STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM H. SWAN	:	DECISION DTA No. 807371
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner William H. Swan, 48 Main Street, Hampton Bays, New York 11946 filed an exception to the determination of the Administrative Law Judge issued on May 14, 1992 with respect to his 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. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner submitted a letter brief together with his exception. The Division of Taxation filed a letter brief in response. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner's sales of certain lots should be aggregated pursuant to the aggregation clause of Tax Law § 1440(7).

FINDINGS OF FACT

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

In 1957, Dolphin Lane Associates, a limited partnership formed under the laws of New Jersey, acquired title to various parcels of land on the Quogue-East Quogue, New York sections of the beach barrier lying between the Atlantic Ocean and Shinnecock Bay in the Town of Southhampton, New York.

The partnership agreement of Dolphin Lane Associates provided that the partnership was formed "for purposes of holding real estate for investment and such other activities as are necessary to accomplish this basicpurpose." Reference was made in the partnership agreement to a contract for purchase of beach lands which included the parcels referred to above.

Petitioner, William H. Swan, was a limited partner in Dolphin Lane Associates. Petitioner was also one of four managers of the limited partnership.

Subsequent to the purchase by Dolphin Lane Associates of the lands referred to above, the limited partnership conveyed a portion of said lands to petitioner and another individual (also a manager of the limited partnership), as trustees who were charged with making a division and distribution of the lands conveyed pursuant to a plan submitted to the trustees by the Dolphin Lane Associates, who were the settlors of the trust.

Pursuant to the aforementioned plan, the trustees did distribute and convey the lands in question in a checkerboard pattern to the individual members of Dolphin Lane Associates for their own personal use and enjoyment.

The plan in question (referred to above) divided some 2,000 feet of ocean-front property into a three-row, 54-lot division as shown in Appendix "A" attached hereto.

The transfers as noted above from Dolphin Lane Associates to the trustees and from the trustees to the individual members of the limited partnership were made pursuant to a single deed dated September 20, 1957.

The division of lands into 54 lots referred to above was done prior to Southhampton Town zoning and before the subsequent creation of a Planning Board and, according to the practices of that day, no map was filed. The validity of these lots as pre-existing (albeit today non-conforming) zoning entities was preserved by the checkerboard pattern. This validity has been recognized by the granting of permits for some 15 homes, cabanas, and other structures on said lots in or about the early 1960's to early 1970's by the Town of Southhampton and other governmental bodies.

Throughout approximately 25 years following the acquisition of lots by the members of the limited partnership, transfers of title to the lots were among the individual associates (including petitioner) and their families. The lots were thus not put out for general sale during this time. Such transfers were always made in such a manner that separate ownerships were maintained in a checkerboard pattern.

Prior to entering into sales contracts in respect of the transfers at issue, petitioner owned whole or fractional interests in the following lots: 19, 21, 22 (19/20 share), 23 (½ share), 24, 25 (9/10 share), 26, 27 (9/10 share), 51 (¼ share), 52 (9/10 share), 53, 54 (9/10 share), 55 (9/10 share), 56, 57, 58, 59, 60 (¼ share), 61, 62 (½ share), 63 (19/20 share), 64 (9/10 share), 65 (¾ share) and 66. Lots 19, 24, 26, 27, 56, 57 and 58 were improved by cottages.

Petitioner subsequently did enter into contracts[1] for the sale of his interest in the lots described above with the following purchasers:

1226 Myron Street Corp.
2006 Antigua Bay
Boynton Beach, Florida 33424

1025 Regent Street Corp.
102 Rollingwood Drive
Taylors, South Carolina 29687

[1]The contracts were not entered into the record. Therefore, the date of execution of the contracts cannot be determined. It does appear (and is concluded) that the contracts were executed, at the very least, at a point or points close in time to one another.

3356 Lincoln Avenue Corp.
220 East Spring Meadow Boulevard
Holbrook, New York 11741

9768 Dean Street Corp.
P.O. Box 1262
Wainscott, New York 11975

2053 Garden Court Corp.
4649 Old Spartanburg Road
Taylors, South Carolina 29687

The contracts contemplated sales of petitioner's interests as described above to the purchasers listed above as follows:

Purchaser	Lots
1226 Myron Street Corp.	21, 25 (9/10 share), 55 (9/10 share), 63 (19/20 share), 66
1025 Regent Street Corp.	26, 23 (½ share), 52 (9/10 share), 64 (9/10 share)
3356 Lincoln Avenue Corp.	19, 24, 53, 61
9768 Dean Street Corp.	56, 57, 58, 59
2053 Garden Court Corp.	27 (9/10 share), 51 (¼ share), 60 (¼ share), 62 (½ share), 65 (¾ share), 22 (19/20 share), 54 (19/20 share)

On June 24, 1987, petitioner entered into five brokerage agreements with one John G. Strong, as broker, in respect of the transfers described above whereby petitioner agreed to payment of commissions for the transfers.

On July 2, 1987, petitioner entered into an agreement with 9768 Dean Street Corp. for the sale of furniture and household furnishings contained in the cottages located on lots 19, 24, 26, 27, 56, 57 and 58.

On or about July 6, 1987, petitioner executed five transferor questionnaires (Form TP-580) in respect of his transfer to the five transferee-corporations set forth above. Each of said transferor questionnaires listed a date of anticipated transfer of August 25, 1987.

The transfers to the five transferee-corporations did not occur on August 25, 1987.

Petitioner subsequently entered into a liquidated damage agreement, dated October 13, 1987, with three of the transferee-corporations: 9768 Dean Street Corp., 3356 Lincoln Avenue Corp., and 1226 Myron Street Corp. This agreement made reference to the sale of lands referred to herein and also that such sale or sales did not close on August 25, 1987 (as apparently required by the contracts of sale) because of a lack of financing by the purchasers. As a result, this agreement set forth liquidated damages to be paid to petitioner as a result of the default. Specifically, 9768 Dean Street Corp. and 3356 Lincoln Avenue Corp. each agreed to pay petitioner $125,000.00. Also, 1226 Myron Street Corp. and petitioner agreed to withdraw lot 66 from the sale and said transferee-corporation agreed to pay $135,000.00 (the amount contemplated as consideration for lot 66) as liquidated damages. The liquidated damage agreement was signed on behalf of 3356 Lincoln Avenue Corp. by a Russell Strong. The agreement was signed on behalf of 1226 Myron Street Corp. and 9768 Dean Street Corp. by a John E. Hurley, attorney-in-fact. The agreement indicated that Mr. Hurley was attorney-in-fact of a Fiona Mason, principal of 9768 Dean Street Corp. and also of a Veronica Dunn, principal of 1226 Myron Street Corp.

We modify finding of fact "18" to read as follows:

> The transfers of land as described above (less lot 66) ultimately occurred on November 12, 1987. The original purchase prices submitted by petitioner on his Transferor Questionnaires were disallowed by the Division in its Tentative Assessments as not verified by petitioner. Although petitioner stated his opposition to this disallowance in his Claim for Refund, he did not raise it as an issue at any time before the Administrative Law Judge. Therefore, the "gain subject to tax" on each transfer remains the figure calculated by the Division, i.e., the purchase price of the transfer less the brokerage fees owed by petitioner, the transferor. The consideration, brokerage fees and gain subject to tax in respect of the transfers were as follows:

Transferee-Corporation	Purchase Price	Brokerage Fees	Gain Subject to Tax
1226 Myron Street Corp.	$774,625.00	$82,690.00[2]	$691,935.00
1025 Regent Street Corp.	742,375.00	67,490.00	674,885.00
3356 Lincoln Avenue Corp.	982,500.00	89,320.00	893,180.00
9768 Dean Street Corp.	950,000.00	86,370.00	863,630.00
2053 Garden Court Corp.	960,562.50	87,320.00	873,242.50[3]

Petitioner paid gains tax totaling $399,687.25 in respect of the subject transfers at the time of the transaction and subsequently filed a claim for refund. By letter dated October 20, 1988, the Division denied petitioner's refund claim.

Petitioner submitted with his transferor questionnaires an affidavit to the effect that the subject transfers were not pursuant to an agreement or a plan to effectuate by partial or successive transfers a transfer which would otherwise be subject to gains tax. At hearing, petitioner submitted an affidavit which contained an identical statement.

OPINION

The Administrative Law Judge determined that, in accordance with Tax Law § 1440(7) and 20 NYCRR 590.43, petitioner has failed to establish that the transfers in question were not made pursuant to a plan to avoid paying gains tax. Specifically, the Administrative Law Judge found that, aside from petitioner's general statement that the transfers in question were not made pursuant to a plan to avoid paying gains tax, petitioner was unable to prove that his intent at the time of the transfers "as manifested by his acts and the facts and circumstances surrounding the transfers" was not indicative of such a plan (Determination, p. 8, quoting, 20 NYCRR 590.43[a]). The Administrative Law Judge enumerated the factors that compelled his determination, as follows: (1) the lots in question are contiguous and adjacent beach properties used for a common purpose of personal use and investment; (2) petitioner used the same broker to arrange each of the five transfers; (3) the contracts in question all appear to have been

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[2]Because of a typographical error, the Administrative Law Judge listed this figure as $82,290.00.

[3]We modified the Administrative Law Judge's finding of fact "18" by adding sentences two through four in order to provide an explanation for the calculation of the "gain subject to tax" figures used in the chart.

executed within a short period of time; (4) all of the transfers closed on the same day; (5) there is reason to suspect a relationship among at least three of the transferees (i.e., they may have been acting in concert) since three transferees executed a single liquidated damages agreement due to a lack of financing, and two of these three used the same individual as attorney-in-fact to draft the agreement; and, finally, (6) petitioner produced no evidence pertaining to the manner in which the property in question was offered for sale, "i.e., whether individual lots were offered separately or whether the lots were offered in their entirety" (Determination, p. 8).

In view of all of these factors "tending to show a plan or agreement within the meaning of Tax Law § 1440(7)," the Administrative Law Judge held that the Division of Taxation (hereinafter the "Division") acted properly in aggregating the consideration for each of the five transfers in question (Determination, p. 8). Therefore, the Administrative Law Judge upheld the Division's denial of petitioner's refund claim.

On exception, petitioner asserts that he has clearly demonstrated his entitlement to the claimed refund, as he has proven that the transfers in question were not made pursuant to a plan or agreement to avoid the gains tax. Specifically, petitioner cites the Administrative Law Judge's finding of fact "5" -- that the lots in question were distributed to the members of Dolphin Lane Associates "for their own personal use and enjoyment" -- to be a finding "dispositive" of the matter in favor of petitioner (Petitioner's brief on exception, p. 1). Petitioner explains that where property is subdivided "'with a view' toward sale of the subdivided pieces of the pie," the Division is authorized to aggregate the separate pieces in order to "tax the entire pie" (Petitioner's brief on exception, p. 1). To the contrary, maintains petitioner, where, as here, the property is not subdivided with a view towards sale, the Division lacks the authority to aggregate the separate parcels.

In response, the Division asks that the Administrative Law Judge's determination be upheld and that petitioner's refund claim be denied. The Division stresses that petitioner may only claim a refund by establishing that the subject transfers qualify for an exemption, under Tax Law

§ 1443, from the aggregation clause of Tax Law § 1440(7), and that petitioner has failed to carry his burden of proving entitlement to such an exemption.

While the Division agrees with the Administrative Law Judge's emphasis on the various factors which contributed to his conclusion, the Division also points out that "the Legislature clearly did not intend that aggregation under Tax Law § 1440(7) is to be triggered only if the transferor engages in partial or successive transfers for purposes of tax avoidance . . . " (Division's reply brief, p. 2, quoting, Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127). Rather, the Division notes, the aggregation provision would properly apply if a seller adopts an agreement or plan to dispose of an entire parcel of land which, but for the structuring of the transfer into partial or successive transfers, would have been subject to the real property transfer gains tax (citing, Matter of Cove Hollow Farm v. State of New York Tax Commn., supra). The Division urges that the Administrative Law Judge correctly found that the evidence in the record indicated that petitioner had such a plan or agreement to dispose of his entire interest in the property in question.

In sum, the Division contends that the aggregation clause of Tax Law § 1440(7) and the applicable regulation, 20 NYCRR 590.43, require the aggregation of the consideration received for all five transfers. The Division adds that, in particular, the first sentence of section 1440(7) is applicable in denying petitioner's refund claim because this section contains a "look through" principle "that requires . . . looking through an entity to determine whether a taxable 'transfer of real property' has taken place" (Division's reply brief, p. 3, quoting, Matter of Von-Mar Realty Co., Tax Appeals Tribunal, December 19, 1991). The Division maintains that for petitioner to establish that multiple transferees existed, petitioner is required to explain the beneficial ownership of the individuals behind the corporate transferees. Since petitioner has failed to provide any information in this regard, argues the Division, i.e., and, therefore, it must be assumed that the beneficial owner of each of the corporate transferees is one and the same person or entity, petitioner could still establish entitlement to the exemption only if he could meet the

dual requirements of 20 NYCRR 590.42. That is, petitioner would have to prove both that "the only correlation between the properties is the contiguity or adjacency itself," and that "the properties were not used for a common or related purpose" (Division's reply brief, p. 3, citing 20 NYCRR § 590.42, Matter of Eff & Zee Co., Tax Appeals Tribunal, April 16, 1992). As petitioner has not proved either -- much less both -- of these things, contends the Division, petitioner has failed to prove entitlement to the exemption from gains tax and, therefore, his refund claim was properly denied.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1441 imposes a 10% tax upon gains derived from the transfer of real property within New York, unless it can be established that the consideration received by the transferor is less than $1,000,000.00 (Tax Law § 1443[1]). Tax Law § 1440(7) defines "transfer of real property" as: "[t]he transfer or transfers of any interest in real property by any method, including but not limited to sale . . . ." The "aggregation clause" found in sentence three of section 1440(7) further provides that:

> "[t]he transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article . . . ."

Petitioner seems to cling to the notion that since he provided an affidavit at the hearing below to the effect that the subject transfers were not made pursuant to such a plan or agreement, he has somehow proven that he is exempt from the aggregation clause and, thus, from the gains tax. However, the courts and this Tribunal have determined that a simple declaration to this effect, in and of itself, is not sufficient to prove qualification for an exemption (see, Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692). As the Executive Land Corp. court held:

> "the plaintiffs' interpretation of [section 1440(7)] is incorrect as it would allow any transferor to claim exclusion from the gains tax simply by stating that he is not acting pursuant to a plan to avoid the tax. That is not a

> rational interpretation of the statute, nor of its clear underlying legislative purpose" (Executive Land Corp. v. Chu, supra, 545 NYS2d 354, 357).

Based on the evidence here, as interpreted by the Administrative Law Judge and as affirmed by this Tribunal, there are indeed facts regarding the subject transfers which are sufficiently inconsistent with petitioner's sworn statement to overcome its effect. Namely, these factors are that: (1) the lots in question are contiguous and adjacent beach properties used for a common purpose of personal use and investment; (2) petitioner used the same broker to arrange each of the five transfers; (3) the contracts in question all appear to have been executed within a short period of time; (4) all of the transfers closed on the same day; (5) there is reason to suspect a relationship among at least three of the transferees (i.e., they may have been acting in concert) since three transferees executed a single liquidated damages agreement due to a lack of financing, and two of these three used the same individual as attorney-in-fact to draft the agreement; and, finally, (6) petitioner produced no evidence pertaining to the manner in which the property in question was offered for sale, "i.e., whether individual lots were offered separately or whether the lots were offered in their entirety" (Determination, p. 8).

According to 20 NYCRR 590.43, the regulation promulgated pursuant to Tax Law § 1440(7), a transferor may provide a sworn statement attesting to the fact that the subject properties are/were not conveyed pursuant to a plan, but:

> "[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" (20 NYCRR 590.43; 590.43[a]).

The regulations of this Tribunal clearly place the burden of proof on petitioner (see, 20 NYCRR 3000.10[d][4]). In consideration of this fact, we are in agreement with the Administrative Law Judge, for the reasons cited above, that petitioner has not refuted the inferences of a plan or agreement, as evidenced by the circumstances. In addition, because the Division has specifically raised the use of the "look through principle" in these proceedings, we note that our support of

the Administrative Law Judge's determination includes his allusion to the fact that petitioner did not conclusively prove that at least three of the transfers were made to multiple, rather than to a single, transferees. Where multiple sales are made to a single transferee, the sales are treated as a single transfer, pursuant to section 1440(7) of the Tax Law, without regard to whether the transferor had a plan to make the sales (see, Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d, 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003; see also, 20 NYCRR 590.42; but see, Matter of General Builders Corp., Tax Appeals Tribunal, December 24, 1992 [where a single transfer was not found, even though petitioner transferred adjacent properties to related transferees, because from petitioner's prospective the transfers were to two unrelated transferees and petitioner had no control over the subsequent assignment of the contracts of sale]).

The other argument petitioner has raised is that the properties were originally conveyed to him for his personal use and enjoyment rather than for resale and, therefore, cannot have been transferred pursuant to a section 1440(7) plan. However, as the Division aptly notes, the limited partnership agreement relating to the property in question established that the purpose of the partnership was for holding real estate for investment (see, Division's reply brief below, p. 2; Exhibit "1"). Furthermore, as the Division also points out, even if such an argument were valid, a conveyance of land to petitioner from his partnership for personal use and enjoyment does not, in and of itself, prove that petitioner did not himself later devise a plan to dispose of his entire interest in the subdivided property (see, Division's reply brief below, p. 2).

Petitioner is reminded that he has the burden of establishing a clear entitlement to the exemption claimed under section 1443 of the Tax Law (see, Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027). Petitioner's argument is insufficient to overcome his burden of establishing that he did not transfer the subject properties pursuant to a section 1440(7) plan and that he is, therefore, entitled to an exemption from the gains tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner William H. Swan is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of William H. Swan is denied; and

4. Petitioner William H. Swan's claim for refund is denied.

DATED: Troy, New York
January 14, 1993

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

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

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