STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
LION BREWERY OF NEW YORK CITY	:	DECISION DTA NOS. 807103
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.	:	AND 807267

Petitioner Lion Brewery of New York City, c/o Coudert Brothers, 1114 Avenue of the Americas, New York, New York 10036, filed an exception to the determination of the Administrative Law Judge issued on January 28, 1993. Petitioner appeared by Coudert Brothers (Emilio A. Dominianni and David G. Richardson, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a letter in opposition and petitioner filed a reply. Oral argument was heard on July 8, 1993 which began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the sale of the eighth and fifteenth floors of a building owned by petitioner is exempt from the tax imposed by Tax Law § 1441, the tax on gains derived from the transfer of real property, as the sale of real property occupied by the transferor as his residence pursuant to Tax Law § 1443.2.

II. Whether the sale of the fifteenth floor apartment should qualify for the one million dollar exemption from gains tax on the ground that the sale was not made pursuant to any plan or agreement in accordance with Tax Law § 1440.7, and therewith should not be aggregated with the sale of the eighth floor apartment or any other apartments in the building.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "12" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Included in petitioner's brief, were 30 proposed findings of fact which have been included in the following findings to the extent that they are relevant, not conclusory in nature and fairly reflect the facts in the record. Proposed findings of fact 8, 9, 10, 11, 13, 15, 17, 18, 21, 22, 23, 25, and 29 were extensively edited or deleted to more accurately reflect the records as established at hearing and to avoid the use of conclusory language in the findings.

Petitioner, Lion Brewery of New York City, was a New York real estate holding corporation which owned certain real property located on Fifth Avenue, New York City.

During the 1960s, petitioner's only assets except for cash and securities consisted of two buildings located at 988 Fifth Avenue and 1150 Fifth Avenue.

Petitioner constructed the apartment building at 988 Fifth Avenue in 1925.

Pauline Schmid Murray, the mother of Paula Murray Coudert, was the sole shareholder of petitioner and its first corporate officer. She resided in an apartment in the building and was generally in charge of its management. All other apartments in the building were rented to third parties.

Upon the death of Pauline Schmid Murray in 1931, Paula Murray Coudert inherited all outstanding shares of petitioner's stock from her mother. Soon after, she married Frederick R. Coudert, Jr.

In or about 1940, Frederick R. Coudert, Jr. and Paula Murray Coudert (hereinafter sometimes "Mrs. Coudert") established their residence in the building. They lived in the eighth floor apartment and used rooms located on the fifteenth floor principally to store their furniture, equipment and other property. Some rooms were utilized as living quarters at various times for

the children and hired help. Also, Mrs. Coudert's companion lived in a room on the fifteenth floor for fifteen years.

Petitioner had never collected any rent for the eighth floor apartment or the fifteenth floor rooms occupied and used by the Coudert family prior to the sales of the apartments.

Mrs. Coudert's children, Frederick R. Coudert, III, and Paula Coudert Rand, lived in the apartment from birth until 1961 and 1957, respectively, when they were married. They returned to the apartment for family visits. Until Mrs. Coudert's death in September 1985, she continuously resided in the eighth floor apartment. Frederick R. Coudert, III, occasionally utilized a room on the fifteenth floor for study purposes during law school at Columbia University.

Beginning in 1927, the entire building was depreciated for Federal income tax purposes based on a 50-year straight line method. Operating expenses for the entire building were deducted by petitioner annually.

No depreciation expenses were taken on the original structure of the building after 1977.

In the early 1960's, Frederick R. Coudert, III, succeeded his mother, Mrs. Coudert, as the president of petitioner.

We modify the Administrative Law Judge's finding of fact "12" to read as follows:

> In 1971, Mrs. Coudert granted all of her shares of stock in petitioner to two family trusts. Each trust received 195 shares of the capital stock of Lion Brewery of New York City. The grantor's transfers of the shares to the trusts were irrevocable and the trustees were granted the broadest possible powers, authority and discretion in connection with the investment, reinvestment and administration of the trust fund. The transfers to the trusts were made for estate planning purposes.[1]

One of the two original trustees of the two family trusts was related to the Coudert family, Alexis C. Coudert, and the other trustee, Eugene D. Wadsworth, was a close family friend.

---

[1] We modified the Administrative Law Judge's finding of fact by adding the last sentence in order to reflect the record in more detail.

At the time Mrs. Coudert granted the shares to the trust, there was an alleged unwritten understanding among Mrs. Coudert, her children and her trustees that she would be entitled to continue to occupy the eighth floor apartment and the fifteenth floor rooms for as long as she desired. She never paid rent for this privilege.

During all the relevant time periods prior to the sales of the apartments, Mrs. Coudert was involved in all major management decisions of petitioner.

The officers of petitioner and the trustees of the two trusts chose to defer decision-making authority regarding management of petitioner's assets to Mrs. Coudert before her death, in contradiction of the terms and provisions of the trust documents.

In July 1979, petitioner began to convert the building to condominium ownership pursuant to an Offering Plan (the building is situated on land located at the southeast corner of the intersection of 80th Street and 5th Avenue in Manhattan, with a frontage of 100 feet on 5th Avenue and 51 feet, 2 inches on 80th Street. The building is a 13-story steel frame structure, erected in 1925 by Dwight P. Robinson and Co., Inc. from plans by J.E.R. Carpenter, Architect.

The front facades of the building faced on both 5th Avenue and 80th Street with limestone from the ground floor level up, with decorative limestone fringe on the second, fourth, fifth and eleventh floors. The entrance doors are wrought iron with panels of clear glass. The lobby floors are made of black and white marble squares. The ceiling consists of decorative plaster painted in an off-white and one-third of the west wall of the lobby is covered by mirrors. The intercoms for the apartments and elevator are located in the lobby, which also contains the mailroom. A separate service entrance is located at the easterly end of the 80th Street side of the building, giving access to the ground level and basement of the building. The basement houses the workshop, laundry cages and the mechanical equipment for the building. On the ground floor are two professional offices, both of which are accessible from the street. The office fronting on 80th Street consists of 2 rooms totalling 525 square feet; the office fronting on 5th Avenue consists of 5 rooms totalling 1,000 square feet. Also on the ground

floor in the rear is a four-room apartment for the building superintendent, as well as his office and one storage room.

There are 12 residential apartments in the building, with each apartment occupying a full floor with private elevator entry. Each apartment consists of eleven rooms with four baths (with the exception of the twelfth and thirteenth [numbered fourteenth] floor apartments, which each contained eight rooms and four baths), and the building's penthouse floor consists of nine maid's rooms and one bath. Each of the apartment units has a wood-burning fireplace in the dining room, and most apartments have a fireplace in the master bedroom. The kitchen for each apartment is equipped with a refrigerator, stove, sinks and cabinets. There is also a butler pantry equipped with a sink and cabinets.

Petitioner, the condominium sponsor, offered for sale 12 apartment units, i.e. the apartments occupying floors 2 through 12 and floor 14.

The Offering Plan identified the fifteenth floor unit as the "Sponsor's Retained Unit" consisting of nine maid's rooms and a terrace. The Offering Plan states that the sponsor's retained unit is "not being offered for purchase in this plan."

Petitioner as sponsor did not state any particular use for the nine maids' rooms, one bath and terrace on the fifteenth floor but reserved the right to convert the nine rooms, one bath and terrace into one or more apartment units suitable for residential occupancy and to sell the unit or units to third parties at a later date.

The fifteenth floor rooms allegedly were not in a condition suitable for personal residence at the time of the offering of the other apartments in the building; however no structural changes were made to the fifteenth floor prior to its offering pursuant to the sixth amendment to the Offering Plan on November 29, 1986.

The date of the first offering of the Offering Plan was July 23, 1979. The front cover of the Offering Plan states: "This Offering Plan may not be used after January 23, 1982." The plan was amended at least six times, but the amended Offering Plan in evidence contained only four amendments. The fifth amendment is not included in the record.

By the end of 1981, all of the units in the building, other than the eighth floor apartment and the sponsor's retained unit, had been sold to third parties pursuant to the amended Offering Plan.

After the condominium conversion, Mrs. Coudert continued to reside in the eighth floor apartment and to use the fifteenth floor rooms for storage until her death in September 1985. Lion Brewery paid the common charges for her use of the eighth floor apartment and Mrs. Coudert refused to pay any rent after she conveyed all her right, title and interest in the property to the trusts in 1971.

The eighth floor apartment was sold on August 5, 1986 to an unrelated party for $2,900,000.00, of which $2,633,813.00 was gain for the purposes of the New York State gains tax.

The Division of Taxation ("Division") determined a real property transfer gains tax due of $263,381.00 upon the gain realized on the sale of the eighth floor apartment. Petitioner paid this tax and timely filed for a refund of tax paid.

Petitioner filed the sixth amendment to the Offering Plan on November 24, 1986 in connection with the sale of the fifteenth floor rooms.

The fifteenth floor rooms were never listed with any broker or specifically offered for sale to any buyer prior to sale, although there was much interest in the fifteenth floor by brokers who called Frederick Coudert, III, prior to the sale.

The fifteenth floor rooms were sold without renovation on December 10, 1986 for $499,990.00. The Division aggregated the transfer of the fifteenth floor unit with the transfer of the eighth floor apartment and determined a real property transfer gains tax due of $47,334.00 with respect to the sale of the fifteenth floor unit. Petitioner paid this tax and timely filed for a refund of tax paid.

On August 9, 1988, petitioner filed a claim for refund of real property transfer gains tax paid on the transfer of the eighth floor apartment located in 988 Fifth Avenue, New York, New York seeking a refund in the amount of $263,381.00.

On August 25, 1988, the Division denied said claim stating that petitioner was not entitled to the exemption set forth in Tax Law § 1443.2 since the premises were not occupied by the transferor as his residence. The denial letter makes specific reference to an opinion letter dated July 25, 1986 from Kenneth R. Wekler to Mr. E. A. Dominianni which previously set forth the same opinion of the Division.

On December 12, 1988, petitioner filed a claim for refund of the transfer gains tax seeking refund in the sum of $47,334.00, representing tax paid on the sponsor's retained unit on the fifteenth floor of 988 Fifth Avenue, New York, New York, on the basis that it was a transfer of real property for a consideration of less than one million dollars, that the unit was specifically not offered for sale as part of the condominium conversion Offering Plan and that the retained unit cannot be aggregated with any other transfer of real property pursuant to Tax Law § 1440.7.

On March 30, 1989, the Division denied said refund claim stating that it was its opinion that the unit was sold pursuant to the Offering Plan and that, in the alternative, the unit could be aggregated with the sale of the eighth floor since they were considered contiguous in sharing the same outside walls of the building.

OPINION

The Administrative Law Judge concluded that the transfers of the eighth and fifteenth floors did not qualify for exemption under section 1443(2) of the Tax Law, which exempts a transfer "[i]f the real property consists of premises occupied by the trasferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes)." The Administrative Law Judge rejected the contention that Mrs. Coudert's use of the property qualified it for the exemption, finding that Mrs. Coudert was not the beneficial owner of the property because "the trust was not held for her benefit nor were the trustees legally acting as her fiduciary" (Determination, conclusion of law "B"). The Administrative Law Judge determined that Mrs. Coudert was merely permitted by her children and the trustees to occupy the premises, her ownership rights having been terminated at the time she transferred her interest in Lion Brewery to the trusts. The Administrative Law Judge also stated that the

facts that the building was depreciated and that expense deductions were taken with respect to the property lead to the conclusion that the property had been used for business purposes which was contrary to the regulations at 20 NYCRR 590.24(d) defining the residential exemption.

The Administrative Law Judge also concluded, relying on our decision in Matter of Lion Brewery of New York City (Tax Appeals Tribunal, May 2, 1991) that the 15th floor was sold pursuant to the condominium Offering Plan dated July 23, 1979 as amended by the sixth amendment dated November 24, 1986 and was, therefore, properly aggregated with the sales of other units in the condominium.

On exception, petitioner argues that the Administrative Law Judge erred in basing his determination on the fact that the trust held legal title to the property. Instead, petitioner contends, the Administrative Law Judge should have found that petitioner held the beneficial ownership of the property based on economic reality. To support its contention, petitioner relies on two decisions of the Tax Court where the court refused to recognize the existence of a trust for Federal income tax purposes because in each instance there was no economic reality surrounding the transfers to the trust, other than the avoidance of Federal income taxes (Markosian v. Commissioner, 73 TC 1235; Furman v. Commissioner, 45 TC 360, affd 381 F2d 22, 67-2 USTC ¶ 9589). We find that these cases provide no support for petitioner's position.

First, these cases stand for the principle that the Commissioner of the Internal Revenue service can ignore a transfer and require a taxpayer to pay tax where the transfer was a sham entered into only to avoid tax. We think that this principle does not create an equal power in a taxpayer to obtain a tax benefit by characterizing a transfer as a sham. As the Division has pointed out, by citing Spector v. Commissioner (641 F2d 376, 81-1 USTC ¶ 9308, cert denied 454 US 868) and Harvey Radio Labs. v. Commissioner (470 F2d 118, 73-1 USTC ¶ 9121), Federal cases have found the taxpayer's power to challenge the form of a transaction as devoid of economic reality to be more limited than the Commissioner's.

Even if we found these cases legally relevant to the instant matter, petitioner has not made a factual showing that the instant trust was comparable to those in Markosian and Furman

and totally devoid of economic reality. For example, petitioner has not shown that the trustees of the trusts were legally powerless to control the trust property in contradiction to Mrs. Coudert's wishes. Instead, as the facts state, the trustees chose to act in contradiction to the powers given them under the trust by deferring decision making authority to Mrs. Coudert. Further, the record before us does not indicate that under the terms of the trusts the beneficiaries had no real economic interest in the property held by the trusts. Finally, the existence of the trusts and the trusts' ownership of the stock served a significant purpose, i.e., estate planning for Mrs. Coudert, and the trusts' ownership of the property was publicly acknowledged by the parties in the condominium Offering Plan. Considering all of the circumstances, we conclude that, unlike the trusts in Furman and Markosian, the instant trusts accomplished legal and economic objectives, vesting the beneficial ownership of the property in the trusts' beneficiaries. We agree with the Administrative Law Judge's conclusions that Mrs. Coudert retained no beneficial interest in the property and that she was merely permitted to reside there by the trustees and her children.

Next, we agree with the Administrative Law Judge's conclusion that the transfer of the property does not qualify for the residential exemption based on the use of the property by Mrs. Coudert's children, the beneficiaries of the trust. Neither of the children resided there since 1961, but Mrs. Coudert did. Thus, the circumstances are not like those in the February 10, 1988 letter of the Technical Services Bureau relied on by petitioner.

We also agree with the Administrative Law Judge that even if the existence of the trusts could be ignored, petitioner has not established that the corporation did not use the property as business property. The Division's regulations at 20 NYCRR 590.24(d) state as the general rule that a corporation cannot occupy premises as its residence, but "if the transferor can establish through all the facts and circumstances that the ownership and maintenance of the premises related solely to personal use and that the premises were never treated as business property (for example, it was not depreciated for Federal income tax purposes), the exemption may be allowed." Because the instant property was depreciated for Federal income tax purposes,

petitioner does not qualify for the exemption under the regulation. Petitioner has not challenged the validity of the regulation. With respect to petitioner's argument that the property was put to a mixed use and that "[a]lthough other apartments in the Building were at one time used and depreciated for tax purposes the Premises were used only as a personal residence," petitioner has not challenged the Administrative Law Judge's findings of fact that the entire building was depreciated and that the operating expenses for the entire building were deducted by petitioner annually.

Lastly, petitioner argues that the Administrative Law Judge erred in holding that the fifteenth floor should be aggregated with the other units sold under the Offering Plan, even though petitioner acknowledges that "it is true that the existence of the 15th floor rooms was referred to and taken into account in the Offering Plan, and the Sixth Amendment to the Offering Plan extended the term of the initial Offering Plan for purposes of the securities law regulations . . ." (Petitioner's brief, p. 14). Petitioner asserts that "[t]he Gains Tax law and the regulations thereunder apply a different set of standards than those applied by the New York condominium registration requirements under the New York securities law regulations" (Petitioner's brief, pp. 14-15). This assertion is contrary to the holdings of Matter of Lion Brewery of New York City (supra) and Matter of Albe Realty Co. (Tax Appeals Tribunal, March 26, 1992, affd Matter of Albe Realty Co. v. Tax Appeals Tribunal, ___ AD2d ___, 598 NYS2d 602, lv denied ___ NY2d ___ [Oct. 12, 1993]). Petitioner cites to no authority for its position other than a regulation, 20 NYCRR 590.45(d), which applies to the aggregation of interests acquired in an entity that owns real property and has nothing to do with sales pursuant to a condominium plan. Therefore, we affirm the determination of the Administrative Law Judge on the aggregation issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lion Brewery of New York City is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Lion Brewery of New York City are denied; and

4. The Division of Taxation's denials of petitioner's applications for a refund are sustained.

DATED: Troy, New York
December 9, 1993

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

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