of Taxation and petitioners Jack Armel and Helen Armel, 770 South Palm Avenue, Sarasota, Florida 34236 filed exceptions to the determination of the Administrative Law Judge issued on October 18, 1990 with respect to the petition of Jack Armel and Helen Armel 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. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel). Petitioners appeared by Richard V. D'Alessandro, Esq.

Each party filed a brief on exception, as well as a reply brief in response to the brief filed by the other party. Oral argument, requested by both parties, was heard on February 13, 1992.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly aggregated the consideration from 36 sales of real property so that the $1 million threshold for real property transfer gains tax liability was met.

II. Whether the real property transfer gains tax law is unconstitutional and/or whether the application of such law to petitioners, who established separate ownership of certain real property prior to its enactment, is unconstitutional.

III. Whether petitioner Helen Armel was denied administrative due process because the auditor communicated solely with Jack Armel throughout the audit process.

IV. Whether petitioners' notice of exception, filed pursuant to the Tax Appeals Tribunal's granting of an extension of time to so file, was based upon good cause, or whether it should be stricken as an exception in the nature of a cross-exception to the Division of Taxation's exception.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "18" which has been deleted and findings of fact "7" and "9" which have been modified.[1] The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

The Division of Taxation has an audit selection process to ensure that taxpayers comply with the real property transfer gains tax law. According to Peter Van Buren, the State auditor, frequent reviews are made of the grantor indices maintained by county clerks. In this instance, in early 1987, Mr. Van Buren was reviewing the grantor index in the Saratoga County Clerk's Office and noticed numerous conveyances by petitioners, Jack and Helen Armel. He determined that there were approximately 36 conveyances that occurred after the enactment of the real property transfer gains tax:

> "On the 36 lots that we identified, we determined consideration by working with the transfer tax, which is the deed stamp tax amount of the recorded deed. By using a mathematical formula, you can work back from the transfer tax paid to determine the consideration."

Using this methodology, Mr. Van Buren calculated aggregated consideration of $1,049,000.00 on the transfers of the 36 lots.

---

[1]The Administrative Law Judge's finding of fact "18" has been deleted because the Administrative Law Judge's comments on petitioners' proposed findings of fact contained therein are unnecessary to this decision.

Mr. Van Buren then sent a letter dated February 3, 1987 to Jack Armel advising him as follows:

> "The records of the Clerk of Saratoga County reveal that you have sold several subdivided lots of real property shown and designated on various maps in the 'Knoll Spring Park' subdivision. The aggregate consideration received from these sales is in excess of $1,000,000.00.
>
> Article 31-B of the Tax Law imposes a tax on the gain derived from a transfer of an interest in real property which is located in New York State where the consideration for such transfer is $1 million or more.
>
> Section 1447 of Article 31-B requires the transferor and transferee to file questionnaires with the Tax Department at least
>
> 20 days prior to the date of transfer of the real property where the gross consideration is $500,000.00 or more.[2]
>
> We have reviewed our files and find no record that you have met the aforesaid statutory filing requirements.
>
> This letter is to inform you that you must file a Gains Tax Questionnaire for each parcel of real property sold to date pursuant to 'Knoll Spring Park' subdivision and file a transferors [sic] questionnaire for each subsequent transfer at least 20 days before the date of transfer of such subdivided lot."

Jack Armel replied by a letter dated February 16, 1987 as follows:

> "We still own three lots in Knoll Spring Park in New York State, but we are now residents of Sarasota, Florida. The lots which you mention in your letter were sold individually since 1974 when the subdivision was first approved. If I understand you correctly you wish for me to recite to you the parcels or lots sold. There is no way I could do this since that is too far back and I don't have any records other than the last three years. I am sure the records you mention from the county clerk are better than mine.
>
> The rules governing parcels of $500,000 and one million are not applicable since they were sold for far less than that. I was also unaware of any such rules and all sales were handled by my attorney. I feel sue [sic] that whatever was required by the State was given to me to sign at the time of the closing.
>
> I will make sure that before the remaining lots are sold I will bring up to my attorney the 20 days rule you mention." (Emphasis added.)

Mr. Van Buren responded with a letter dated March 25, 1987 to Mr. Armel that advised that it was his understanding that:

---

[2] Petitioners had filed instead "real property transfer gains tax affidavits of individuals" for each transfer at issue herein noting that the respective transfers were of real property where the consideration was less than $500,000.00, and that the transfers were not pursuant to a cooperative or condominium plan or partial or successive transfers pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be subject to gains tax.

> "[T]he aggregate consideration received from the sale of the lots [exceeded] $1 million and, therefore, the gain derived from the transfer of such lots [was] subject to the Gains Tax."

Consequently, Mr. Van Buren informed petitioners that they should make "a gains tax filing". The Division of Taxation introduced into evidence the envelope in which this letter was mailed. It was stamped by the Post Office, "Returned to Sender", with "refused" as the reason checked off.

The Division of Taxation then issued a Notice of Determination of Tax Due Under Gains Tax Law dated May 7, 1987 against petitioners assessing gains tax of $104,900.00, plus penalty and interest. The notice explained that because Mr. Van Buren's letter of March 25, 1987 had been returned "as being refused by you", petitioners' gains tax liability was computed "using the best information obtainable" and without the information which would have been included on gains tax questionnaires (including the original purchase prices and development costs for the parcels of real property). Consequently, the Division computed gains tax on total gross consideration of $1,049,000.00 on the sale of the 36 lots as listed in Appendix "A" attached hereto (which corresponds to petitioners' Exhibit "6").

Petitioners' financial success, achieved by the sale of land in Saratoga Springs, occurred almost by chance. In the early 1970's, Jack Armel's fortunes were at a low ebb. A nuclear engineer, Mr. Armel had started his own business, Gamma Processing Company, which marketed the utilization of gamma radiation for industrial purposes. At its height, it had annual sales of several million dollars, 20 to 25 employees, and its stock was publicly traded. However, by the early 1970's the business had collapsed and, in Mr. Armel's words, "we were broke."

We modify the Administrative Law Judge's finding of fact "7" to read as follows:

> In 1968, Jack Armel bought out his mother's interest in approximately 50 acres of land in Saratoga Springs, which he had jointly owned with her (hereinafter the "Armel parcel"). He then built a home on this land when his business, which had a plant in nearby Malta, New York, was prospering. However, in November 1973, as a result of his serious ill health as well as his reversal of business fortunes, Jack Armel transferred a portion of the Armel parcel to his wife, Helen Armel, while retaining approximately 13½ acres in his own name for their personal residence. Helen Armel had come

up with the idea of subdividing the other 36½ acres of land, and she undertook this task in order to improve petitioners' financial situation.

Helen Armel hired a surveyor, Richard Danskin, who assisted in developing a subdivision plan, which was marked into evidence as petitioner's Exhibit 8.[3] This "Subdivision Plan of 'Knoll Spring Park' Section 1" dated July 19, 1973 (hereinafter "subdivision plan dated July 19, 1973") shows 11 lots, each consisting of approximately two acres, numbered "3" to "13," to be developed. Helen Armel's idea to subdivide the land, which petitioners could not sell in one piece when they tried prior to Jack Armel's transfer to Helen Armel, proved successful. Helen Armel testified that she "originally sold 11"[4] (in the mid 1970's) of the 13 subdivided lots available for sale and the remaining couple of lots in the early 1980's before the tax at issue became effective.

Part of this land transferred by Jack Armel to Helen Armel was designated on the subdivision plan dated July 19, 1973 as "not to be developed at this time," including lots numbered "1" and "2." Such land was not offered for sale because the Armels thought that their two sons, at some future time, might want to build on the land. Jack Armel testified that over the years Helen had refused offers from third parties to buy this land. Both Helen and Jack testified that Helen did not intend to sell the land as part of the subdivision sales. However, in 1984 or 1985, the Armels decided to establish a new residence in Sarasota, Florida. Consequently, when Helen Armel received an offer to purchase lot 2, part of the land "not to be developed at this time," from Gary Stone, an adjoining land owner, she agreed to its sale. As noted in Appendix A, this lot was sold to Mr. Stone for $27,000.00. Approximately four months later, on March 6, 1986, Helen Armel sold another portion of the land "not to be developed at this time" to G.W.R. Construction Co., Inc. (hereinafter "GWR Construction"). Helen Armel testified:

> "Witness: Well, Jerry called me on the phone and said he wanted to build a house there.
>
> ALJ: Jerry who?
>
> Witness: Jerry Robusto, who was a builder who lives in the area. And I said, 'Go ahead.'
>
> * * *
>
> Jerry gave me approximately $1,000 down, and it was paid for when the building was built and sold.

---

[3] However, petitioners did not explain the fact that the subdivision plan developed by Mr. Danskin shows Jack Armel as "owner and developer."

[4] She probably meant to say 9, since her testimony was that only 11 lots were available for sale.

* * *

I'm sure it was about $26,500[5] because at that time I wasn't selling any lots."[6]

As noted above, Jack Armel retained petitioners' residence and approximately 13½ acres in his own name. In May 1984, Mr. Armel sold a portion of this retained land (described under the heading "lot" in Appendix "A" as "Corrall & Estate"). He testified as follows:

"It is a little bit of a long story, but it doesn't matter. He [Herbert Schwartz] stopped by. He came over, walked across the lawn and he said, 'I like this. Can I buy this?' And I said yes, because here I had 13½ acres that we were living on and I was mowing all of it. And I was very glad to have somebody buy a piece off of me, so I wouldn't have to mow quite as much. So, that was it and I said yes."[7]

This sale to Mr. Schwartz was a cash sale for $75,000.00, and Jack Armel expanded upon his reason for selling part of the land:

"Attorney D'Alessandro: I think you indicated the reason you wanted to do this was you got a little tired of mowing the lawn?

Witness: Yes, but it was very good to get the $75,000 too.

Attorney D'Alessandro: Had you decided already that you were going to move from the State of New York to Florida?

Witness: Yes."

We modify the Administrative Law Judge's finding of fact "9" to read as follows:

On February 4, 1972, prior to his illness, Jack Armel purchased approximately 84 acres of land from his neighbor, Marie Briscoe, for $25,000.00. Shortly thereafter, Jack Armel became seriously ill, and he tried very hard to resell the 84 acres. He testified, "but we couldn't sell it.

5

As noted in Appendix "A," Footnote "14," the consideration paid for this lot is in dispute. Petitioners introduced into evidence a certified copy of a mortgage between GWR Construction and Helen Armel for this property in the amount of $25,700.00. A copy of a contract of sale was not introduced.

6

The third sentence of the third paragraph of Finding of Fact "7," which originally read "Helen Armel testified that over the years she refused offers from third parties to buy this land and did not intend to sell it as part of the subdivision sales," was modified to more accurately reflect the record.

7

Later in the hearing, petitioners' real estate attorney, John Carusone, testified that the reason Jack Armel sold part of the land near petitioners' residence was because petitioners "were going to be making Florida their full-time residence."

> There was no market." (Emphasis added.) Petitioners introduced into evidence a subdivision plan dated February 28, 1979 entitled "Knoll Spring Park Section 2, Jack & Helen Armel [emphasis added], Owners & Developers" (hereinafter "subdivision plan dated February 28, 1979"). Nonetheless, Jack Armel testified that he "initiated this subdivision action":
>
> > "Well, I learned a lot in ten years about lots and what happens in there. And it was in my name, and so I just stood up on my own two feet and proceeded with it."
>
> This land, obtained from Marie Briscoe seven years earlier in 1972, was subdivided into 37 lots numbered "14" through "50" ranging in size from 2 acres to 2.86 acres. As detailed in Appendix A, 26 out of the 37 lots were sold for amounts ranging from $20,000.00 (for lot 43) to $34,500.00 (for each one of lots 33 and 46). These 26 sales were made from June of 1983 to early October, 1986.[8]

On June 29, 1981, Jack Armel and Helen Armel purchased approximately 20 acres of land from the City of Saratoga Springs for $5,000.00. Petitioners introduced into evidence a certified copy of a subdivision plan dated December 29, 1982 entitled "Knoll Spring Park Section 3 and a Portion of Section 2 Revised" (hereinafter "subdivision plan dated December 29, 1982"). The 20 acres were subdivided into nine lots numbered "51" through "59." The lots for sale ranged in size from 2.03 acres to 2.10 acres. The subdivision plan dated December 29, 1982 also shows the revision of the eight lots previously included in the subdivision plan dated February 28, 1979, which were numbered "23R" through "36R." The revisions were necessary in order to extend road access to the nine newly-created lots in Knoll Spring Park Section 3.

As detailed in Appendix "A," seven out of the nine lots were sold for amounts ranging from $36,500.00 (for lot 57) to $15,000.00 (for lot 55).[9]

---

[8] We modified the last sentence of finding of fact "9" which originally read, "These 25 sales were made from June 1983 to October 1986," to more accurately reflect the record.

[9] This 2.03-acre lot was sold in January 1985 to Barry and Melissa Goldberg. The adjacent lot 54 of 2.04 acres was sold eight months later to the Goldbergs for $20,000.00. They purchased, in sum, 4.07 acres for $35,000.00, which was one-half the approximate going price of 2-acre lots sold to GWR Construction by petitioners.

Petitioners and the Division of Taxation agreed to an allowance and an allocation of original purchase prices (including various development costs) to the sale of each of the 36 lots at issue herein, as detailed in joint exhibits "24" and "25." If the consideration received by Helen Armel for the sale of lot HA, as noted in Appendix "A," Footnote "14," is determined to be $26,700.00 as petitioners assert, the parties agreed that the total gain on the sale of the 36 lots was $626,013.00. If $30,000.00 was the consideration received by Helen Armel on the sale of lot HA, the parties agreed that the total gain would be $628,544.00.

Paul L. Tommell, a licensed surveyor, was qualified by petitioners' representative as an expert on surveys, lot size, location and configuration of property. Mr. Tommell gave the opinion that the subdivision plan dated July 19, 1973 (Knoll Spring Park Section 1), the subdivision plan dated February 28, 1979 (Knoll Spring Park Section 2), and the subdivision plan dated December 29, 1982 (Knoll Spring Park Section 3) represent separate and distinct subdivisions because "the properties were picked up at different times and no one was dependent on the other . . . ."

Petitioners assert that Helen Armel acted independently of Jack Armel with regard to the subdividing and sale of properties owned in her name and that Jack Armel acted independently of Helen Armel with regard to the subdividing and sale of properties owned in his name. Paul Tommell, the surveyor hired to do much of the professional work necessary to subdivide the property at issue, testified, in part, as follows on direct examination:

> "Helen Armel called me and asked me to prepare a map on the HA lot and add the acre -- approximately one acre -- behind it to it and get it approved as a building lot.
>
> * * *
>
> Attorney D'Alessandro: And can you describe the kind of services that you undertook to perform for Helen?
>
> Witness: Yes. I had to go out and check the boundary of that area because it was not included in the boundary survey that I had done . . . . I prepared a map, reviewed it with Helen, and then made application to the Saratoga Planning Board and to the . . . New York State Health Department for approval . . . .
>
> * * *

Attorney D'Alessandro: During the course of your investigation, how often did you meet with Helen?

Witness: Oh, probably once a week.

Attorney D'Alessandro: And can you, in a general way, describe things that were discussed during those meetings?

Witness: The Health Department requirement that fill be brought in for an acceptable sanitary disposal system, and just what we might expect in meetings with the City of Saratoga Springs.

Attorney D'Alessandro: Can you describe the extent to which she participated in these discussions?

Witness: Fully. She was my client in these discussions.

* * *

Attorney D'Alessandro: From your observations of Helen during the time that you met with her, did you ever observe Jack during any of these times?

Witness: Yes. Jack sat in on some of our meetings.

Attorney D'Alessandro: Was he always there?

Witness: No.

Attorney D'Alessandro: And when he was there, did he ever seek to influence or control Helen in any of her decisions?

Witness: No.

Attorney D'Alessandro: From your observations of Helen, did she look to anyone else for guidance in making decisions with respect to these properties?

Witness: No.

* * *

Attorney D'Alessandro: Were you engaged by Jack to perform some service for him?

Witness: Yes.

* * *

Attorney D'Alessandro: From your observations, did you ever observe Helen with him during those discussions?

Witness: Yes.

Attorney D'Alessandro: From your observations, were you able to determine whether or not Helen controlled or influenced any of these actions?

Witness: Jack was his own person. He made the decision for the subdivisions that he had me working on.

* * *

Attorney D'Alessandro: How long have you known Jack?

Witness: I have known Jack and Helen since 1979, 1978.

* * *

Attorney D'Alessandro: How would you describe their ability to make decisions?

Witness: They can make decisions as well as anyone.

Attorney D'Alessandro: Did you ever observe Helen look to Jack to make a decision for her?

Witness: No.

Attorney D'Alessandro: And did Jack look to Helen to make a decision for him?

Witness: Not that I was aware of."

On direct examination, Helen Armel testified as follows:

"Attorney D'Alessandro: Did your husband Jack influence or control you in any way with respect to any of the terms of that sale [to Gary Stone]?

Witness: No."

On direct examination, Jack Armel testified as follows:

"Attorney D'Alessandro: Did Helen influence you in your decision to sell this property [estate and corrall lots sold to Mr. Schwartz]?

Witness: No, nobody.

Attorney D'Alessandro: Did she influence or control your decision with respect to the purchase price or any of its terms?

Witness: No way.

* * *

Attorney D'Alessandro: Now, with respect to Section 2, which was in your name, were you influenced or controlled by Helen in any way with respect to the development of those lots?

Witness: No. You asked me that already and the answer was 'No'.

Attorney D'Alessandro: Were you influenced or controlled by Helen in any way with respect to the sale proceeds?

Witness: No. Nothing. No part of it. I ran my show, and she ran her show."

On direct examination, John Carusone, an attorney who specializes in real estate and advised petitioners on their land sales, testified as follows:

"Attorney D'Alessandro: When she discussed with you the sale [of the land which had originally been retained for the children], was Jack ever present?

Witness: Was he ever present? He may have been, although my recollection is that, particularly with this one -- because I think she had some specific questions about the mortgage -- that she and and I spent maybe two or three sessions together.

Attorney D'Alessandro: Was she required to make some decisions?

Witness: Yes.

Attorney D'Alessandro: Did she make those decisions?

Witness: Yes, she did.

Attorney D'Alessandro: Was Jack present when she made these decisions?

Witness: No, he was not.

Attorney D'Alessandro: In your observations of Jack and Helen with respect to this transaction, did you ever observe Jack try to influence or control her or any of her actions or affect her decisions?

Witness: No.

Attorney D'Alessandro: Do you know if Helen looked to anyone else for guidance in making decisions?

Witness: I don't think so. She, I guess, looked to me for some advice, but my impression was that they each had their own ways of doing things and they were both strong-willed people and each pretty much made up their own mind.

* * *

Attorney D'Alessandro: Did you observe Jack in making any of these decisions [concerning the sale of land to Mr. Schwartz]?

Witness: Yes.

Attorney D'Alessandro: Was he influenced in his actions by his wife in any way?

Witness: Not to my knowledge.

Attorney D'Alessandro: Was he controlled in his actions by his wife in any way of your own knowledge?

Witness: Not to my knowledge.

Attorney D'Alessandro: Now, from a professional viewpoint and in any other relationship, how long have you known Jack?

Witness: We represented Marie Briscoe. Our office began dealing with Jack, I think, in the early '70s. And I have forgotten exactly when he began to use our office for his legal work, but I think it was in the early '80s. But I have known Jack and Helen through the '70s -- but not very well.

Attorney D'Alessandro: Did you have an opportunity to observe them together?

Witness: Both together and separately, yes.

Attorney D'Alessandro: And at the times you observed them together, how many would you say that would be, just generally?

Witness: Together?

Attorney D'Alessandro: Yes.

Witness: Oh, a couple hundred maybe.

Attorney D'Alessandro: Did you ever observe Jack influencing any action that Helen would take?

Witness: No, never.

Attorney D'Alessandro: Did you ever observe Helen influence any action that Jack might take?

Witness: Well, I think there might have been an attempt on either of their parts, but it was unsuccessful. As I said before, Dick, they were both strong-willed people. They had their own backgrounds. They were married rather late in life and kind of set in their own ways. They did things their own way."

On cross-examination, Helen Armel testified that "some" of the money spent on the development of the subdivision plan dated July 19, 1973 came from petitioners' joint bank account, and apparently all of the proceeds from the sale of lots in such subdivision were deposited in the joint account.

Helen Armel was formerly (in the 1960's) a stockbroker, who owned a seat on the so-called National Stock Exchange and managed between 30 to 40 investment portfolios, which

totalled approximately $1,000,000.00 in value. In 1965, she married Jack Armel. Helen Armel's first husband had passed away, and she was concerned when Jack Armel became quite ill in 1973. Her desire for financial security prompted the attempt to subdivide the land which Jack Armel deeded over to her. The need for some emotional security prompted her to designate a certain portion of such land as "not to be developed at this time" so it could be retained for possible use by her son from her previous marriage and Jack Armel's son from his previous marriage.

The lots in all three subdivision plans were marketed as lots in Knoll Spring Park without differentiation between Sections 1, 2 and 3. In reviewing the list of grantees of each of the 36 lots detailed in Appendix "A," it is observed that the grantee for 23 of the 36 lots was GWR Construction and for one was Gerald and Kathleen Robusto as individuals. Mr. Armel described GWR Construction as follows:

> "That's Jerry Robusto and his wife. That's the corporation, GWR.
>
> * * *
>
> They would contract with somebody to build a house and proceed to build.
>
> * * *
>
> He is pretty good at it and we have an easy relationship, in the sense that sometimes he would start building on the lot without even telling me about it. You know, we didn't negotiate every lot from lot to lot." (Emphasis added.)

Further, four of the 36 lots were deeded to Mertin A. and Edith F. Carlston who Mr. Armel described as follows:

> "When we went to Florida, we saw a condominium there and we thought it would be a good investment and it was owned by these people. And I said, 'Look, how about a trade, your condominium for four lots up there?' and the deal was made and that's what it is."

Consequently, it would seem that little marketing of the lots by petitioners was necessary. It is unknown to what extent GWR Construction marketed its building sites. Nonetheless, it would seem that the value of petitioners' subdivided lots would depend greatly on GWR Construction's ability to market its building sites especially since the purchases by GWR Construction of the lots at issue herein were spread out over nearly a three-year period.

John Carusone, the lawyer whom petitioners consulted concerning their real estate transactions, advised petitioners that the gains tax at issue herein was not applicable because there was no contiguity between Jack Armel's lots and the two sold by Helen Armel, which had been originally retained for petitioners' children, and Helen Armel's transfers were separate and distinct from Jack Armel's:

> "[T]hese were separate people making separate decisions; that the transfer [by Jack Armel] to Helen was maybe 10 years before this [the gains tax] came into effect, and it certainly was not done with this [avoiding gains tax] in mind."

Petitioners also introduced into evidence a copy of a letter dated April 6, 1987 from Ralph J. Fatato on the letterhead of the Technical Services Bureau noting the following:

> "The Department does not take the position that transferors should be aggregated solely on the basis of family relationships, however, such a relationship may indicate that one transferor is controlling the act of the other."

OPINION

The Administrative Law Judge determined that the notice of determination issued to petitioners was not invalid for lack of a rational basis because the auditor's aggregation of the consideration received on the transfers of the 36 lots was not irrational on its face.

However, the Administrative Law Judge ultimately cancelled the notice of determination, having found that the "HA" and "2 Harris Road" lots from subdivision 1[10] and the "Corrall and Estate" lot retained by Jack Armel for petitioners' residence, all of which lots were sold after the effective date of the real property transfer gains tax (hereinafter "gains tax") law, should be excluded from the aggregation of consideration since, unlike those lots in subdivisions 2 and 3 sold after the effective date of the gains tax law, the development of a residential subdivision was not the operative factor for the transfer of these particular lots. With the gains from these three properties removed from the aggregation total, the $1 million threshold for the imposition of the gains tax was not reached.

---

[10]The terms "subdivision" and "Section" are used interchangeably in the record, and are used so herein.

The Administrative Law Judge rejected petitioners' claim that Helen and Jack Armel each acted independently, as separate transferors of the properties owned by him or her, and free of concern for the other's opinion or influence. Therefore, the Administrative Law Judge aggregated the consideration received on the transfer of the lots in Section 2 (owned by Jack Armel) and Section 3 (owned jointly by Jack and Helen Armel).

The Administrative Law Judge also rejected petitioners' argument that Helen Armel's rights were violated because the auditor issued the notice of determination without any attempts to communicate with her. Further, the Administrative Law Judge noted that there is no constitutional, legal or regulatory basis for the cancellation of the assessment against Helen Armel based on this argument.

Finally, the Administrative Law Judge found meritless petitioners' arguments that the gains tax law is unconstitutionally void for vagueness, and that it is "unconstitutionally retrospective in application" (Petitioners' post-hearing brief, pp. 29-31).

On exception, the Division of Taxation (hereinafter "the Division") asks that the determination of the Administrative Law Judge be reversed, that the petition of Jack Armel and Helen Armel be denied, and that the matter be remanded on the issue of penalty.

Specifically, the Division maintains that at all times Jack and Helen Armel were joint venturers, acting in concert for the subdivision, development and sale of all of the real property at issue. The Division asserts that the $1 million gains tax threshold has been reached because the total consideration received on the sales of all of the subdivision lots in question is subject to aggregation, including the three lots excluded from aggregation by the Administrative Law Judge. The Division's theory for the aggregation of the consideration received on all the lots is that the lots were transferred pursuant to a plan. That is, at the time the lots were transferred, the "operative factor" for the transfer of the lots was that petitioners "desire[d] to divest themselves of [the] real property for monetary gain," and that the lots were from the same contiguous realty; in fact, all of the lots were marketed as lots in Knoll Spring Park (Division's exception, attached rider, p. 2; Division's brief on exception, p. 15).

The Division argues that it is irrelevant that the lots in question came from three, rather than just one, subdivisions because the gains tax statute does not distinguish between transfers pursuant to a single versus multiple subdivisions (citing the "aggregation clause" of Tax Law § 1440[7] which includes "partial or successive transfers" in the definition of "transfer of real property").

Finally, the Division stresses that in seeking an exemption from the gains tax under Tax Law § 1443, petitioners carried the burden of proving clear entitlement to the exemption, as exemptions are "strictly [and narrowly] construed against the taxpayer" (Division's brief on exception, p. 12 citing Matter of Dworetz v. State Tax Commn., 128 AD2d 946, 512 NYS2d 745, lv denied 69 NY2d 612, 517 NYS2d 1028). According to the Division, petitioners failed to carry this burden.

In response, petitioners ask that the Administrative Law Judge's ultimate cancellation of the notice of determination be upheld; however, petitioners object to several of the intermediate rulings of the Administrative Law Judge. First, petitioners disagree with the Administrative Law Judge's decisions that Helen and Jack Armel did not act as separate transferors and that the consideration received on the sale of lots in Sections 2 and 3 should be aggregated.

Secondly, petitioners reassert their claim that the gains tax is unconstitutional. Thirdly, petitioners reassert that Helen Armel was denied due process during the audit, and that the notice of determination issued to Helen Armel should be cancelled.

In its reply brief, the Division asks that petitioners' exception be stricken as it is in the nature of a cross-exception, impermissible under the Rules of Practice and Procedure of the Tax Appeals Tribunal (hereinafter the "Tribunal"), and that the extension of time to file the cross-exception was not properly granted since "[s]uch a request cannot constitute 'good cause'" (Division's reply brief, p. 4).

In response, petitioners assert that their request for an extension of time to file an exception was properly granted and that the exception should not be stricken. Petitioners add that they relied upon the granting of this request, and will be "irreparably prejudiced" if the exception is

stricken at this point in the proceedings (Petitioners' reply brief, p. 7). Furthermore, petitioners argue that the Division waived its right to object to petitioners' exception and to the granting of an extension of time to file said exception by failing to file a proper motion in objection within 90 days after being served with petitioners' notice of exception. Petitioners contend that by raising this objection in its reply brief six months after the fact, the Division improperly asks for relief not previously requested, and effectively precludes petitioners from having a full and fair opportunity to respond to the objections.

In the alternative, petitioners ask that if their exception is stricken, that this Tribunal exercise its discretionary power to review the Administrative Law Judge's findings of fact and conclusions of law to which petitioners took exception.

We affirm the determination of the Administrative Law Judge.

Before we turn to the substantive issues before us, we will address the procedural issue raised by the Division in its reply brief, namely, that petitioners' notice of exception, which the Division claims is in the nature of a cross-exception, be stricken.

Briefly, by way of background, on July 11, 1991, the day before the expiration date for filing notices of exception to the determination of the Administrative Law Judge issued June 13, 1991, petitioners requested a 30-day extension of time to file an exception. Petitioners made this request because the Division had not yet filed an exception, but if the Division did file an exception and the matter were reviewed, petitioners wished to preserve their rights to seek review of several of the intermediate rulings of the Administrative Law Judge to which they objected while, of course, agreeing with the ultimate outcome. Petitioners' counsel contacted the Secretary to the Tax Appeals Tribunal for guidance as to the most appropriate course of action to take in such a situation. The Secretary informed petitioners' counsel that in such a situation, the way to preserve one's right to file the notice of exception is to request an extension of time to file from the Tribunal (see, Petitioners' reply brief, p. 4). Petitioners did this and properly served a copy of the request upon the Division by first class mail. On July 12, 1991, the Tribunal granted petitioners' request for extension. Also on July 12, 1991, the Division filed

its notice of exception. On August 9, 1991, petitioners timely filed their notice of exception. Both parties then filed briefs. On or about January 6, 1992, the Division filed its reply brief in this matter raising for the first time the issue of the impropriety of petitioners' notice of exception.

The granting of an extension of time to file an exception lies within the discretion of this Tribunal: 20 NYCRR 3000.11(a)(2) provides that:

> "[t]he tribunal may extend the 30-day period for filing an exception, provided an application for extension is filed within such period and served on the other party, and if good cause is shown. 'Good cause' depends on the circumstances of each case, but would include any cause which appears to an ordinarily prudent person as a reasonable ground for failure to file an exception within the prescribed period."

In granting petitioners' request, the Tribunal implicitly recognized this request as one made for good cause. Petitioners, although ultimately successful below, nevertheless wished to preserve their right to except to various determinations of the Administrative Law Judge in the event that such an exception became necessary to preserve their rights if/when the Division filed an exception. Petitioners, having won on the merits, did not see a reason to expend the resources to file if it was not necessitated by the Division's filing of an exception. But, on the other hand, petitioners did not want to lose their right to protest certain findings of fact and conclusions of law if the Division did file an exception.

If this Tribunal were to disallow the practice of granting extensions to file exceptions to parties such as the Armels, wishing to preserve their rights in the event such a filing becomes necessary, a successful party, for its own protection, would have to file an exception in every case where that party objected to any finding of fact or conclusion of law in the determination. This would increase the number of exceptions filed and clog the calendar of the Division of Tax Appeals, be a drain on judicial resources, and needlessly waste the taxpayers' legal resources, as well as the Division's. Therefore, there is clearly, in our estimation, "good cause" to permit extensions under circumstances such as these.

Further, we reject the Division's characterization of petitioners' exception as a "cross-exception," something not provided for in the Tribunal's Rules of Practice and Procedure. The

Division asks us to compare the rulings denying cross-exceptions in Matter of Klein's Bailey Foods (Tax Appeals Tribunal, August 4, 1988) and Matter of Caleri (Tax Appeals Tribunal, August 11, 1988) to the situation at hand. We find the comparisons inappropriate. In each of these cases, the Division filed no exception and made no request for an extension to file an exception within the 30-day time period following the issuance of the determination. Instead, in each case, the Division filed a reply brief -- in Klein's Bailey, on day 89 after the determination was issued, and in Caleri, on day 143 -- which raised an aspect of the Administrative Law Judge's determination which was not raised by the petitioners in their exception. The Tribunal ruled in both cases that since no exceptions are permitted to be filed beyond the 30-day time period unless an extension has been requested, and no extension had been requested, the reply of the Division raising a new aspect of the determination was in the nature of a cross-exception, impermissible under such circumstances according to the Regulations of the Tribunal.

We find the situation at hand inapposite to the situations in the cases cited by the Division. First, petitioners properly requested and were granted an extension of time to file their exception. Secondly, petitioners' exception, while it raised new aspects of the determination, did so within a proper time period. Thus, we see no merit in the Division's request that petitioners' notice of exception be stricken. In any case, our Rules do not preclude the filing of cross-exceptions, but merely the filing of untimely cross-exceptions. Our decision in this matter makes it unnecessary for us to address petitioners' other arguments on their behalf.

We turn now to the substantive issues presented. Pursuant to Tax Law § 1441, effective March 28, 1983, New York State imposes a ten percent tax upon gains derived from the transfer of real property located within the State, unless the consideration received on the transfer is less than $1 million, in which case the transfer is exempt from gains tax under Tax Law § 1443(1).

Petitioners argue that the language of the statute is void for vagueness in that "[i]ts reach extends to transfers 'deemed to be a single transfer of real property'" (Tax Law § 1440[7]), but that this wording does not properly advise one or prepare one for the eventualities that separate ownership of land may be ignored and that separate transactions may be deemed a single

transaction (Petitioners' post-hearing brief, p. 28). We reject this argument. This Tribunal lacks the authority to declare an act of the Legislature unconstitutional on its face (see, Matter of Goldome Capital Invs., Tax Appeals Tribunal, May 16, 1991, citing Matter of Allied Grocers Coop., Tax Appeals Tribunal, November 30, 1989, affd 162 AD2d 791, 557 NYS2d 707).

Next, we address the principle issue raised by the Division on exception, i.e., that the Administrative Law Judge erred in concluding that the transfers of a certain three parcels should not be aggregated with the other transfers. According to Tax Law § 1440(7), not only are the transfers of singular parcels of land subject to the gains tax, but the definition of "transfer of real property" allows for the aggregation of "partial or successive transfers" unless the transferor(s) provide(s) 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 [Article 31-B] . . . ." Thus, the main question we face is whether or not to aggregate the consideration received on the 36 properties in question; that is, whether or not the transfers were made pursuant to an agreement or plan by Helen and Jack Armel to transfer by partial or successive transfers parcels, which, if not so divided and transferred, would have otherwise been taxable under the gains tax law (see, Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127, 129).

The application of the "aggregation clause" of section 1440(7) is guided, in part, by 20 NYCRR 590.43, which provides that:

> "[w]hether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated" (see also, Matter of Brown, Tax Appeals Tribunal, September 5, 1991).

In analyzing the transfers of the 36 parcels in question, we are in complete agreement with the Administrative Law Judge that the consideration received on the transfer of parcels "2 Harris Road" and "HA" owned by Helen Armel and sold to Gary Stone and G.W.R. Construction Co., Inc., respectively, and the "Corrall & Estate" parcel owned by Jack Armel and sold to Herbert and Arlene Schwartz should not have been included in the aggregation

calculation. We reach this conclusion because we find that petitioners have established that their plan to transfer real property did not encompass the "2 Harris Road," "HA" and "Corrall & Estate" parcels. To the contrary, from the time that Helen Armel received the property (in what later became subdivision 1) from Jack Armel to subdivide, properties "HA" and "2 Harris Road" were not included in the subdivision map as being for sale. This is evidenced by the notation made across these two lots on the 1974 subdivision map (see, Exhibit "8") which reads "not to be developed at this time." Helen Armel had a specific reason for wishing to retain these two properties. As she testified, "I was thinking of having the children move down -- we have two sons. And I thought -- Jack was in pretty bad shape -- and I thought they would sort of help me and would be near me" (Hearing Tr., p. 119). Later, referring to the same two properties, Helen Armel explained that she wanted to "retai[n] these two lots because they were pretty close to our property" (Hearing Tr., p. 120). In his testimony, Jack Armel echoed Helen Armel's sentiments, stating that lots "HA" and "2 Harris Road" comprised "[f]rom the outset, the land reserved for the kids" (Hearing Tr., p. 150).

Jack Armel testified, in addition, to the fact that over the years, unsolicited offers had been made for the two properties, but that these offers had been refused because the properties were being retained for the kids (see, Hearing Tr., pp. 150-151). As both Helen and Jack Armel testified, the only reason the two properties were eventually sold is that the couple had decided to move to Florida and, therefore, saw no reason to continue to hold the property for the children any longer (see, Hearing Tr., pp. 123, 129, 150-151).

The Administrative Law Judge obviously found this testimony credible and we agree that it establishes that petitioners did not plan to dispose of these two parcels in conjunction with their other sales of real property.

Similarly, the "Corrall & Estate" parcel owned by Jack Armel was, from the time Jack Armel bought the property from his mother in 1968, intended to and did ultimately serve as land for the Armel's home and grounds. It was not slated for sale. The 1974 subdivision map in

evidence (see, Exhibit "8") supports this fact, as the words "not in subdivision" and "not to be developed at this time" are written across these properties. Jack Armel only sold the parcel in 1984 when he was approached by a Mr. Schwartz, unsolicited, and was asked if he'd like to sell the property. Jack Armel agreed, as he testified:

> "[h]e stopped by. He came over, walked across the lawn and he said, 'I like this. Can I buy this?' And I said yes, because here I had 13 1/2 acres that we were living on and I was mowing all of it. And I was very glad to have somebody buy a piece off of me, so I wouldn't have to mow quite as much . . . " (Hearing Tr., p. 160).

Jack Armel further testified that at that point he and his wife had already decided to move to Florida, and he was pleased to get the $75,000.00 as well (see, Hearing Tr., p. 163). In view of these facts, we agree with the Administrative Law Judge that petitioners did not have a plan to transfer real property that included the sale of the "Corrall & Estate" parcel.

With these three properties excluded from the aggregation calculation, the total consideration received on all of the 36 transfers was at the most $917,000.00.[11]

The Division refutes this conclusion, asserting that the sale of the "HA," "2 Harris Road" and "Corrall & Estate" lots were "indistinguishable from the sale of all the other lots and were properly aggregated [by the Division] with the other lots" (Division's exception, attached rider, p. 3). For all of the reasons cited above, we reject this argument, finding that the sale of the three parcels was distinguishable from the sale of the

others and that the parcels were, therefore, properly excluded from aggregation.

While the Division cites Matter of Cove Hollow Farm v. State of New York Tax Commn. (supra) and Matter of Brown (supra) in support of its position that the "HA," "2 Harris Road" and "Corrall & Estate" parcels were part of the plan to dispose of land through the Knoll Spring Park development, we find these cases inapposite. In Brown, we held that the sales should be aggregated because:

---

[11]As noted in footnote "5" in the findings of fact, and footnote "14" in the Appendix, the consideration paid for the "HA" property is in dispute with numbers ranging from $25,700.00 to $30,000.00. However, the $4,300.00 difference in these numbers is insignificant in view of our ultimate determination that the $1 million consideration threshold was not reached (i.e., $917,000.00 versus $912,700.00).

> "the subdivision of these parcels within the same plan, coupled with the sale of all of the lots at issue within a very short time from each other [two months] support the conclusion that the sale of these parcels was made pursuant to a plan."

In the case at hand, as noted, two of the parcels in question were marked "not for sale at this time" on the 1974 subdivision map and one was not part of the subdivision plan (see, Exhibit "8"). Further, they were sold approximately 10 years after the majority of the other lots in Section 1 were sold.[12]

In Cove Hollow, similarly, the court found aggregation proper as the lots in question were all sold pursuant to a plan from the beginning to dispose of the entire parcel of property. The three parcels in the case at hand were distinctly not part of a plan to dispose of all of the property in the subdivision, but were, rather, meant to be retained by petitioners.

Since we have concluded that petitioners' transfers are not subject to the gains tax, we need not address the remaining issues raised by the parties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jack Armel and Helen Armel is granted to the extent that the notice of determination is cancelled, but is otherwise denied;

2. The exception of the Division is denied;

3. The determination of the Administrative Law Judge is affirmed; and

[12]According to Helen Armel's testimony, a couple of lots in subdivision 1 were sold between 1980 and 1981, prior to the enactment of the gains tax statute; however, that would still mean that at least three years had passed between these sales and the sales of the three parcels in question (see, Hearing Tr., p. 122; Appendix "A").

4. The petition of Jack Armel and Helen Armel is granted.

DATED: Troy, New York
July 23, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner

APPENDIX "A"

Date Transfer Recorded	Lot Consideration	Grantor	Grantee
06/15/83	27 $ 31,000	Jack Armel	G.W.R. Construction Co., Inc.
06/15/83	24 25,000	Jack Armel	G.W.R. Construction Co., Inc.
07/18/83	23 25,500	Jack Armel	G.W.R. Construction Co., Inc.
10/11/83	25 25,500	Jack Armel	G.W.R. Construction Co., Inc.
10/26/83	21 25,500	Jack Armel	G.W.R. Construction Co., Inc.
11/04/83	14 26,500	Jack Armel	Frank W. & Judith A. Bartkowski
11/28/83	22 24,000	Jack Armel	G.W.R. Construction Co., Inc.
02/06/84	43 20,000	Jack Armel	G.W.R. Construction Co., Inc.
04/17/84	42 26,000	Jack Armel	G.W.R. Construction Co., Inc.
05/16/84	32 25,000	Jack Armel	G.W.R. Construction Co., Inc.
05/17/84	Corrall & Estate 75,000	Jack Armel	Herbert T. & Arlene Schwartz
05/23/84	34 33,500	Jack Armel	Gerald W. & Kathleen M. Robusto
06/19/84	36 27,500	Jack Armel	G.W.R. Construction Co., Inc.
07/06/84	33 34,500	Jack Armel	Paul J. & Lynda W. Ferrigan
07/23/84	35 27,500	Jack Armel	Merton A. & Edith F. Carlston
08/07/84	39 26,000	Jack Armel	Merton A. & Edith F. Carlston
08/08/84	37 27,500	Jack Armel	Merton A. & Edith F. Carlston
09/21/84	26R13 33,000	Jack Armel	G.W.R. Construction Co., Inc.

09/21/84	41	Jack Armel	Merton A. & Edith F. Carlston
	27,500		
10/17/84	59	Jack & Helen Armel	Knoll Spring Park
	30,000		

---

13 As noted in the findings of fact, the subdivision plan dated December 29, 1982 revised lots 23 through 27 and 34 through 36, which were first shown on the subdivision plan dated February 28, 1979. On petitioners' Exhibit "6", the only lot designated with an "R" following the number was lot 26R. However, it would seem that lots 23, 24, 25, 27, 34, 35 and 36 should also have an "R" following the number since they too were revised by the subdivision plan dated December 29, 1982.

Date Transfer Recorded	Lot Consideration	Grantor	Grantee
10/17/84	53	Jack & Helen Armel	G.W.R. Construction Co., Inc.
31,000			
11/27/84	31	Jack Armel	G.W.R. Construction Co., Inc
33,000			
12/18/84	40	Jack Armel	G.W.R. Construction Co., Inc.
26,000			
01/07/85	58	Jack & Helen Armel	G.W.R. Construction Co., Inc.
36,000			
01/16/85	55	Jack & Helen Armel	Barry & Melissa N. Goldberg
15,000			
01/16/85	56	Jack & Helen Armel	G.W.R. Construction Co., Inc.
32,500			
04/05/85	38	Jack Armel	G.W.R. Construction Co., Inc.
25,500			
06/17/85	47	Jack Armel	G.W.R. Construction Co., Inc.
29,500			
07/01/85	57	Jack & Helen Armel	G.W.R. Construction Co., Inc.
36,500			
11/04/85	44	Jack Armel	G.W.R. Construction Co., Inc.
30,500			
11/18/85	2 Harris Road	Helen Armel	Gary E. Stone
27,000			
11/25/85	46	Jack Armel	G.W.R. Construction Co., Inc.
34,500			
01/14/86	50	Jack Armel	G.W.R. Construction Co., Inc.
31,000			
03/24/86	HA	Helen Armel	G.W.R. Construction Co., Inc.
30,000			
09/09/86	54	Jack & Helen Armel	Barry & Melissa N. Goldberg
20,000			
10/06/86	45	Jack Armel	Anna DiMateo
15,000			
Total $1,049,000			

14

[14] Petitioners assert that the consideration received by Helen Armel on this transfer was only $26,700.00. Helen Armel testified that she probably has the contract for this lot, whose purchase price is in dispute, but it was not offered into evidence.