STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALBANY PUBLIC MARKETS, INC.	:	DECISION DTA No. 807968
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 Albany Public Markets, Inc., c/o Weis Markets, Inc., P.O. Box 471, Sunbury, Pennsylvania 17801 filed an exception to the determination of the Administrative Law Judge issued on November 14, 1991 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. Petitioner appeared by Douglas A. Winner and R. Michael Cortez, employees of petitioner. The Division of Taxation appeared by William F. Collins, Esq. (Paul Lefebvre, Esq., of counsel).

Petitioner did not submit a brief in support of its exception. The Division of Taxation submitted a letter in lieu of a brief in response to petitioner's exception. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether the Division of Taxation properly treated the sale of two contiguous properties to one transferee as a single transfer of property pursuant to Tax Law § 1440(7).

II. Whether the Division of Taxation properly disallowed the expenses incurred by petitioner for accounting and appraisal fees in calculating the original purchase price.

FINDINGS OF FACT

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

Petitioner, Albany Public Markets, Inc. ("APM"), is the wholly-owned subsidiary of Weis Markets, Inc., ("Weis") a Pennsylvania corporation. In 1967 APM purchased two parcels of land (Parcel 1 and Parcel 2) located in Colonie, New York from a partnership consisting of three individuals whowere also the former shareholders of APM. The real property was acquired in connection with the acquisition by Weis of all of the stock of APM. Parcel 1 and Parcel 2 were acquired by separate deeds and were transferred to APM on the same date, November 30, 1967.

In October 1986, APM contracted to sell substantially all of its business assets to Grand Union Company, including Parcels 1 and 2. APM filed separate gains tax questionnaires for each parcel of land to be transferred. Each questionnaire is dated October 17, 1986, and each indicates that the anticipated date of transfer was to be October 31, 1986, the date upon which the transfer actually occurred.

Attached to the questionnaire for Parcel 1 is a document entitled "SUPPLEMENTAL DOCUMENTATION TO NEW YORK STATE REAL PROPERTY TRANSFER GAINS TAX". The document states: "The selling price of the two non-contiguous parcels has been allocated based on an appraisal of their fair market value". An attached copy of the relevant provisions of the selling agreement between APM and Grand Union describes the two parcels of land with buildings and improvements as the "Distribution Center" and recites one purchase price ($3,600,000.00) for both. Petitioner did not provide a copy of the appraisal referred to. On the same document, petitioner indicated that independent documentation showing the purchase price of the properties was not available; therefore, the purchase prices were determined based upon amounts recorded in APM's books and records. The purchase price of Parcel 1 is shown as $1,443,143.00 consisting of land with a purchase price of $297,440.00 and

building and improvements with a purchase price of $1,145,703.00. To this, petitioner added selling expenses of $20,000.00, resulting in an original purchase price of $1,622,057.00. Petitioner reported gross consideration to be paid for Parcel 1 of $3,085,200.00, yielding a gain subject to tax of $1,622,057.00.

Petitioner's selling expenses consisted of two items: a payment to a Pennsylvania law firm and a payment to an accounting firm. The amount of each payment was not reported.

The questionnaire filed for Parcel 2 claimed that the transfer was exempt from gains tax on the basis that consideration for the transfer was less than $1,000,000.00. A schedule attached to the questionnaire states that the selling price of the two parcels was allocated based upon an appraisal of fair market value and indicates that the allocation for Parcel 2 is $514,800.00. Information regarding the purchase price of Parcel 2 was included with the questionnaire for Parcel 1. It states that, based on APM's books and records, the purchase price was determined to be $108,455.00, representing the cost of land ($49,630.00) and the cost of "improvements" ($58,825.00).

Grand Union Company filed one questionnaire for both parcels, indicating a single purchase price of $3,600,000.00.

On October 23, 1986, the parties executed an addendum to their sales agreement containing the following provision: "With respect to the Distribution Center described in paragraph 1 of the Agreement, it now appears that the Statement of Tentative assessment and Return (the 'Statement of Assessment') to be issued by the New York State Department of Taxation and Finance under Article 31-B of the Tax Law of the State of New York (the 'Gains Tax') will not be received within the time for Closing. Accordingly, the parties agree that they shall close under the Agreement, 'in escrow'...."

By letters dated December 2, 1986 and December 5, 1986, petitioner submitted additional information to the Division of Taxation (hereinafter the "Division"). The letter of December 2, 1986 indicates that petitioner previously submitted statements of sale for the two parcels executed at the time of their transfer to APM. Based on those statements, petitioner asserted

that the cost of the parcels should be adjusted as follows: the cost of Parcel 1 was asserted to be $1,316,723.00 consisting of land valued at $171,020.00 and building and improvements valued at $1,316,723.00; the cost of Parcel 2 was asserted to be $234,875.00 consisting of land valued at $176,050.00 plus building and improvements valued at $58,825.00. Petitioner then stated its position that the consideration paid by Grand Union should be allocated between the two parcels of land based on each parcel's proportionate cost of land and improvements. Thus, petitioner calculated that the consideration paid for Parcel 1 was $3,060,000.00 and the consideration paid for Parcel 2 was $540,000.00.

The letter of December 5, 1986 was in the form of an affidavit signed by Richard L. Wetzel, Vice President-Accounting, and stated petitioner's position regarding aggregation of the two parcels of land. Mr. Wetzel stated that Parcel 1 contained a warehouse and office building and was used in petitioner's business of operating retail grocery stores, while Parcel 2 was a vacant lot and was held by APM as a passive investment. He also stated that since the parcels were not used for a common or related purpose they were not subject to aggregation.

On December 15, 1986, the Division issued to petitioner a Tentative Assessment and Return calculating a total tax due of $204,840.00 based on the aggregation of the consideration received for Parcel 1 and Parcel 2 and allowing no adjustments for selling expenses.

Petitioner paid the tax and filed a claim for refund in the amount of $32,641.00, calculated as follows:

	Parcel #1	Parcel #2
Sales Price	$3,060,000.00	$540,000.00
Less allocated expenses	(21,288.00)	(3,757.00)
Net Sales Price	3,038,712.00	536,243.00
Cost	1,316,723.00	234,875.00
Gain	1,721,989.00	301,368.00
Gain Subject to Tax	1,721,989.00	None
Tax Due	172,199.00	None
Tax Paid	204,840.00	None
Refund Due	$ 32,641.00	None

By letter dated September 13, 1988, the Division denied petitioner's claim for refund. Petitioner then made a timely request for a conciliation conference. In connection with that conference, petitioner submitted certain documents to the conferee which were later submitted into the record of this hearing. These documents were the basis for a recalculation of tax due by the Division.

Petitioner submitted itemized statements of account from its law firm and accounting firm for services rendered in connection with the sale of the assets of APM.

Petitioner submitted a letter prepared by Hafner Appraisal Associates, Inc., reporting the results of an inspection of the subject property. The appraisal company clearly stated that a complete appraisal had not been made and that the field inspection did not constitute a complete appraisal. The appraisal company estimated the value of the property in issue as follows:

Improved Lot	$ 375,000.00	to	$ 420,000.00
Vacant Lot	325,000.00	to	360,000.00
Building Improvements	1,500,000.00	to	1,700,000.00

The letter describes the warehouse and office building situated on the improved lot and states: "The warehouse area is at truck height. An interior rail siding area is located at the east side of this section which can accommodate 5 average sized rail cars". The letter does not indicate that a railroad track or siding is located on the vacant lot. Although petitioner, in several documents, speaks of the properties as "non-contiguous", the appraisal company's letter describes the properties as follows: "The subject building sits on a 13.968 +/- acres parcel of land and is additionally adjoined by a 12.056 parcel of excess land <u>located adjacent and to the south of the improved lot</u>" (emphasis added).

To substantiate its claim that the original purchase price of the two parcels of land was $345,000.00, petitioner submitted minutes of a Special Meeting of the Board of Directors, excerpts from the original purchase contract and notes from APM's 1967 financial statements. Copies of statements of sale, essentially worksheets prepared in connection with the closing, show an allocation of $175,000.00 for the 12.056 acre lot and $170,000.00 for the 13.968 acre lot. All other documents refer to an unallocated purchase price of $345,000.00.

In a letter transmitting the documents described, petitioner's representative stated: "Another issue raised related to the improvements in the amount of $58,025 made to Parcel 2. The amounts were expended for the construction of a railroad siding. We have enclosed a copy of the original general ledger account card to support this expenditure". The account card shows that APM depreciated the value of the railroad track and siding from 1967 through 1975.

Based upon all of the documentation submitted during the course of the conciliation conference, the Division recalculated petitioner's tax deficiency as follows:

Consideration	$ 3,600,000.00
Acquisition	345,000.00
Capital Improvements	1,204,528.00
Selling Expenses	14,599.00
Gain	2,035,873.00
Tax Due	203,587.00
Interest (10/31/86 - 12/23/86)	2,827.43
Total Due	206,414.73
Less Payment (12/23/86)	(204,840.20)
Balance Due thru 12/23/86	1,574.53
Interest thru 10/31/89	450.78
Balance due as of 10/31/89	2,025.31

Selling expenses as calculated by the Division included legal fees but not accounting or appraisal fees.

On October 31, 1989, the Division issued to petitioner a notice of determination of tax due under article 31-B of the Tax Law in the amount of $26,817.93. The notice shows a calculation of tax and interest reflecting the calculations shown above. In addition, the notice assessed penalty in the amount of $24,430.48 for the period October 31, 1986 through

December 23, 1986 and penalty in the amount of $362.14 for the period December 24, 1986 through October 31, 1989.

Petitioner applied for a conciliation conference to challenge the denial of its refund claim. The notice of determination was not issued until the conciliation proceedings were underway. By order dated December 22, 1989, the conferee denied petitioner's request for a refund of tax paid and also sustained the statutory notice. Petitioner filed a petition with the Division of Tax Appeals on March 21, 1990. At hearing, the Division conceded that the notice of determination was the subject of the conciliation conference and, thus, the petition was conceded to be timely with regard to both the claim for refund and the challenge to the correctness of the notice of determination.

By its petition, petitioner reiterated its position that the two parcels of land in question were not used for a common or related purpose. Petitioner's position rests, in part, on certain factual assertions: that the vacant parcel of land was not purchased to allow petitioner access to the developed parcel; that it was not necessary for petitioner to obtain the vacant parcel of land in order to make use of the railroad siding located on the developed parcel; that the vacant parcel was not acquired in contemplation of expansion of APM's warehouse and office facilities; and that petitioner's only purpose in acquiring the vacant parcel was as a passive investment.

The documents submitted in evidence contain conflicting descriptions of the two parcels of land involved in this transfer. Several documents refer to Parcel 1 as 13.968 acres of land upon which a warehouse and office building are situated (Transferor Questionnaire; Petitioner's Claim for Refund; letter to the Division dated December 2, 1986; letter to the Division dated December 5, 1986; letter to the State Tax Commission dated February 10, 1987; letter from appraisal company dated August 18, 1986; Petition to the Division of Tax Appeals). These documents are in conflict with others indicating that the improved lot contained 12.056 acres of land (Notes to APM's financial statement dated October 28, 1967; Agreement of Sale dated October 31, 1967). Petitioner claims that an easement was granted to New York Central

Railway on the vacant lot and petitioner identifies the vacant lot as the parcel containing 12.056 acres; however, the deeds offered in evidence establish that the easement was on the 13.968 acre parcel of land. The appraiser's letter states that the vacant lot is located to the south of the improved lot, and the deeds establish that the 13.968 acre parcel is located to the south of the 12.056 acre parcel. The following description of the two parcels of land is based on a reconciliation of assertions made by petitioner with the deeds to the two parcels of land.

Parcel 1 consists of 12.056 acres upon which an office building and warehouse are located. The property line begins 1,000 feet to the south of Central Avenue in Colonie, New York. Ingress and egress to Parcel 1 from Central Avenue is over Jupiter Lane. At the time Parcel 1 was purchased by APM, Jupiter Lane ended at roadways extending into Parcel 1. There are railroad tracks and a siding on Parcel 1 which allow railroad cars to pull into the warehouse for unloading. Parcel 1 was used by APM as an integral part of its operation of a retail grocery business.

Parcel 2 is essentially a vacant lot containing 13.968 acres of land. It adjoins Parcel 1 and lies to the southwest of it. Parcel 2 is subject to an easement granted to New York Central Railroad. The easement is approximately 24 feet wide and runs from Parcel 2's border with Parcel 1 south to lands owned by the railroad. There is a railway track and siding on Parcel 2 which existed at the time APM acquired the property. It was built by the prior owners of Parcel 2. Parcel 2 is also subject to the following easement: "a right of way and easement for ingress and egress from Central Avenue over Jupiter Lane . . . . Said easement . . . for the use of [APM], its employees, customers and invitees. The easement shall terminate when Jupiter Lane is accepted as a public street by the Village of Colonie."

At the time APM purchased the two parcels, it believed that the existing warehouse and office building would be sufficient to meet any future expansion needs of the retail grocery business. There was no intention of developing Parcel 2 in connection with APM's operation of that business. APM's parent company, Weis, regularly invested in real estate, stocks, bonds and

other securities. Weis had been informed that Jupiter Lane would eventually be extended into an industrial park area which would enhance the value of Parcel 2.

After filing gains tax questionnaires in October 1986, petitioner was contacted by the Division and asked to submit additional information. After several conversations with a Division employee, petitioner's representative was left with the impression that "there existed uncertainty in the Department as to handling of properties which were not considered to be used for a common or related purpose" (Affidavit of Richard L. Wetzel). The Division requested additional information to support petitioner's contention that the two parcels of land were not used for a common or related purpose. The Division also requested additional information to substantiate petitioner's claimed selling expenses. At the time the transfer of property took place, petitioner had not yet received a tentative assessment from the Division, and it decided not to pay the tax until such an assessment was received. For that reason, it entered into an agreement to escrow the consideration for the real property transfer until the amount of tax due was determined by the Division.

OPINION

In her determination below, the Administrative Law Judge concluded that Parcel 1 and Parcel 2 were contiguous. Furthermore, the Administrative Law Judge decided that petitioner did not establish that the only correlation between the parcels was their contiguity and, thus, she held that aggregation of the transfers was proper. The Administrative Law Judge noted that although petitioner's intent at the time of purchase may have been to maintain Parcel 2 as an investment, both parcels were, in fact, used for a common or related purpose. The Administrative Law Judge reached her conclusion based on the following facts: (1) that Parcel 2 was used by petitioner to gain railway access to Parcel 1, (2) that the easement on Parcel 2 was necessary to connect Parcel 1 with lands owned by the railway, (3) that the former owners of Parcel 2 built the railroad tracks and siding which were used by the railway to travel to Parcel 1, and (4) that petitioner carried the siding on its books and records as an asset of the corporation and continued to depreciate it over a period of years.

The Administrative Law Judge also noted that petitioner's proof with respect to the proper valuation of Parcel 2 supported the aggregation of the parcels. The Administrative Law Judge reasoned that the sales contract between petitioner and the former owners of the property cited one unapportioned sales price for both parcels of land, as did the contract between petitioner and Grand Union.

With respect to the accounting and appraisal fees, the Administrative Law Judge upheld the Division's disallowance of such fees and she also noted that she did not have jurisdiction to hear petitioner's claim concerning the constitutionality of the regulation regarding allowable fees. Lastly, the Administrative Law Judge upheld the penalty imposed by the Division for petitioner's failure to pay any tax due on the date of transfer.

In its exception, petitioner argues that Parcel 1 and Parcel 2 were not used for a common or related purpose. Petitioner states that the easement over Parcel 2 was used by the railroad, not petitioner, to gain railway access to Parcel 1 and that Parcel 2 was already subject to this railway easement when petitioner purchased Parcel 2. Petitioner further disagrees with the Administrative Law Judge's conclusion that the record established that Parcel 2 was used by petitioner to service Parcel 1. Petitioner claims that Parcel 2 was never used by petitioner and that its only interest in Parcel 2 was as an investment.

Moreover, petitioner argues that the unapportioned sales price for both parcels is irrelevant in determining whether aggregation is proper in this case. Petitioner points out that the agreement between it and Grand Union clearly states that the sale consists of two separate tracts of land. Petitioner states that the parcels have two deeds, two separate and distinct legal descriptions, had two transfer taxes paid and were considered by the parties to be two separate parcels of land. Petitioner asserts that:

> "[t]he fact that, for administrative ease, the two parcels, along with the buildings and improvements located thereon, are transferred at the same time for a single purchase price is simply irrelevant when considering whether they were used for a common and related purpose" (Petitioner's exception, p. A-1).

Lastly, petitioner disagrees with the narrow interpretation given to Tax Law § 1440(5)(a) in disallowing accounting and appraisal fees which, it contends, any reasonable interpretation of this section would allow. Petitioner states that this narrow interpretation unfairly limits and interferes with its right to contract. Petitioner has not taken exception to the Administrative Law Judge's determination not to abate penalty.

In response, the Division asserts that the Administrative Law Judge properly found that the properties had a common and related use. The Division also contends that its legal position, as set forth at pages 40-45 in the hearing transcript, was improperly rejected by the Administrative Law Judge and, thus, the Division reasserts that argument as well as the conclusions reached by the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1441 imposes a ten percent tax on the gains derived from the sale of real property located within New York State where the consideration received for such transfer is $1 million or more (Tax Law §§ 1441; 1443[1]). The "transfer of real property" is defined, in pertinent part, to include "the transfer or transfers of any interest in real property by any method" (Tax Law § 1440[7]).

The regulation at 20 NYCRR 590.42 codifies the Division's interpretation of this first sentence of Tax Law § 1440(7) (Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003). This regulation states, in relevant part, that:

> "the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property . . . . However, if the transferor establishes 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, the consideration will not be aggregated" (20 NYCRR 590.42, emphasis added).

Therefore, as Parcel 1 and Parcel 2 are contiguous, petitioner bears the burden to prove the negative requirements set forth in the above quoted regulation.

In support of its argument that the property was not used for a common or related purpose, petitioner excepts to the Administrative Law Judge's conclusion that Parcel 2 was used by petitioner to gain railway access to Parcel 1. Petitioner claims that, in fact, the easement over Parcel 2 was used by the railroad to gain railway access to Parcel 1 and that it is irrelevant whether petitioner or the railroad had the obligation to maintain the railroad tracks.

The Administrative Law Judge found it significant, and we agree, that petitioner carried the railroad track and siding on Parcel 2 as an asset on the books and records of the corporation and depreciated this asset over a period of years. In our view, this fact evidences a proprietary interest in the track and siding and a business use of Parcel 2 that is linked to Parcel 1. Petitioner has not negated either of these by simply asserting that the railroad held the easement. Therefore, we agree with the Administrative Law Judge's reasoning and conclude that the properties were used for a common or related use.

The other requirement outlined in the regulation, that "the only correlation between the properties is their contiguity or adjacency itself," also creates a significant hurdle to petitioner in light of its broad language.[1]

> "The use of such language is consistent with the expansive definition of 'transfer of real property' which was designed to maximize revenues (Tax Law § 1440[7]; Matter of Bombart v. Tax Commn. of the State of New York, supra; Matter of Iveli v. Tax Appeals Tribunal, supra). We read this requirement in a manner consistent with this legislative intent - to comprehensively tax real property transfers - to allow separate gains tax treatment of contiguous properties only in the rare instance that the nature of the properties at issue had no kinship whatsoever, except their physical proximity" (Matter of Von-Mar Realty Co., Tax Appeals Tribunal, December 19, 1991).

As the Administrative Law Judge noted, the two parcels here were acquired from a single grantor on the same date under a single contract of sale, which stated a single, unapportioned price for both parcels. The parcels were held by petitioner for the same length of time and

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[1]Previous cases and decisions have supported the conclusion that two separate showings are required under 20 NYCRR 590.42 by a taxpayer seeking to defeat the aggregation of contiguous or adjacent properties (Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55; Matter of Bombart v. Tax Commn. of the State of New York, 132 AD2d 745, 516 NYS2d 989 [whether the properties were used for a common or related purpose]; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988 [whether the only correlation between the properties is their contiguity or adjacency itself]).

transferred by petitioner to a single purchaser, through a single sales contract. The sales contract pursuant to which petitioner transferred the properties stated one unapportioned amount for the two parcels which were referred to as the "Distribution Center." Finally, as discussed above, petitioner treated the railroad tracks and siding on the easement of Parcel 2 as a business asset, and the tracks and siding were used to link Parcel 1 with the railroad. Given these facts, we conclude that petitioner has not established that the only correlation between the properties was their contiguity or adjacency.

With respect to petitioner's argument concerning the disallowance of accounting and appraisal fees, the statute states, in pertinent part, that:

> "[o]riginal purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property . . . " (Tax Law § 1440[5][a]).

The statute does not provide for the allowance of accounting or appraisal fees and, thus, we conclude that the Division properly disallowed such amounts.

Lastly, in its letter in lieu of a formal brief, the Division states that one of its legal positions argued at the hearing of this case was improperly rejected by the Administrative Law Judge in her determination. Since we have sustained the determination issued by the Administrative Law Judge, we need not address this alternative argument set forth by the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Albany Public Markets, Inc. is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Albany Public Markets, Inc. is denied; and

4. The Notice of Determination issued on October 31, 1989 is sustained.

DATED: Troy, New York
August 27, 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