

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KIM POY LEE, EUNICE TAN,	:	DECISION
HUGH KEE LEE, ET AL.	:	DTA No. 808244
	:	
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.	:	

Petitioners Kim Poy Lee, Eunice Tan, Hugh Kee Lee, Bob Y. Lee, Douglas Yuen, Hong Wah Lee and David Lee, c/o Barbara Boner, Esseks, Hefter & Angel, 108 East Main Street, Riverhead, New York 11901 filed an exception to the determination of the Administrative Law Judge issued on February 13, 1992 with respect to their 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. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Petitioners' request for oral argument was denied.

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

ISSUE

Whether petitioners' sale of certain lots should be aggregated pursuant to Tax Law § 1440(7).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2" and "5" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

The real property involved in this matter consists of four parcels of land located in East Moriches, New York. Three of the parcels are situated side by side with frontage on one side of Head of Neck Road. The fourth parcel fronts on Head of Neck Road across from the other three parcels.

Parcel 1 was transferred from Hannah Edgerton to Hugh K. Lee, Yuet Ling Eng and Lillian M. G. Yuen by deed dated September 16, 1966. Lillian M. G. Yuen transferred her interest in Parcel 1 to Douglas Yuen and Eunice Tan by deed dated June 3, 1972. Information in the record indicates that Yuet Ling Eng's interest was transferred by deed dated April 17, 1979, but there is nothing in the record which indicates the identity of the transferee involved.

Parcels 2 and 4 were transferred from Paul R. Warner to Lee Yick, Inc. by deed dated March 4, 1964. Parcel 4 was conveyed from Lee Yick, Inc. to Douglas and John, Inc. by deed dated June 10, 1964. Pursuant to plans of liquidation dated December 24, 1985, Lee Yick, Inc. and Douglas and John, Inc. transferred Parcels 2 and 4, respectively, to petitioners on December 22, 1986.

Parcel 3 was transferred by Lila Barber, et al., to George K. Lee, Hugh K. Lee and Kim Poy Lee by deed dated May 25, 1966. George K. Lee, at the time of his death in 1981, was married to Eunice Tan.

The corporations Lee Yick, Inc. and Douglas and John, Inc. filed their certificates of incorporation with the Department of State on December 10, 1963 and February 20, 1964, respectively. Both certificates were signed and filed by George K. Lee. Sang Lee Farms, Inc. filed its certificate of incorporation on March 23, 1955. The certificate indicated that the directors and equal shareholders of the corporation were George K. Lee, Kim Poy Lee and Lew Yoke Foon. At the time of the transfer involved in this matter, the three shareholders of Sang Lee Farms, Inc. were Hugh Lee, Eunice Tan and Kim Poy Lee.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

Prior to the transfers involved herein, the four parcels were leased by petitioners to Sang Lee Farms, Inc. which used them in a farming operation that raised Chinese vegetables. Sang Lee Farms, Inc. leased 500+ acres for its operations, and the four parcels at issue comprise approximately 161 of the 500+ acres. Rent was not charged to the corporation, but the corporation paid the insurance and real estate taxes and generally maintained the property. There were no fences which separated the parcels and none of the petitioners used any of the parcels as their residences.¹

David Lee and Kim Poy Lee are brothers as was the late George K. Lee. As previously mentioned, Eunice Tan was married to George K. Lee and is also the sister of Douglas Yuen. Hong Wah Lee, Bob Y. Lee and Hugh K. Lee are not related to each other or to any other petitioner.

On December 26, 1985, four contracts of sale were executed for the sale of Parcels 1 through 4 to John and J. Scott Prudenti. The seller(s) and purchase price for each parcel as indicated by the contracts of sale were as follows:

<u>Parcel</u>	<u>Price</u>	<u>Seller(s)</u>
1	\$152,217.91	Hugh K. Lee, Eunice Tan, Douglas Yuen
2	986,679.00	Lee Yick, Inc.
3	151,723.99	Hugh K. Lee, Eunice Tan, Kim P. Lee
4	361,260.00	Douglas and John, Inc.

The contracts were identical in form. The four contracts were signed by David Lee under a power of attorney from the other petitioners. The same real estate broker was utilized for all sales. All four contracts contained cross-default provisions, making a default on one of the contracts a default on all the contracts. Each contract was contingent upon the purchasers obtaining conditional final approval for a major subdivision of the four parcels. The closings of title were contingent upon each other and were to occur simultaneously. The sellers had an option, under each of the contracts, to take back one purchase money mortgage to encumber all four parcels. The contracts also provided that the purchaser was to continue to rent the parcels to Sang Lee Farms, Inc., at no cost, until April 15, 1987.

¹Finding of fact "2" was modified to include the acreage used by Sang Lee Farms, Inc. in its operations, and to mention what portion of this acreage is attributable to the four parcels at issue.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

On February 26, 1987, the closings of title occurred simultaneously on the four parcels. Petitioners were represented by the same attorney. Appearing at the closing on behalf of petitioners were Douglas Yuen and David Lee, pursuant to the aforementioned power of attorney. The attorney for petitioners received the proceeds of the sale and then distributed it to the individual petitioners based upon their respective interests in the parcels being sold. At the time of the closing, the transferors of each parcel were as follows:

<u>Parcel 1</u>	<u>Parcel 2²</u>	<u>Parcel 3</u>	<u>Parcel 4³</u>
Eunice Tan Hugh K. Lee Douglas Yuen	Eunice Tan Hugh K. Lee Douglas Yuen Kim P. Lee Bob Y. Lee Hong Wah Lee David Lee	Eunice Tan Hugh K. Lee Kim P. Lee	Eunice Tan Hugh K. Lee Douglas Yuen Kim P. Lee Bob Y. Lee Hong Wah Lee David Lee

The interests held by each of the transferors in each of the parcels are as follows: parcels 1 and 3 -- each transferor held a 1/3 interest; parcels 2 and 4 -- each transferor held a 2/13 interest except for Hong Wah Lee, who held a 1/13 interest in parcels 2 and 4.⁴

The Division of Taxation (hereinafter the "Division") aggregated the consideration from all four parcels for purposes of the real property transfer gains tax. On August 15, 1988, petitioners filed a claim for refund in the amount of \$159,687.19. The basis of the claim was that (1) the Division improperly aggregated the consideration received on the sale of the four parcels, and (2) the original purchase price ("OPP") of \$217,296.82 was not claimed by petitioners on pre-audit. In response to the claim for refund, the Division allowed the OPP as claimed, resulting in a refund of \$489.08. The aggregation of the four parcels was upheld by the Division, which explained its reasons as follows:

²Interests were distributed by Lee Yick, Inc. to petitioners on December 22, 1986.

³Interests were distributed by Douglas and John, Inc. to petitioners on December 22, 1986.

⁴Finding of fact "5" has been modified by the addition of the last line which describes the interests held by each of the transferors in the parcels at issue.

"[T]he Department takes the position that where there is mutuality of interest between transferors or where one transferor is controlling the acts of another transferor, such transferors are treated as a single transferor unless it can be shown otherwise.

The facts presented in this case indicate a mutuality of interest existed, as supported by the following:

- 1) The four contracts of sale were executed on the same date and were identical, in form, except for property description and purchase prices.
- 2) The same broker was utilized for all four sales with all broker agreements dated January 9, 1987.
- 3) All four contracts were contingent upon the purchaser obtaining conditional final approval for a major subdivision of the four parcels.
- 4) All four parcels were leased to Sang Lee Farms, Inc. by sellers and would continue to be leased to Sang Lee Farms, Inc. by purchasers.
- 5) A default by purchaser on any one of the contracts constitutes a default on all four contracts.
- 6) The closings of title were contingent upon each other.
- 7) The closings did in fact occur on the same date, February 26, 1987."

OPINION

The Administrative Law Judge determined that the facts and circumstances do not support a finding that the several transferors were separate and independent; rather, he found that the situation displayed a commonality of purpose. The Administrative Law Judge also found that 20 NYCRR 590.43(b) was inapplicable to the situation, as that regulation contemplates several separate and independent transferors each holding an undivided interest in a parcel of land. Further, the Administrative Law Judge determined that aggregation was proper, as the facts support the conclusion that the sale of the four parcels was pursuant to a plan or agreement which would otherwise be subject to gains tax. Finally, the Administrative Law Judge dismissed the applicability of Matter of Howes (Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 552 NYS2d 972) because Howes concerned, in effect, one owner selling the residential and

business portions of one building, whereas the present situation involves several owners and several parcels.

On exception, petitioners assert that under the clear, unambiguous language of 20 NYCRR 590.43(b) aggregation is not applicable because there are several transferors selling to one transferee. Further, petitioners assert that Matter of Howes (supra) is applicable because it stands for the proposition that aggregation is appropriate only on a transferor-by-transferor basis.

In response, the Division relies on the determination of the Administrative Law Judge and its post-hearing brief. Further, the Division asserts that aggregation is proper at either the entity or shareholder level, and that petitioners have misinterpreted the holding in Matter of Howes (supra) in their attempt to support their assertion that aggregation at the shareholder level should result in an exemption.

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

Tax Law § 1441 imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. Tax Law § 1443(1) provides that a partial or total exemption shall be allowed if the consideration is less than \$1,000,000.00. As a general rule, statutes which provide for exemptions from tax must be strictly construed, and the taxpayer must clearly demonstrate that it is entitled to the exemption (see, Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158).

The term "transfer of real property" is defined in Tax Law § 1440(7) which provides, in part, as follows:

""[t]ransfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale . . ." (emphasis added).

The third sentence of Tax Law § 1440(7), the "aggregation clause," provides:

""[t]ransfer 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 . . ." (emphasis added).

The aggregation clause affects the application of the \$1,000,000.00 exemption because the proceeds from the transfers that are treated as a single transfer are aggregated to determine the applicability of the exemption.

However, the aggregation clause is not applied in certain situations (see, 20 NYCRR 590.42 and 590.43). Petitioners assert that the facts of this case warrant a granting of relief under a literal reading of 20 NYCRR 590.43(b). This regulation provides, in relevant part, as follows:

"Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:

* * *

"(b) Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?

"Answer: The consideration is not aggregated, even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors" (emphasis added).

20 NYCRR 590.43(b) is inapplicable to these facts, as it addresses situations where several transferors each holds a separate parcel; the present situation concerns several parcels, but each is held by several, not one, transferors. However, 20 NYCRR 590.43(b) is relevant for the principle it sets forth, i.e., that transfers of contiguous parcels by independent parties to one transferee will not be aggregated (see, Matter of Brooks, Tax Appeals Tribunal, September 24, 1992). Also relevant, but not directly applicable, is 20 NYCRR 590.43(d), which states:

"Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:

* * *

"(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?

"Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the

consideration is \$1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property" (emphasis added).

20 NYCRR 590.43(d) sets forth the principle that, when determining the applicability of the \$1 million exemption, the total consideration paid for jointly owned property is the figure to be examined. Each party's proportionate interest in the proceeds is relevant only in regard to his/her liability for the gains tax due on the transaction.

The application of the principles set out in 20 NYCRR 590.43(b) and (d) provides the basis upon which this case is resolved. Petitioners have testified as to the relationships between the parties generally (Tr., pp. 19, 20-22), and have offered evidence demonstrating the ownership interest each party held in the parcels. However, petitioners have failed to demonstrate the independence of the parties involved.

Our decision in Matter of Brooks (*supra*) illustrates the point. In Brooks, we concluded that one individual, B.V. Brooks, held the beneficial interest in all of the parcels transferred by him and corporations in which he held an interest. This decision was based, in part, on the level of control which B.V. Brooks had over the purchase, distribution, and eventual sale of the parcels. However, underlying this conclusion was the lack of evidence supporting the petitioners' assertion that the transfers were conducted by several, independent parties.

It is this lack of evidence which determines our decision in this case. It was incumbent upon petitioners, who dispute the appropriateness of the aggregation, to produce evidence which clearly demonstrates that they were entitled to an exemption from the gains tax (Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55; 20 NYCRR 3000.10[d][4]).

Factors which support the Division's position that aggregation is appropriate include the following: David Lee and Kim Poy Lee are brothers and Eunice Tan and Douglas Yuen are brother and sister (Tr., p. 19); Eunice Tan had been married to George Lee (now deceased), who was the brother of David and Kim Poy Lee; the parcels sold comprised approximately 161 acres of the 500+ acres leased and used by Sang Lee Farms, Inc. (Exhibit "M"); Sang Lee Farms'

principals at the time of the sale at issue were Hugh K. Lee, Kim Poy Lee, and Eunice Tan (Tr., pp. 25, 29; Exhibit "M"); all of the interests in each of the parcels sold were conveyed at the same time, through the same transaction, to the same purchaser; and each petitioner had an interest in at least two of the four parcels: parcel 1 had three owners -- Eunice Tan, Hugh K. Lee, and Douglas Yuen -- each owning 1/3; parcel 2 had seven owners -- Eunice Tan, Hugh K. Lee, Douglas Yuen, Kim Poy Lee, David Lee, Bob Y. Lee, and Hong Wah Lee -- each owning 2/13 except for Hong Wah Lee, who held only a 1/13 interest; parcel 3 had three owners -- Eunice Tan, Hugh K. Lee, and Kim Poy Lee -- each owning 1/3; and parcel 4 had seven owners -- Eunice Tan, Hugh K. Lee, Douglas Yuen, Kim Poy Lee, David Lee, Bob Y. Lee, and Hong Wah Lee -- each owning 2/13 except for Hong Wah Lee, who held only a 1/13 interest.

Petitioners have failed to offer evidence which clearly demonstrates that aggregation was not proper under these circumstances (see, Matter of Sanjaylyn Co. v. State Tax Commn., supra). Petitioners' position is based solely on their interpretation of 20 NYCRR 590.43(b) and the decision in Matter of Howes (supra). The inapplicability of 20 NYCRR 590.43(b) has already been addressed above; the reliance on the Howes decision is misplaced.

Howes concerned the interaction of two exemptions allowed under the gains tax law: the exemption of transfers for less than \$1,000,000.00 (Tax Law § 1443[1]) and the exemption of transfers of residential property (Tax Law § 1443[2]). Specifically, Howe concerned how the exemptions apply to the sale of one parcel of mixed use property. After the order in which the exemptions were to apply was addressed, and gains tax was determined to be due, the petitioner's proportional beneficial interest in the taxable portion of the proceeds was established so that the amount of gains tax properly due from the petitioner could be calculated. These are not the issues before us in this case. Therefore, Matter of Howes is inapplicable.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Kim Poy Lee, Eunice Tan, Hugh Kee Lee, Bob Y. Lee, Douglas Yuen, Hong Wah Lee and David Lee is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of petitioners Kim Poy Lee, Eunice Tan, Hugh Kee Lee, Bob Y. Lee, Douglas Yuen, Hong Wah Lee and David Lee is denied and the Division of Taxation's denial of petitioners' refund claim is sustained.

DATED: Troy, New York
October 15, 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