

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EDWARD AND JEAN A. MEIXSELL	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 808311
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioners Edward and Jean A. Meixsell, P.O. Box 1263, Longwood, Florida 32752, filed an exception to the determination of the Administrative Law Judge issued on May 13, 1993. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation resubmitted its hearing brief and also submitted a document entitled "Meixsell Exception Comments." Petitioners filed a reply brief on December 3, 1993, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether transfers of two parcels of property known as Dentrac Shopping Plaza and Scott Shopping Plaza, respectively, were properly subjected to real property transfer gains tax by the Division of Taxation.

II. Whether, assuming the transfers were properly subject to tax, the amount of gain subject to tax may be reduced by allowance of any original purchase price for said parcels.

III. Whether, again assuming the transfers were properly subject to tax, petitioners have nonetheless established sufficient grounds to warrant reduction or abatement of penalties imposed.

FINDINGS OF FACT

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

On June 8, 1988, the Division of Taxation ("Division") issued to petitioners, Edward and Jean A. Meixsell, husband and wife, a two-page Statement of Proposed Audit Adjustment. This statement contains, on its first page, an explanation for the Division's proposed imposition of real property transfer gains tax on petitioners' transfers of two parcels of property, as follows:

"Section 1440.7 of the Tax Law provides in part that the transfer of real property will include partial or successive transfers. Sections 590.42 and 590.43 of the Gains Tax Regulations provide that the separate deed transfers of contiguous or adjacent properties is, for the purposes of the Gains Tax, a single transfer of real property. To determine the application of the one million dollar exemption, the consideration for each transfer is to be aggregated. However, if the transferor can establish 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 would not be aggregated."

The Statement of Proposed Audit Adjustment provides, at page 2, the following calculations of tax, penalties and interest with respect to the properties in question:

	<u>Parcel 1</u>	<u>Parcel 2</u>
Consideration:	\$850,000.00	\$800,000.00
Brokerage: (No Documentation)	-0-	-0-
Original Purchase Price: (No Documentation)	-0-	-0-
Gain Subject to Tax	850,000.00	800,000.00
Gains Tax Rate	x <u>10%</u>	x <u>10%</u>
Gains Tax Due	85,000.00	80,000.00
Penalty & Penalty Interest	x <u>35%</u>	x <u>35%</u>
Penalty & Penalty Interest Due	29,750.00	28,000.00
Interest: 5/12/87 - 7/1/88	<u>8,002.81</u>	<u>7,532.07</u>
Total Tax; Penalty & Penalty Interest; Interest	<u>\$122,752.81</u>	<u>\$115,532.07</u>

On May 26, 1989, the Division issued to petitioners a Notice of Determination of Real Property Transfer Gains Tax Due under Tax Law Article 31-B ("gains tax") assessing tax due in the amount of \$165,000.00, plus penalty and interest.

The two parcels of property at issue herein are known as Dentrac Shopping Plaza ("Parcel 1") and Scott Shopping Plaza ("Parcel 2").

Parcel 1, located in and around 7th Street and Lake Avenue in Smithtown, Suffolk County, Long Island, New York, was purchased by petitioner Edward Meixsell on or about January 6, 1961 from Rosendo Latalladi and Antonia Latalladi. Thereafter, on May 1, 1964, title to Parcel 1 was transferred to a corporation known as Dentrac Shopping Plaza, Inc. ("Dentrac"). Dentrac had been organized and incorporated on or about December 18, 1963. Its sole incorporator and 100% shareholder was Edward Meixsell. Parcel 1 was subsequently improved and developed into a shopping plaza including a five-store strip mall.

Parcel 2 was purchased by Edward Meixsell from one Joan Swensson on or about July 13, 1962. Parcel 2 was, and is, adjacent to Parcel 1. Title to Parcel 2 was subsequently transferred to a corporation known as Scott Plaza, Inc. ("Scott") on or about September 24, 1970. Scott was incorporated in August 1968 by Edward Meixsell, who was Scott's sole shareholder. Parcel 2 was subsequently improved and developed in or about 1971 into a shopping center including seven stores.

Petitioner Edward Meixsell was president of Dentrac and of Scott. Petitioner Jean A. Meixsell served as secretary/treasurer of both corporations.

Dentrac held title to and operated Parcel 1 for approximately 22 years until 1986. Scott held title to and operated Parcel 2 for some 16 years until 1986.

At some point in time, unspecified however in the record, ownership of 100% of the shares of Dentrac was transferred from Edward Meixsell as sole shareholder to Jean A. Meixsell. The circumstances of this transfer were described in petitioners' three exhibits offered in evidence, to wit, affidavits made by Edward Meixsell, Jean A. Meixsell and one Frank G. Finkbeiner, who was the attorney for each petitioner and for the two corporations. The reasons

for the transfer of shares from Edward Meixsell to Jean A. Meixsell were described in similar (nearly identical) terms in each of such three affidavits. Generally stated, the transfer was made in furtherance of "sound business and financial advice by various professionals [including] Frank G. Finkbeiner, Esq." More specifically, according to the affidavits Edward Meixsell transferred 100% of the corporate stock of Dentrac to Jean A. Meixsell upon advice by counsel that he should divest himself of certain assets, including Dentrac's stock, for purposes of "estate tax planning, in order to utilize the \$600,000.00 Internal Revenue Code unified credit. Moreover, [Mr. Meixsell] was further advised that other financial and economic purposes would be achieved including, but not limited to, a limitation on personal liability and [advantageous] long-term health care planning."

The affidavits do not specify the date of the stock transfer, noting only that it was "previous" to the December 22, 1986 liquidation of Dentrac (discussed hereinafter). The three affidavits describe the stock transfer as follows:

Affidavit of Edward Meixsell

"That, [on December 22, 1986] Jean A. Meixsell was the sole shareholder of Dentrac Shopping Plaza, Inc. That, following sound business and financial advice by various professionals and Frank Finkbeiner, Esq., the attorney for myself, my wife, and the corporations Dentrac Shopping Plaza, Inc. and Scott Plaza, Inc., your deponent had previously transferred one hundred percent (100%) of the corporate stock of Dentrac Shopping Plaza, Inc. to my wife, Jean A. Meixsell. That, I had been advised by counsel to divest myself of certain assets, including the Dentrac Shopping Plaza, Inc. stock for various purposes including Estate Tax planning, in order to utilize the \$600,000.00 Internal Revenue Code Unified Credit. Moreover, I was further advised that other financial and economic purposes would be achieved including, but not limited to, a limitation on personal liability and long-term health care planning." (Ex 1, ¶ 3; emphasis added.)

Affidavit of Frank G. Finkbeiner

"That, Edward Meixsell was the sole incorporator of Dentrac Shopping Plaza, Inc. and the sole shareholder of said corporation, until he transferred all ownership, one hundred percent (100%) of the stock, to his wife Jean A. Meixsell.

"That, the transfer of one hundred percent (100%) of the shares of stock in Dentrac Shopping Plaza, Inc. from Edward Meixsell to Jean A. Meixsell, was a sound business decision based upon financial, estate and economic planning. Mr. Meixsell was advised by [Frank G. Finkbeiner] to take advantage of the \$600,000.00 Unified Credit provided for by the Internal Revenue Code for Estate planning purposes, by divesting himself of certain assets, including his shares of stock in Dentrac Shopping Plaza, Inc. Moreover, Edward Meixsell was further advised to divest himself of certain assets for economic and other financial

purposes, including limitation of liability purposes and long-term health care planning purposes." (Ex 2, ¶¶ 5, 6.)

Affidavit of Jean A. Meixsell

"That [on December 22, 1986, Jean A. Meixsell] was the sole shareholder of Dentrac Shopping Plaza, Inc. That, [Jean A. Meixsell] had been the sole shareholder of said corporation, having obtained one hundred percent (100%) of the stock from [her] husband, Edward Meixsell, who had previously been advised to divest himself of certain assets for Estate Tax planning purposes and to utilize the \$600,000.00 Internal Revenue Code unified credit." (Ex 3, ¶ 3.)

There is no evidence in the record of any filing for gains tax purposes with respect to such stock transfer.¹

As of 1986, Parcels 1 and 2 were titled, individually, in the individual corporations. According to the affidavits and to the petition, in 1986 a business decision was made to liquidate the two corporations, in contemplation of selling Parcels 1 and 2. More specifically, had each corporation sold its respective parcel outright, without first liquidating, then each corporation and its respective stockholder would have been taxed on the gain from the sale. However, a properly carried-out liquidation would be tax-free event at the corporate level. Therefore, in order to avoid "double" tax liability, the decision was made to liquidate each corporation and to transfer its respective asset (Parcel 1 and Parcel 2) to the respective corporate stockholder. Tax-free liquidation, as described and permitted by then-existing Internal Revenue Code ("IRC") § 337 was, due to 1986 IRC changes, scheduled to end as of December 31, 1986.

In or about late November of 1986, a plan of liquidation was adopted and thereafter, on or about December 22, 1986, each of the corporations was dissolved and its respective parcel was transferred to the sole stockholder of each respective corporation (i.e., Parcel 1 was transferred to Jean A. Meixsell, while Parcel 2 was transferred to Edward Meixsell). The section 337 liquidations were made, as noted, in each instance, "in contemplation of selling" the respective parcels of property, and presumably in light of Edward Meixsell's overall estate, medicaid and financial plan.

¹Since the record does not disclose the date of transfer, it cannot be ascertained whether such transfer took place before or after the March 28, 1983 effective date of Tax Law Article 31-B.

With respect to the foregoing transfers upon liquidation, Edward Meixsell executed separate gains tax affidavits (Form TP-584-C), one as the sole shareholder of Scott and one as president on behalf of Dentrac. By these affidavits, exemption from gains tax was claimed on the basis that each of the transfers was for consideration of less than \$500,000.00. In turn, reference to Schedule D of petitioners' Federal income tax return (filed jointly) for the year 1986 shows the transfers involved and, in each case, reflects consideration of \$495,000.00. A "cost or other basis" of \$225,000.00 is reported with respect to Parcel 2 thus leaving a reported net taxable gain in the amount of \$270,000.00. A "cost or other basis" of \$175,000.00 is reported with respect to Parcel 1, thereby leaving a reported net taxable gain of \$320,000.00. In turn, Federal (and State) income tax was paid on the aggregate net taxable gain reported.

On or about May 12, 1987, petitioner Jean A. Meixsell entered into an agreement for the sale of Parcel 1 to Lake Avenue Associates, a partnership consisting of Eugene Krauss and Yvonne Shahmoon. The contract price for the sale of the property was \$800,000.00. On June 10, 1987, petitioner Jean A. Meixsell executed a deed conveying Parcel 1 to Lake Avenue Associates pursuant to the terms of the contract. Real property transfer tax was paid in the sum of \$3,200.00, based upon consideration of \$800,000.00. In addition, gains tax questionnaires (Forms TP-580 and TP-581) were filed by petitioner Jean A. Meixsell, as transferor, and by Lake Avenue Associates, as transferee, reporting the transfer as exempt from gains tax because the consideration was less than \$1,000,000.00. There seems to be no dispute that at the time of this transfer, petitioner Jean A. Meixsell was the sole owner of Parcel 1 and that she held no interest in the transferee partnership, Lake Avenue Associates.

Also on or about May 12, 1987, petitioner Edward Meixsell entered into a contract for the sale of Parcel 2 to 7th Street Associates, a partnership consisting of Alvin Krauss and Yvonne Shahmoon. The contract price for the sale of Parcel 2 was \$850,000.00. On May 21, 1987, Edward Meixsell executed a deed conveying Parcel 2 to 7th Street Associates pursuant to the terms of the contract. Real property transfer tax was paid in the sum of \$3,400.00, based on consideration of \$850,000.00. Gains tax questionnaires (Forms TP-580 and TP-581) were filed

by petitioner Edward Meixsell, as transferor, and by 7th Street Associates, as transferee, reporting the transfer as exempt from gains tax because the consideration was less than \$1,000,000.00. It appears undisputed that at the time of transfer petitioner Edward Meixsell was the sole owner of Parcel 2 and that he held no interest in the transferee partnership, 7th Street Associates.

Petitioners' Federal income tax return for 1987 (filed jointly) indicates, at Schedule D, the June 1987 sale of real estate acquired in December 1986. Schedule D reflects a combined selling price of \$1,600,000.00 for the real estate, a cost or other basis of \$1,007,578.00, and a reported gain of \$592,422.00. This filing appears to represent the sales of Parcel 1 and Parcel 2 in 1987.²

Petitioners' gains tax filings did not reflect any amounts for original purchase price ("OPP") for the properties (presumably because exemption based on consideration of less than \$1,000,000.00 was claimed). Accordingly, the Division calculated gains tax due without allowance of any amount for OPP. Petitioners claim that even if the transfers are properly subject to tax, an allowance should be made for OPP. In this regard, petitioners have offered a number of different possibilities as the amount of OPP, as follows:

(a) Petitioners argue that the proper OPP should be the December 22, 1986 selling price listed for the liquidating distribution and redemption of the corporate stock, to wit, \$495,000.00 for each parcel. Petitioner Edward Meixsell described this price as the appropriate fair market value based on his years of experience as a developer and real property manager.

(b) Petitioners offered letters from the assessor for Smithtown, New York indicating market values, in 1986, of \$211,020.00 for Parcel 1 and \$264,000.00 for Parcel 2.

(c) Petitioners also point to Schedule D from their 1986 Federal income tax return which lists a cost or other basis for the properties of \$175,000.00 (Parcel 1) and \$225,000.00 (Parcel 2).

(d) Petitioners submitted a letter from one Werner H. Schmitz, an experienced masonry contractor who was involved in the actual masonry construction aspect of the development of each of the parcels. Mr. Schmitz "checked" each parcel in June 1992, and his letter estimates the cost to construct and improve the buildings at the time of their construction to have been

²No explanation was offered to reconcile the combined income tax selling price of \$1,600,000.00 with the aggregate gains tax consideration of \$1,650,000.00 (\$800,000.00 Parcel 1 plus \$850,000.00 Parcel 2).

\$190,000.00 for Parcel 1 (constructed in 1964/65) and \$297,000.00 for Parcel 2 (constructed in 1970/71).

(e) Finally, petitioners refer to the original deeds of purchase for the properties. These deeds show then-required IRS deed stamps in the amounts of \$8.80 (Parcel 1) and \$22.55 (Parcel 2). Extrapolating at the then-deed stamp rate of \$1.10 per \$1,000.00 of purchase price results in land acquisition costs of \$8,000.00 (Parcel 1) and \$20,500.00 (Parcel 2). In addition, Parcel 1 was conveyed to Dentrac by deed dated May 1, 1964 subject to a mortgage of \$55,000.00. In addition to this information, petitioners note the Dentrac and Scott 1985 corporate tax forms. Specifically, petitioners point to Form 1120, Schedule L, which lists the following income tax basis information as reported:

	<u>Dentrac (Parcel 1)</u>	<u>Scott (Parcel 2)</u>
land cost (net of amortization)	\$13,030.00	\$20,000.00
buildings and other depreciable assets	<u>55,705.00</u>	<u>57,000.00</u>
Total	<u>\$68,735.00</u>	<u>\$77,000.00</u>

OPINION

The Administrative Law Judge, relying on Matter of Brooks (Tax Appeals Tribunal, September 24, 1992), which was subsequently affirmed by the Appellate Division (Matter of Brooks v. Tax Appeals Tribunal, ___AD2d___ [Mar. 10, 1994]), determined that aggregation was proper in this case (see also, Matter of Lee, Tax Appeals Tribunal, October 15, 1992, affd ___AD2d___ [Mar. 31, 1994]). The Administrative Law Judge found that petitioners did not fit within 20 NYCRR 590.43(b) because although petitioners separately owned the parcels transferred, petitioners did not prove the independence of the transfers. The Administrative Law Judge stated that in view of the absence in the record of the date of the Dentrac stock transfer to Jean Meixsell, it would be reasonable to assume that it occurred shortly before the liquidation of the corporations and in contemplation of the sale of the parcels. Therefore, the Administrative Law Judge found that Jean Meixsell would have had little time to assume management responsibilities for the parcel. In addition, the Administrative Law Judge found no evidence showing that Jean Meixsell exercised any independent management or operational control over the parcel in her name. Further, the Administrative Law Judge found that, other than the stock transfer itself, there was no evidence that Edward Meixsell did not continue to be the controlling force in operating the parcels. The Administrative Law Judge stated that

aggregation will be upheld where one party is controlling the other transferors and there is no true independence among the parties.

The Administrative Law Judge rejected petitioners' argument that the parcels were aggregated because the transferors were husband and wife. The Administrative Law Judge, relying on Matter of Brooks (*supra*) and Matter of Lee (*supra*), held that petitioners' family relationship was properly considered in determining if the parcels should be aggregated.

With respect to the question of original purchase price, the Administrative Law Judge allowed original purchase price in the amount of \$63,000.00 for Parcel 1 and \$20,500.00 for Parcel 2, relying on the deeds for the land and mortgage indebtedness. The Administrative Law Judge found no further evidence to allow any other increases in original purchase price. The Administrative Law Judge stated that carryover original purchase price applies in the case of the December 22, 1986 change of identity liquidation transfers and, further, that the fair market value per assessor's information, the estimate of the cost to construct the buildings and income tax basis amounts are not original purchase price (Determination, conclusion of law "I").

Finally, the Administrative Law Judge found no evidence to support abatement of penalties.

On exception, petitioners continue to argue that: (1) the parcels should not be aggregated as they were separately owned and petitioners each exercised independent control and authority over their properties; (2) the Division is aggregating the parcels merely because petitioners are husband and wife; and (3) no penalties or interest are due if aggregation is not determined to be applicable. In addition, petitioners argue that:

"[t]he sale of Parcel 1 and Parcel 2 were totally separate and distinct one from the other and were not pursuant to an agreement or plan to effectuate a transfer which would otherwise be included as a transfer of real property under Section 1440(7) of the Tax Law . . ." (Petitioners' brief, p. 7).

On exception, petitioners have submitted affidavits in support of their position that petitioner Jean Meixsell undertook independent activities in managing or operating Parcel 1. We reject these documents on the basis that they were submitted after the record was closed.

"In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)" (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Finally, petitioners argue that they should receive an increased original purchase price. At the very least, petitioners argue, Jean Meixsell should be allowed an original purchase price in the amount of \$495,000.00 which was the price she paid to acquire ownership of Parcel 1 in 1986. With regard to petitioner Edward Meixsell, it is asserted that he is entitled to an original purchase price of "\$20,500.00 for the purchase price of the land, plus \$225,000.00 cost basis for original building construction as set forth on Mr. Meixsell's federal income tax returns and, finally, build-out and capital improvement costs of \$128,000.00 . . . which total an OPP of \$373,500.00" (Petitioners' brief, p. 12).

In response, the Division relies on its brief below and the "Meixsell Exception Comments" it submitted. In these comments, the Division argues that the Administrative Law Judge erred in finding that "Edward Meixsell was the sole incorporator and 100 percent shareholder of Dentrac and Scott prior to their liquidation" (Exception comments, p. 1). The Division also argues that the Administrative Law Judge erred in accepting petitioners' affidavits below. We will not address these issues because the Division did not file a timely exception raising them (see, Matter of Auriemma, Tax Appeals Tribunal, September 17, 1992).

In their reply brief, petitioners ask that the Division's "Exception Comments" be ignored. Petitioners again ask the Tax Appeals Tribunal not to allow aggregation of the parcels, but if aggregation is allowed that the original purchase prices be increased.

On exception, petitioners have raised the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these

arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Edward and Jean A. Meixsell is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Edward and Jean A. Meixsell is granted to the extent indicated in conclusions of law "I" and "K" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The Division of Taxation is directed to modify the Notice of Determination dated May 26, 1989 in accordance with paragraph "3" above, but such notice is otherwise sustained.

DATED: Troy, New York
May 5, 1994

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

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