STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LION BREWERY OF NEW YORK CITY	:	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.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 24, 1990 granting the cross motion for summary determination filed by petitioner Lion Brewery of New York City, c/o Coudert Brothers, 200 Park Avenue, New York, New York 10166 with respect to its 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 Nos. 807103 and 807267). Petitioner appeared by Coudert Brothers (Richard Horodeck, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Each party filed a brief on exception. Oral argument was heard on November 11, 1990 at the Division's request.

ISSUE

Whether the Administrative Law Judge erred in deciding that no material issue of fact existed with respect to whether the transfer of a condominium unit was pursuant to a condominium plan within the meaning of section 1440.7 of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Lion Brewery of New York City, is a New York real estate holding corporation created to own and hold certain real property located on Fifth Avenue in New York City. Lion

acquired this property in two stages. In May 1925, it purchased a parcel of land then known as 989 Fifth Avenue from the Justinian Construction Corporation. In December 1925, it purchased the parcel then known as 988 Fifth Avenue from Pauline Schmid Murray. An apartment building was constructed on this property in 1926.

Pauline Schmid Murray was the sole shareholder of the Lion Brewery and its first corporate officer. She resided in an apartment in the building built by Lion ("the Building") and was generally in charge of its management. All other apartments in the Building were rented to third parties.

Mrs. Murray died in 1931. Her shares of Lion stock passed by inheritance to her daughter, Paula Murray Coudert. At that time, Mrs. Coudert and her husband, Frederick R. Coudert, Jr., assumed the management of the Building, and for that purpose, they established their residence in the Building.

In or about 1940, Frederick R. Coudert, Jr., and Paula Murray Coudert moved into the Building's 8th floor apartment. They also took control of rooms located in the 15th floor apartment, including a maids' apartment. The 15th floor rooms were used principally to store Mr. and Mrs. Coudert's furniture. Lion did not collect rent for the 15th floor rooms which were considered part of the owner's residence.

Beginning in 1927, the Building was depreciated for Federal income tax purposes. In accordance with the common practice at that time, all expenses for the entire Building were deducted by Lion. The rental value of the apartment occupied by the Couderts was treated as a shareholder's dividend.

The original building structure was fully depreciated by 1977. Certain facts regarding the depreciation of the building remain in dispute. Petitioner claims that no depreciation expenses were taken on the original structure since 1967 and that no depreciable improvements were ever made to either the 8th floor apartment or the 15th floor rooms. The condominium offering plan states that the building structure was not fully depreciated until 1977, as was found here. Building improvements and equipment continued to be depreciated by Lion until 1981.

In 1971, Mrs. Coudert granted all of her shares in Lion to one or more trusts for the benefit of her two surviving children and their descendants. The parties submitted conflicting evidence regarding the number of trusts created. At the time she granted the shares to the family trust, it was understood by Mrs. Coudert, her children and her trustees that she would continue to occupy the 8th floor apartment and the 15th floor rooms for as long as she desired. It is not known whether this "understanding" was memorialized in writing or was included in any instrument creating a trust. It is also not known whether Mrs. Coudert or any other person or entity paid rent to Lion for her use of these properties.

In July 1979, Lion took steps to convert the Building to condominium ownership pursuant to an Offering Plan. At that time, the Building consisted of fourteen floors, with one apartment on each floor except the first. (The thirteenth floor was designated the fourteenth floor and omitted from the numbering of the floors.) The condominium sponsor (Lion) offered for sale 12 apartment units, i.e., the apartments occupying floors 2 through 12 and floor 14.

The Offering Plan states: "Mrs. Frederic R. Coudert, Jr. is a tenant of the Building, and will have voting rights like those of other individual Unit Owners if she chooses to purchase her apartment." Purchase prices were established in the Offering Plan for each of the 12 apartments offered for sale, including Mrs. Coudert's apartment on the 8th floor.

The Offering Plan identified the 15th floor unit as the "Sponsor's Retained Unit", consisting of nine maids' rooms and a terrace. It states that the sponsor's retained unit "is not being offered for purchase in this Plan." The sponsor reserved the right to convert the nine rooms and terrace into one or more apartment units suitable for residential occupancy and to sell the unit or units to third parties.

The percentage of interest allocated to the Sponsor's Retained Unit was 1.36 percent, and the sponsor accepted responsibility for paying the common charges attributable to its percentage of interest in the Building's common elements. Under the terms of the Offering Plan, the percentage of interest allocated to the 15th floor unit and its owner would increase from 1.36 percent to 4 percent following conversion into an apartment unit. The monthly common charges

of all other unit owners would then decrease proportionately, by a reduction in the percentage of interest of each in the common elements, from 8.22 percent to 8 percent. The Offering Plan contained this proviso: "[T]he conversion of the 15th floor unit is not certain at this time, and Sponsor does not guarantee that the conversion will occur and that the monthly common charges will be consequently changed".

The date of the first offering of the Offering Plan is July 23, 1979. The plan states: "This Offering Plan May Not be Used After January 23, 1982."

By the end of 1981, all of the units in the Building, other than the 8th floor apartment and the Sponsor's Retained Unit, had been sold to third parties pursuant to the Offering Plan. Mrs. Coudert continued to reside in the 8th floor apartment and to use the 15th floor rooms for storage until her death in September 1985. It is not known whether she paid rent to Lion during these years of occupancy.

The 8th floor apartment was sold on August 5, 1986 to Mr. and Mrs. John Irwin, III, for $2,900,000.00, of which $2,633,813.00 was gain. 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 8th floor apartment. Lion paid this tax and timely filed for a refund of tax paid.

The Sponsor's Retained Unit on the 15th floor was sold without renovation on December 10, 1986 for $499,990.00. The Division aggregated the transfer of the 15th floor unit with the transfer of the 8th floor apartment and determined a real property transfer gains tax due of $47,334.00 with respect to the sale of the 15th floor unit. Lion paid this tax and timely filed for a refund of tax paid.

Lion based its claim for refund of gains tax paid on the sale of the 8th floor apartment on its claim that the apartment should be distinguished from the other units offered for sale under the Offering Plan and treated as residential property eligible for the residential property exemption found at section 1443.2 of the Tax Law. The Division denied Lion's claim, stating in its letter of denial dated August 25, 1988:

> "It is the Department's position...that since the shareholders of Lion Brewery (three trusts, the beneficiaries of which are the children of

> Frederick R. Coudert, Jr.) do not occupy and use the eighth floor as a residence and since the property has been depreciated, the sale of the premises by the corporation would not be afforded the residential exemption from the Gains Tax as provided under Section 1443.2 of the Tax Law."

Lion based its claim for refund of gains tax paid on the sale of the 15th floor unit on two grounds. First, Lion asserted that the 15th floor rooms are also eligible for the personal residence exemption, since they were used by Mrs. Coudert as an extension of her personal residence. Second, Lion contended that the sales of the 8th floor apartment and 15th floor rooms were not subject to aggregation because the 15th floor rooms were not transferred pursuant to the Offering Plan. The Division denied Lion's refund claim by letter dated March 31, 1989. In that letter, the Division stated its position that the 15th floor rooms were sold pursuant to the Offering Plan. In addition, the Division took the position that the 8th floor apartment and 15th floor rooms are contiguous parcels in that they share outside walls of the same building and are thus subject to aggregation.

OPINION

The Administrative Law Judge denied the motion of the Division of Taxation (hereinafter the "Division") and petitioner's cross motion for summary determination with respect to the transfer of the 8th floor on the basis that there existed a question of fact about Mrs. Coudert's occupancy of the premises. Accordingly, the Administrative Law Judge ordered a hearing on this matter. With respect to the 15th floor, the Administrative Law Judge granted petitioner's cross motion for summary determination, holding that the 15th floor was not transferred pursuant to a condominium plan and, thus, the consideration for this floor could not be aggregated with the consideration received for the other floors in the building. The Administrative Law Judge's holding that the 15th floor was not sold pursuant to a condominium plan was premised upon her finding that this sale took place almost four years after the offering plan had expired and five years after the other floors, except the 8th, had been sold. The Administrative Law Judge also concluded that there was no other plan or agreement that would justify treating the sales of the

8th and 15th floors as a single transfer. Therefore, the Administrative Law Judge concluded that petitioner was entitled to a refund of the gains tax paid on the 15th floor.

On exception, the Division contends that the Administrative Law Judge erred in ruling that the 15th floor was not sold pursuant to a condominium plan. The Division argues that pursuant to the terms of the condominium offering plan petitioner reserved the right to sell the 15th floor in the future and made provisions for such sale. This fact, suggests the Division, clearly expresses petitioner's intention to sell all of the residential units in the building and renders the time interval between the sales and the status of the offering plan meaningless. As a result, the Division argues, the consideration from the sale of the 15th floor should be aggregated with all of the other sales.

In response, petitioner asserts that the facts upon which the Administrative Law Judge based her opinion, including the expiration date of the offering plan, are clearly supported in the record and apparently not contested by the Division. Further, the Administrative Law Judge's conclusion is in accord with the Division's policy, petitioner contends, as expressed in an advisory opinion and certain letter opinions. Petitioner also asserts that whether the offering plan expired at its stated expiration date or was subsequently amended is irrelevant, that the relevant fact is that the 15th floor was "not sold as part of the original Offering Plan pursuant to which the other apartments were sold" (Petitioner's brief on exception, p. 4).

We reverse the Administrative Law Judge and remand the matter for a hearing.

It is undisputed that the 15th floor was made subject to the provisions of Article 9-B of the Real Property Law, the Condominium Act (see, Condominium Declaration, attached to the offering plan as page 198). All units of a property made subject to the provisions of the Condominium Act are "deemed to be cooperative interests in realty within the meaning of section three hundred fifty-two-e of the general business law" (Real Property Law § 339-ee). Pursuant to section 352-e of the General Business Law (part of the Martin Act governing the sale of securities in New York State), the Attorney General requires sponsors proposing to sell cooperative interests in realty to file an offering plan prior to selling or offering for sale such real

estate securities. If the offering plan is not adequate to satisfy the informational requirements established by the Attorney General, the Attorney General may refuse to accept it and, thus, prevent the property from being sold or offered for sale (Council for Owner Occupied Hous. v. Abrams, 72 NY2d 553, 534 NYS2d 906, 907).

Given this regulatory scheme, it appears to us that the 15th floor, after having been submitted to the provisions of the Condominium Act, could only be sold by the sponsor pursuant to an offering plan filed with and approved by the Attorney General. Thus, the law itself calls into question the validity of a material fact, assumed to be undisputed by the Administrative Law Judge, i.e., that the offering plan pursuant to which the other ll floors had been sold had expired by the time the 15th floor was sold. Where a material issue of fact exists, summary determination should not be granted (see, Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 487 NYS2d 316).

We also find no basis for petitioner's contention that it is the Division's articulated policy not to require aggregation of units retained by a sponsor under an offering plan with other units sold pursuant to such plan. The documents to which petitioner has directed us do not establish such a policy. The advisory opinion upon which petitioner relies, TSB-A-90(6)R, holds that units held by a sponsor and transferred by his death are not aggregated with prior units sold by the sponsor because transfers by devise, bequest or inheritance are specifically excluded from the definition of "transfer of real property" at section 1440.7 of the Tax Law. The two private letter rulings issued by the Division, to which petitioner cites, dated January 9, 1986 and May 11, 1987, both involve apartments owned by the cooperative housing corporation, rather than by the sponsor of the offering plan. In such a situation, in order for the cooperative housing corporation to own the units, they must have already been transferred by the sponsor. Thus, the facts involved in the letter rulings are significantly different than those here and we have nothing before us that indicates that the Division has a policy as stated by petitioner.

Therefore, we conclude that the Administrative Law Judge erred in granting petitioner's motion for summary determination and we remand this matter for a hearing to allow for the complete development of the facts surrounding the sale of the 15th floor.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. To the extent that the determination of the Administrative Law Judge granted petitioner's cross motion for summary determination, it is reversed;

3. Petitioner's cross motion for summary determination is denied; and

4. This matter is remanded for a hearing to be held in conjunction with the hearing ordered by the Administrative Law Judge with respect to the transfer of the 8th floor.

DATED: Troy, New York
May 2, 1991

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

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

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