STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SIX STARS REALTY	:	DECISION DTA No. 808656
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 Six Stars Realty, c/o Joseph D'Elia, Esq., 790 New York Avenue, Huntington, New York 11743, filed an exception to the determination of the Administrative Law Judge issued on December 24, 1992. Petitioner 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 in support of its exception. The Division of Taxation filed a letter brief in response. Petitioner had until April 16, 1993 to file a reply brief, at which point the six-month period for the issuance of this decision began.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioner's sales of two contiguous parcels of real property to separate transferees were properly aggregated by the Division of Taxation pursuant to Tax Law § 1440(7).

FINDINGS OF FACT

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

On June 5, 1989, the Division of Taxation ("Division") issued to Six Stars Realty ("petitioner") a Statement of Proposed Audit Adjustment (along with a letter of explanation from the Division's Transaction and Transfer Tax Bureau) which stated as follows:

"[a] review of your Real Property Transfer Gains Tax Questionnaire received on June 23, 1986 and March 30, 1987, for the sale of properties located at CR 83, Seldon [sic], NY reveals that these parcels constitute the transfer of contiguous parcels in a taxable transaction. (Please see the attached letter). Also, pursuant toRider To Contract, dated February 1987, (Thomas Colasanto) purchaser, Page 2, para (c) discloses purchaser undertaking seller obligations which constitute [sic] additional consideration (which must be documented). This places the consideration one million dollars or over. Therefore the transaction transferring 46 plus acres to Thomas Colasanto is taxable for Gains Tax purposes in [sic] of itself and further will be aggregated to the 25 plus acre transaction.

"Consideration: 1,999,980 - 977,285.50 (O.P.P.) = 1,022,694.50 x 10% = $100,269.45

"Penalty & Interest Penalty (3/30/87 - 7/17/89) 35% x 100,269.45 =	35,094.31
Interest: 335 days @ 7.5%	21,790.42
365 days @ 8.9%	
139 days @ 10.2%	
839 Total Days	$157,154.18"

On September 22, 1989, the Division issued a Notice of Determination to petitioner in the amount of $159,187.69 ($100,269.45 tax, $23,824.05 interest and $35,094.19 penalty) for the tax period ended March 30, 1987.

By a Conciliation Order dated August 17, 1990 (CMS No. 100726), the Bureau of Conciliation and Mediation Services recomputed the determination at issue to $82,965.51, plus interest computed at the applicable rate (penalty was cancelled). This reduction evidently was the result of petitioner's payment of $33,000.00 in June 1990 (see, Exhibit "P").

Pursuant to a contract dated May 9, 1985, petitioner purchased from the executors of the estate of Kenneth Leeds a piece of real property consisting of approximately 71.5 acres on the north side of Bicycle Path and County Road 83 in Selden (Town of Brookhaven, County of Suffolk), New York for the purchase price of $997,285.50.[1] The closing on the property occurred on February 12, 1986.

On June 12, 1985, petitioner submitted an application for consideration of the preliminary layout for the subdivision of land to the Brookhaven Town Planning Board. The site plan, to be

[1]It should be noted that the record herein does not contain a copy of the contract of sale. The date of the contract was obtained from the affidavit of Leonard Primack, petitioner's managing partner, which affidavit formed a portion of Exhibit "J."

known as Bald Hill Office Park, was to consist of 72 acres. On the application, the nature of the business to be conducted at the site was described as follows:

> "[t]he subject parcel is presently zoned by L-1 (Industrial) and J-4 (Business). It is the intent of the developer to subdivide the property for the purpose of developing a high quality office/industrial park which shall consist of a variety of different size parcels according to market demand according to regulation."

The affidavit of Leonard Primack, managing partner of petitioner (Exhibit "J"), indicates that the land which petitioner purchased consisted of two distinctly different zoned parcels, one parcel being zoned L-1 (light industrial) and the other being zoned J-8 (commercial).

By a contract of sale dated December 20, 1985, petitioner agreed to sell approximately 24 acres of the property (the portion which was zoned L-1) to Leonard Rosenbaum for the price of $960,000.00. As part of this contract, petitioner agreed to construct a road from the purchaser's property to the main road since, without the road, this property was landlocked.

At the hearing, attorney Joseph D'Elia testified on behalf of petitioner. Mr. D'Elia had previously represented a few of petitioner's members and subsequently represented Thomas Colasanto who, on June 16, 1987, purchased the balance, or approximately 47.5 acres, from petitioner. Mr. D'Elia stated that in order to represent Mr. Colasanto and because of litigation between Mr. Rosenbaum and petitioner, he had to fully familiarize himself with all of the facts concerning petitioner's purchase and subsequent sales of the property at issue.

Mr. D'Elia stated that, prior to petitioner's purchase of the property from the Leeds estate, Joseph Rizzo, one of petitioner's partners, entered into negotiations with Leonard Rosenbaum, president of CVD Equipment Corporation, which led to the contract for the sale of approximately 24 acres to Mr. Rosenbaum (see, above). Mr. Rosenbaum, in contemplation of his agreement to purchase a portion of the real property, agreed to lend petitioner the sum of $980,000.00 in order that petitioner could purchase the entire 71.5-acre parcel from the Leeds estate. As security for this loan, petitioner, on February 12, 1986 (the date of the purchase of the land by petitioner), executed a mortgage in the amount of $980,000.00 to CVD Equipment Corporation

(Mr. Rosenbaum's corporation), as mortgagee. The mortgage covered the entire 71.5 acres purchased by petitioner. As previously indicated (see, above), prior to the execution of the mortgage (on December 20, 1985), Mr. Rosenbaum entered into a contract with petitioner to purchase approximately 24 acres of this tract of land for $960,000.00. The sale by petitioner to Mr. Rosenbaum took place on August 14, 1986 and the actual selling price was $999,990.00 (see, Transferee Questionnaire - Exhibit "D").

Mr. D'Elia testified that Mr. Rosenbaum became displeased with the timing of the construction of the road by petitioner which had been delayed due to the fact that petitioner had encountered difficulty in getting permission to build the road from the Suffolk County Departments of Health and Environmental Conservation. Because of the delay, Mr. Rosenbaum began to hire his own engineers, water experts, ecologists, etc. and subsequently commenced litigation against petitioner.

According to the testimony of Mr. D'Elia and the affidavit of Leonard Primack, the intent of petitioner at the time of its purchase of the 71.5-acre parcel was to sell the 24-acre portion (which was zoned industrial) to Mr. Rosenbaum and then retain the remaining 47.5 acres for the purpose of developing condominiums. However, due to mounting expenses (including the litigation with Mr. Rosenbaum) and the difficulty in obtaining approval of the condominium plan from the Brookhaven Town Board (the plan was not approved until 1990), petitioner was compelled to look for a buyer. Thomas Colasanto, a business acquaintance of John and Joseph Rizzo, two of petitioner's partners, agreed to purchase the remaining 47.5 acres (Mr. Colasanto had a relationship with J. D. Basile Co., Inc., one of the largest road builders in the State) pursuant to a contract dated March 5, 1987.

Joseph D'Elia was retained by Thomas Colasanto to represent him in the purchase. As part of the agreement between Mr. Colasanto and petitioner, Mr. Colasanto had to agree to assume petitioner's obligation to build the road from the Rosenbaum property. On June 16, 1987, the

closing took place at which time Thomas Colasanto purchased the remaining 47.5 acres from petitioner for $999,990.00.

As indicated above, petitioner no longer contests the taxability of its sale of the 47.5 acres to Thomas Colasanto in 1987. Accordingly, payments of gains tax and interest were paid in June 1990, thereby reducing the amount at issue.

OPINION

In the determination below, the Administrative Law Judge, based on his reading of Tax Law § 1441 (which imposes a 10% tax upon gains derived from the transfer of real property located within New York State), Tax Law § 1443(1) (which provides for an exemption from gains tax when the consideration for the transfer is less than $1,000,000.00), Tax Law § 1440(7) (which defines the "transfer of real property") and 20 NYCRR 590.43 (questions and answers relating to the aggregation clause of section 1440[7] of the Tax Law), held that the Division was correct in its assertion that it is not necessary to ascertain the intent of the transferor in the present matter since what is at issue is not a transfer of contiguous or adjacent parcels of land, but a subdivision of a single parcel, and it is clear that 20 NYCRR 590.43(g) is applicable.

The Administrative Law Judge held that even if the intent of the transferor was relevant, the facts contradict petitioner's assertion that the transfers at issue were not pursuant to a plan to effectuate, by partial or successive transfers, a transfer which otherwise would have been subject to the gains tax. The Administrative Law Judge found that while it may not have been petitioner's intention to sell the 47.5 acres to Thomas Colasanto at the time of its purchase from the Leeds estate, it appears clear that petitioner did intend to purchase the entire 71.5-acre tract and then subdivide and sell the real property.

On exception, petitioner argues that the Administrative Law Judge, in relying on 20 NYCRR 590.43(g), made a clear error in holding that it is not necessary to ascertain the intent of the transferor since what is at issue herein is a subdivision of a single parcel.

On the aggregation rule, § 1440(7) of the Tax Law, petitioner argues that "[w]hether particular transfers are 'pursuant to an agreement or plan' is, of course, a factual question which turns on the intention of the transferor at the time of each transfer. See 20 NYCRR 590.43(A)" (Petitioner's brief, item #2).

Petitioner argues that prior to the acquisition of the 71.5-acre parcel, the 24 acre parcel was under contract to Mr. Rosenbaum and "[u]nder these circumstances, the sale of the 24-acre parcel was unrelated and not pursuant to the plan to develop the 47.5 acre parcel. Accordingly, aggregation is not authorized. See Matter of Armel, Tax Appeals Tribunal, July 23, 1992" (Petitioner's brief, item #3).

Petitioner argues its exception should be granted and the Notice of Determination should be annulled and vacated except as modified by the Conciliation Order and petitioner's concession (see, Determination, finding of fact "9").

The Division, in reply, argues that the Administrative Law Judge's treatment of transferor intent was correct and consistent with Tax Law § 1440.7, 20 NYCRR 590.43(g) and case precedent, citing the Appellate Division in Executive Land Corp. v. Chu (150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692).

The Division's brief made reference to the definition of a "subdivision," arguing that "[t]he subdivision is itself the manifestation of the transferor's plan to transfer, by partial or successive transfers, a larger parcel which if sold in a single disposition would trigger Gains Tax Liability" and, further, that "this record provides ample support for the ALJ's conclusion that Petitioner did have a plan to dispose of the entire 71 acre parcel acquired" (Division's brief, p. 2).

We affirm the determination of the Administrative Law Judge.

First, we agree with petitioner that the Administrative Law Judge erred in interpreting 20 NYCRR 590.43(g) to mean that the intent of the transferor was irrelevant in this case because it

involved the subdivision of a single parcel, rather than the transfer of contiguous or adjacent parcels. The regulation states:

> "(g) Question: Will the subdividing of real property be subject to aggregation pursuant to section 1440(7) of the Tax Law?
>
> "Answer: Yes. Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans. (See section 590.68 of this Part for information on payment of tax in aggregated transfer situations.)"

The phrase "subject to the aggregation rule" means that the sale of subdivided parcels will be treated as a single transfer if it is determined that the transferor had a plan or agreement to dispose of the entire parcel. The phrase does not, as opined by the Administrative Law Judge, mean that all sales of subdivided parcels are automatically treated as a single transfer. The latter interpretation is contrary to the Court's decision in Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127, 129) where the Court, in addressing the treatment of the sale of subdivided lots, said "aggregation applies when the seller has adopted an agreement or plan for the disposal of an entire parcel of property, which would have been subject to the real property transfer gains tax, but for the structuring of the disposal of the property into partial or successive transfers." The Administrative Law Judge's interpretation of this regulation is also contrary to our decision in Matter of Armel (supra) where we explicitly upheld an Administrative Law Judge determination that certain lots of a subdivided parcel were not to be aggregated with the other sales in the subdivided parcel because petitioners had established that they did not have a plan to dispose of all of the property in the subdivision.

Applying the correct interpretation of the regulation, we nonetheless affirm the determination of the Administrative Law Judge because we agree wih the Administrative Law Judge's conclusion that petitioner did not prove that the transfers at issue were not pursuant to plan or agreement. As the Administrative Law Judge noted, even if the petitioner's evidence was

deemed to be credible, that evidence showed that "petitioner intended to purchase the entire 71.5-acre parcel, sell 24 acres to Leonard Rosenbaum and then develop the remaining 47.5 acres pursuant to a condominium plan which, undoubtedly, would then have resulted in partial or successive transfer of its interest in the 47.5 acres" (Determination, conclusion of law "C").

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Six Stars Realty is denied;

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

3. The petition of Six Stars Realty is denied; and

4. The Notice of Determination dated September 22, 1989, as amended by Conciliation Order dated August 17, 1990 (CMS No. 100726), is sustained.

DATED: Troy, New York
October 7, 1993

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

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