

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MATTHEW AND MARILYN MINZER	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 807437
of Real Property Transfer Gains Tax 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 July 2, 1992 with respect to the petition of Matthew and Marilyn Minzer, 40 Dickenson Place, Great Neck, New York 11023. Petitioner appeared by Carol A. Hyde, Esq. The Division of Taxation appeared by William F. Collins, Esq (Andrew J. Zalewski, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioners filed a brief in response. The Division of Taxation filed a letter brief in reply to petitioners' brief. Oral argument was heard on December 10, 1992 which began the six-month time period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the consideration for the transfer of seven condominium units located in three separate condominiums should be aggregated for purposes of the real property transfer gains tax.

FINDINGS OF FACT

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

1. Petitioners submitted 22 findings of fact that have been incorporated in the following findings of fact unless otherwise indicated.
2. Petitioners, Matthew and Marilyn Minzer, purchased the following seven condominium units on the dates and from the purchasers listed below:

<u>Unit</u>	<u>Date Purchased</u>	<u>Seller(s)</u>
19 78th Street	4/21/80	Cloverdale Realty at Howard Beach, Inc.
25 77th Street	7/31/84	Warren and Mindy Chervin
27 77th Street	2/5/85	Steven and Laura Pegalis
7 78th Street	4/21/80	Cloverdale Realty at Howard Beach, Inc.
15 79th Street	approx. 11/1/82	Beaufort Cloverdale Realty Co., Inc.

(Petitioners purchased a ½ interest in this unit in November 1982. The other interest was purchased by Harvey and Kathryn Wachsman at the same time. In November 1986, the petitioners purchased the Wachmans' ½ interest.)

33 79th Street	2/25/85	Beaufort Cloverdale Realty Co., Inc.
23 79th Street	approx. 11/1/82	Beaufort Cloverdale Realty Co., Inc.

(Petitioners purchased a ½ interest in this unit in November 1982. The other interest was purchased by Steven and Laura Pegalis. In February 1985, the petitioners purchased the Pegalis' ½ interest.)

3. The seven condominium units each consist of a two-family house located within three different condominiums. Each condominium is bordered by 156th and 157th Avenues and is separated from the others by a public street (78th and 79th Streets).

4. Two units, (19 78th Street and 7 78th Street) were located in Cloverdale at Howard Beach Condominium ("Cloverdale I"); two other units (25 77th Street and 27 77th Street) were located in Cloverdale at Howard Beach Condominium II ("Cloverdale II"); and three units (15 79th Street, 33 79th Street, and 23 79th Street) were located in Cloverdale at Howard Beach Condominium III ("Cloverdale III").

5. Cloverdale I was sponsored by Cloverdale Realty at Howard Beach, Inc., pursuant to an offering plan dated December 14, 1978. Cloverdale II was sponsored by Sapphire Cloverdale

Realty Co., Inc., pursuant to an offering plan dated September 22, 1979. Cloverdale III was sponsored by Beaufort Cloverdale Realty Co., Inc., pursuant to an offering plan dated November 15, 1980. In the respective offering plans, all three sponsors had their principal office listed at 142-12 41st Avenue and had the same three stockholders: Eli Bluestone, Norman Bluestone and Harold Bluestone.¹

6. In the offering plans, it was provided that the purchaser of a unit would own the unit in fee simple absolute and that the common elements of the community would consist of:

"all of the Community, except the Homes, including but without limitations, outside walls and roofs of Homes, the land, buildings and improvements (other than the Homes) comprising the Community (including the land under the Homes and under the improvements), front, rear and side yards irrevocably restricted in use to certain Home Owners, and all utility or other pipes and material located outside of the Homes."

7. Of the seven units, only two units within a single condominium are located next to each other (25 77th Street and 27 77th Street). The two units located in Cloverdale I and three units located in Cloverdale III are separated by other units within the respective condominiums.²

8. On October 5, 1988, petitioners entered into an agreement granting to Business & Brokerage Placement Associates, Ltd. an option to purchase, expiring on March 31, 1989, one or more of nine units, seven of which were the units described in Finding of Fact "2" and two of which were located respectively at 79-15 157th Avenue, Howard Beach, N.Y. and 156-11 79th Street, Howard Beach, N.Y. The purchase price for each condominium unit was \$290,000.00 for a total consideration of \$2,610,000.00 if the purchaser bought all nine condominium units.

¹In their proposed finding of fact "9," petitioners stated that the three condominiums each had their own bylaws, Board of Managers, officers, budget, bank accounts, insurance and house rules. In support of these allegations petitioners refer to the three offering plans submitted into evidence by the Division. However, while each offering plan has provisions concerning the individual condominium's by-laws, Board of Managers, officers, budget, bank accounts, insurance and house rules, it cannot be concluded from these offering plans alone whether each condominium had, in fact, its own Board of Managers, officers, budget, bank accounts, insurance and house rules that did not overlap with each other.

²In their proposed finding of fact "10," petitioners stated that only two of the seven units were contiguous or adjacent to one another and that the other five units were neither contiguous nor adjacent to the other units owned by them. This finding of fact is rejected only to the extent it referred to the terms "contiguous" or "adjacent" inasmuch as these terms are terms of art involving a legal interpretation discussed infra in the conclusions of law.

9. By letter agreement, dated November 1, 1988, the option contract was amended to exclude the two units located at 79-15 157th Avenue and 156-11 79th Street. The purchase price for each of the remaining seven units remained at \$290,000.00. It is unclear from the record whether petitioners still retained ownership of these two units or whether they own any other units in the three condominiums other than the nine units described in Findings of Fact "2" and "7". In their petition dated October 4, 1989, petitioners allege that, except for the seven units at issue, the remaining units in each condominium were owned by persons having no relation to them. The petition was signed by petitioners' representative, Carol A. Hyde. No further proof was offered by way of affidavit or documentary evidence to support this statement.

10. On November 17, 1988, petitioners sold three of the condominium units to Business & Brokerage Placement Associates, Ltd., pursuant to the amended option agreement. The three units sold at that time were 19 78th Street, 25 77th Street, and 27 77th Street.

11. On February 28, 1989, petitioners sold the remaining four condominium units to Business & Brokerage Placement Associates, Ltd., also pursuant to the amended option agreement. The four units sold were 7 78th Street, 15 79th Street, 33 79th Street, and 23 79th Street.

12. Prior to these sales, petitioners and Business & Brokerage Placement Associates, Ltd., filed gains tax questionnaires with respect to the purchase of 19 78th Street showing gain in the amount of \$176,841.00. They also filed questionnaires with respect to the purchases of 25 77th Street and 27 77th Street aggregating the gain for both in the amount of \$228,882.00. Separate transferor questionnaires were also filed with respect to the purchases of 7 78th Street and 15 79th Street.

13. The Division of Taxation ("Division") issued a tentative assessment and return, dated November 16, 1988, computing gains tax in the total amount of \$86,109.50 as follows:

<u>Assessment</u>	<u>Property Address</u>	<u>Amount of Tax</u>
C40271-0001	Cloverdale at Howard Beach Condominium I 19 78th Street Howard Beach, NY	\$18,600.00
C40271-0002	Cloverdale at Howard Beach Condominium II 25 77th Street Howard Beach, NY	\$11,750.00
C40271-0003	Cloverdale at Howard Beach Condominium II 27 77th Street ³	\$12,250.00
C40271-0008	Cloverdale at Howard Beach Condominium I 7 78th Street Howard Beach, NY	\$17,450.80
C40271-0009	Cloverdale at Howard Beach Condominium III 15 79th Street Howard Beach, NY	\$ 7,544.50
C40271-0010	Cloverdale at Howard Beach Condominium III 33 79th Street Howard Beach, NY	\$ 8,575.80
C40271-0011	Cloverdale at Howard Beach Condominium III 23 79th Street Howard Beach, NY	\$ 9,938.40

14. Petitioners paid gains tax at the time of the sale of the seven units in the total amount of \$86,109.50. On July 11, 1989, petitioners submitted a refund claim to the Division for the full amount of the tax paid alleging that there was no basis for aggregating the sales under the theory that they were contiguous or adjacent or the theory that the transfers were made pursuant to a

³In their proposed finding of fact "2," petitioners mistakenly referred to this condominium unit as located at 27 78th Street (instead of "77th" Street) at Howard Beach Condominium I (instead of Condominium II).

cooperative or condominium plan. Petitioners contended that the aggregation clause under the statute only applies to sponsors of a condominium plan and not to purchasers under the plan who are not affiliated with the sponsors and who subsequently sell their interest. Petitioners also argued that because the units sold were located in three separate condominiums, and with the exception of two units (25 77th Street and 27 77th Street), were not located next to each other within the same condominium, five of the units were not contiguous or adjacent for purposes of aggregation.

15. By letter dated August 23, 1989, the Division denied the refund claim. It stated that the sales of the condominium units by the taxpayers were still made pursuant or subject to the condominium plan even though they were not the sponsors. The Division also contended that the condominium units were adjacent to each other because the units within a single condominium shared common areas and that the three condominiums in which the units were located were contiguous or adjacent to each other, separated only by a public street and were sponsored by corporations all owned by the same people.

16. By petition dated October 4, 1989, petitioners challenged the denial of refund stating, inter alia, that only two of the seven condominium units are adjacent or contiguous to one another and that the aggregate consideration for the two adjacent units did not exceed \$1 million.

17. The Division filed an answer dated April 26, 1990. In its answer, the Division denied knowledge or information sufficient to form a belief as to whether the units, other than the seven sold, were owned by persons, other than petitioners, having no relation to petitioners.

OPINION

The Administrative Law Judge determined that the seven condominium units were not contiguous or adjacent within the meaning of 20 NYCRR 590.42 because the units were separated from each other, with the exception of those at 25 and 27 77th Street, by other privately-owned condominium units. The Administrative Law Judge held that the fact that the owner of a condominium unit has an undivided interest in, and the right in common to use, the common elements of the respective three condominiums was not a sufficient basis for finding the

seven units adjacent or existing as a single economic unit. The Administrative Law Judge also concluded that the units were not transferred pursuant to a plan within the meaning of section 1440(7) of the Tax Law because the instant transfers were not pursuant to the initial offering plan, but, instead, involved a subsequent sale by a purchaser under the plan.

On exception, the Division argues that the Administrative Law Judge erred in her determination because she failed "to properly consider that the real property transferred consists not solely of the condominium unit but also of the appurtenant undivided interest in the common elements as well" (Division's brief on exception, p. 9). The Division urges that if the real property interests appurtenant to the condominium units, i.e., the common elements, are considered, the properties are contiguous or adjacent.

In response, petitioners argue that the units were not contiguous or adjacent because they were separated by dozens of units owned, in fee simple absolute, by third parties. With respect to the ownership interest in the common elements, petitioners assert that each unit owner had the exclusive and irrevocable right to use the driveway, the land beneath, and the front, rear, and (if any) side yards abutting their unit and that these irrevocably restricted areas encompassed virtually all of the land within the condominium with the exception of the sidewalks. Petitioners contend that though they had an ownership interest in all the common elements, as a practical matter, they had no right to use or even to enter upon any of the land within the condominium beyond the sidewalks and the areas restricted to their own units. Petitioners also stress that the seven units are in three separate condominiums and that only the condominiums as a whole, and not the specific units in question, were across the street from each other. Petitioners conclude that under the totality of these circumstances the units cannot be considered as adjacent.

We affirm the determination of the Administrative Law Judge.⁴

It is undisputed that this controversy depends on the meaning of adjacent in the Division's regulation at 20 NYCRR 590.42, which provides that the considerations received by a transferor

⁴In doing so, we have not considered the factual material submitted by petitioners with their brief on exception that was not submitted to the Administrative Law Judge (see, Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989).

for the transfer of contiguous or adjacent parcels of property to one transferee are to be added together for purposes of applying the \$1 million exemption. In Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), adopting the ordinary, everyday meaning of adjacent, we concluded that adjacent included properties that were nearby, but not touching. In this case, the Division argues that the seven units are nearby each other and, thus, adjacent.

The Division seeks to link the physically separated units through petitioners' ownership interest in the common elements of each of the three condominiums. Petitioners held their undivided interest in the common elements of each condominium jointly with all of the other unit owners in each condominium (Real Property Law §§ 339-e[5] and 339-i). The Division does not assert that the three condominiums had unit owners, other than petitioners, in common (cf., Matter of Lee, Tax Appeals Tribunal, October 15, 1992; Matter of Brooks, Tax Appeals Tribunal, September 24, 1992 [where the transfer of separate parcels was treated as a single transfer because the facts indicated that the owners of the parcels were not independent of each other]). Therefore, the connection between the three condominiums relied on by the Division is simply that of petitioners' undivided interest in each. We agree with the Administrative Law Judge that this interest is not a sufficient basis to find the seven units adjacent or existing as a single economic unit (see, Matter of Calandra, *supra*). Of course, our decision on these facts is not intended to, and does not, decide the case where the units are all in the same condominium.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Matthew and Marilyn Minzer is granted; and

4. The refund claim of Matthew and Marilyn Minzer is granted.

DATED: Troy, New York
May 20, 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