STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DIMITRI AND TAISA BALABANOW	:	DECISION DTA No. 808898
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 Dimitri and Taisa Balabanow, 3002 Trinity Street, Oceanside, New York 11572, filed an exception to the determination on remand of the Administrative Law Judge issued on November 4, 1993. Petitioners appeared by Herbert Garfinkel, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter brief in opposition. Petitioners were given until February 7, 1994 to file a reply brief, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners' sales of certain properties should be aggregated 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.

Petitioners, Dimitri and Taisa Balabanow, were married in Argentina in 1957. Dimitri Balabanow came to the United States in 1962, followed by his wife, Taisa, in 1965. While employed in the construction business, Mr. Balabanow began to purchase, renovate and sell apartment buildings on Long Island. When Taisa Balabanow arrived in this country, petitioners purchased the buildings as husband and wife, thereby establishing their ownership interest as tenants by the entirety. However, in 1978, petitioners started purchasing apartment buildings individually or as tenants in common. In the same year, they also began to execute deeds which altered their ownership interests in properties they owned as husband and wife to that of tenants in common.

According to the testimony of Mrs. Balabanow, the decision to purchase properties individually and to recast petitioners' ownership interests in various properties from tenants by the entirety to tenants in common was based on several factors. These included attempting to protect the children's beneficiary interest in her property should she predecease her husband, providing for her own financial needs should petitioners divorce and the overall desire to be financially independent of her husband. Mrs. Balabanow wished to insure that the two children would receive their fair share of her investments upon her death. Mrs. Balabanow also explained that owning the investments by herself, individually or as a tenant in common, provided her with a degree of independence as well as a sense of financial security should petitioners divorce.

During the years 1965 through 1973 and 1975 through 1979, petitioners earned the following salaries:

	Dimitri	Taisa
1965	$ 4,949.00	$ 702.00
1966	4,800.00	6,476.00
1967	5,280.00	8,720.00
1968	5,938.00	10,515.00
1969	8,047.00	11,342.00
1970	8,130.00	13,571.00
1971	8,709.00	7,722.00
1972	9,001.00	10,865.00

1973	8,991.00	16,140.00
1975	10,012.00	9,530.00
1976		23,606.00
1977		24,366.00
1978		27,887.00
1979		15,992.00

Petitioners were unable to produce salary information for the year 1974. In addition, Mrs. Balabanow testified that following 1975, the majority of Mr. Balabanow's income was from real estate. Mrs. Balabanow's salary income derived from her employment as a chemist for and later director of research and development of a pharmaceutical company located in Inwood, New York. She had earned her degree in pharmacy while residing in Argentina.

During the years 1975 through 1987, petitioners maintained both individual and joint bank accounts. The interest income earned from these accounts was (in rounded amounts) as follows:

	Dimitri	Taisa	Joint
1975	$	$ 111.00	$
1976		21.00	
1977		510.00	759.00
1978		765.00	1,009.00
1979	69.00	492.00	1,862.00
1980	222.00	238.00	1,999.00
1981	928.00	735.00	4,237.00
1982	1,940.00	1,914.00	5,343.00
1983	16,565.00	14,289.00	9,685.00
1984	7,774.00	19,647.00	5,289.00
1985	3,237.00	6,384.00	6,136.00
1986	14,800.00	16,847.00	6,068.00
1987	8,084.00	10,545.00	6,496.00

On April 20, 1979, petitioners entered into a contract of sale to purchase three lots located at 215, 225 and 235 West Broadway, Long Beach, New York. The three parcels of property were adjacent, with Lot 225 having a common boundary with both Lots 215 and 235. All three buildings were used as rental property, with the building on Lot 215 having 25 apartments and the buildings situated on Lots 225 and 235 having 12 apartments each. At the time of the sale, Lot 215 was owned by Sea Island Apartments, Inc. and Lots 225 and 235 were owned by Louis Katz. Louis Katz represented Sea Island Apartments, Inc. in the negotiations and executed the

contracts of sale on behalf of the corporation. The purchase price of the three lots was $425,000.00, which included a note secured by a purchase money first mortgage in the amount of $300,000.00. The contract of sale provided that, at the time of closing, the sellers would execute three deeds to the premises. Lot 215 was to be conveyed to petitioners, Lot 225 to Dimitri Balabanow and Lot 235 to Taisa Balabanow. Petitioners wished to have the ownership interests in the three buildings set up along these lines to avoid the imposition of rent stabilization, which, according to the testimony of Mrs. Balabanow, was imposed by the Village of Long Beach on an individual or entity which owned more than 25 apartment units. In addition, petitioners were required to prepare three separate mortgage instruments covering the three parcels not to exceed in the aggregate $300,000.00. The contract further provided that in the event the sellers were unable to convey title to any of the three parcels, petitioners had the absolute right to terminate the contract. Both petitioners participated in the negotiations which resulted in the purchase of the three buildings.

On June 30, 1979, petitioners executed a note and purchase money first mortgage payable to Sea Island Apartments, Inc. in the amount of $75,000.00, relating to the sale of Lot 215. On the same date, Taisa Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 225. Finally, on the same date, Dimitri Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 235.

The three parcels were transferred to petitioners on June 28, 1979. The remaining portion of the purchase price was paid by a promissory note in the amount of $25,000.00, signed by Dimitri Balabanow, a cash payment of $10,000.00, made by Taisa Balabanow, and several bank checks, the source of which was funds obtained by petitioners through the remortgaging of certain of their properties.

Following the purchases, petitioners continued to use the buildings on the three lots as rental properties. Petitioners created a management company to collect the rents, to pay all

debts, including the mortgages, and to take care of the maintenance and repairs relating to the three buildings. Any extra money in the management company account was divided equally between Taisa and Dimitri Balabanow.

On December 20, 1985, petitioners entered into a contract of sale to sell the Lot 215 property to Stewart Dickler for $934,000.00. The contract provided that petitioners would take back from the purchaser a purchase money note and mortgage in the amount of $675,000.00. On the same date, Taisa Balabanow contracted to sell the Lot 225 property to Fred Pilevsky for $490,000.00. The contract provided that petitioner Taisa Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $320,000.00. On the same December 20, 1985 date, petitioner Dimitri Balabanow entered a contract of sale to sell the Lot 235 property to Allen Pilevsky for $635,000.00. The contract of sale provided that Dimitri Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $464,000.00. Both petitioners participated in the negotiations and discussions with the buyers concerning the sale price of the three buildings.

The process of selling the properties commenced when petitioners were approached by a broker familiar with the lots at issue. Prior to contact by the broker, petitioners had not offered the properties for sale. In fact, the purchase contracts for each of the properties in issue call for the purchasers to pay the brokerage commission.

Each of the contracts of sale contained a provision which stated that the purchasers could assign the contract on or before the closing of title. Immediately prior to the closing of title on June 25, 1986, the purchasers assigned the three contracts of sale to Herbert Tessler. Petitioners then transferred title to Lots 215, 225 and 235 to Herbert Tessler on the same June 25, 1986 date. At the closing, petitioner Dimitri Balabanow was represented by Robert S. Breitbart, Esq., while petitioner Taisa Balabanow was represented by Saul S. Le Vine, Esq. At the time of the closing, the office address for both attorneys was 287 Northern Boulevard, Great Neck, New York 11021.

The proceeds from the sale of the three lots were deposited into the individual accounts of each petitioner as follows:

Petitioner	Amount	Source (Lot)
Dimitri	$ 30,000.00	235
Dimitri	59,500.00	235
Dimitri	50,000.00	215
Taisa	30,000.00	225
Taisa	58,500.00	225
Taisa	168,000.00	215

Proceeds from the sale which had been placed in escrow and paid to petitioners at the time of closing were paid out of special accounts of both Mr. Le Vine and Mr. Breitbart. Mr. Le Vine's special account was the source of funds paid to Taisa Balabanow, while the special accounts of both attorneys were used to transfer funds to Dimitri Balabanow.

On March 23, 1987, Herbert Tessler satisfied the three purchase money notes and mortgages executed at the time of the sale of the property in issue. The proceeds relating to Lot 235 were paid to, and deposited in an account of, Dimitri Balabanow. The proceeds relating to the mortgage on Lot 225 were paid to, and deposited in an account of, Taisa Balabanow. Finally, the proceeds relating to the mortgage on Lot 215 were paid in equal amounts to each petitioner and deposited in their respective accounts.

Petitioners filed New York State resident income tax returns for the years 1985 and 1986 on a married filing separately on one return basis. For Federal purposes, petitioners filed jointly for the same two years.

On the 1985 New York State Resident Income Tax Return, petitioners divided the income earned from capital gain and rents and the losses incurred from partnerships equally between husband and wife. Petitioners combined on the Federal Schedule E, Supplemental Income Schedule, the rents, expenses, depreciation and resulting income arising from all of the properties owned by petitioners as tenants in common as well as the individually owned properties. The Schedule E also included two partnerships whose combined losses were split equally between Dimitri and Taisa Balabanow.

Accompanying petitioners' 1986 New York State Resident Income Tax Return were three Federal Schedule D's, Capital Gains and Losses. The first indicated the combined capital gains and losses of petitioners. The second and third related to the individual assets of each petitioner. Under Long Term Capital Gains and Losses, the sale of the lots in issue was summarized, with the sales price, cost or other basis and gain realized split equally between Dimitri and Taisa Balabanow. On the attached Federal Schedule E, all of the properties which petitioners owned as tenants in common and individually were listed as one entry. The rents, expenses and depreciation from all petitioners' rental properties were combined and the resulting income split equally between petitioners. In addition, the losses from two partnerships and a subchapter S corporation were evenly divided between husband and wife.

On March 30, 1989, the Division of Taxation issued to petitioners a notice of determination asserting real property gains tax due in the amount of $205,900.00, plus penalty and interest. In its Conciliation Order dated August 31, 1990, the Bureau of Conciliation and Mediation Services recomputed the amount of tax due to $159,796.80, plus penalty and interest.

ADDITIONAL FINDINGS OF FACT ON REMAND

Petitioners' prior accountant shared an office with a real estate broker. During visits to the accountant's office, Mrs. Balabanow would often talk with the broker about her various properties, including the three lots located in Long Beach. Following one of their discussions, the accountant called to advise Mrs. Balabanow that the broker had someone interested in purchasing the Long Beach property.

The individual that the broker sent to Mrs. Balabanow was Stewart Dickler, the initial transferee of the Lot 215 property. Mr. Dickler discussed the sale of the Long Beach property with Mrs. Balabanow. A few weeks later, Mr. Dickler, accompanied by one of the Pilevskys, had further discussions about purchasing the three lots. Subsequently, Mr. Pilevsky's father was also brought into the discussions. When the purchasers had decided which lot they each wished to purchase, negotiations commenced between the purchasers and the Balabanows. Eventually,

the parties entered into three separate contracts which were not contingent upon each other. As noted above, all three contracts were executed on December 20, 1985.

On June 4, 1986, the purchasers' attorneys advised petitioners' attorneys that the contracts of sale had been assigned to Mr. Herbert Tessler. Prior to the assignment and closing, petitioners did not know Mr. Tessler, were not aware of him and had not had any business dealings with him. In addition, prior to becoming aware of the assignments, petitioners believed they were going to sell the three lots to Messrs. Dickler, Pilevsky and Pilevsky.

OPINION

In his first determination on this matter, dated October 22, 1992, the Administrative Law Judge concluded that the Division properly treated petitioners as a single transferor and that the assignment to Herbert Tessler provided a sufficient basis for the Division to treat the transactions as being to one purchaser subject to the rule set forth at 20 NYCRR 590.42. Under this regulation, the Administrative Law Judge found that the consideration from the transactions should be aggregated because petitioners failed to show both 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. Having so concluded, the Administrative Law Judge did not address the Division's alternative argument that the transactions were properly aggregated under 20 NYCRR 590.43 because they were pursuant to a plan or agreement.

In Matter of Balabanow (Tax Appeals Tribunal, August 19, 1993), we reviewed the Administrative Law Judge's first determination and affirmed the Administrative Law Judge's conclusion that petitioners were properly treated as a single transferor, but disagreed with his conclusion that the assignment to Herbert Tessler, in itself, was sufficient to treat the transactions as being to a single transferee and subject to 20 NYCRR 590.42. We held that in the case of an assignment the transactions should be treated as being to a single transferee for purposes of 20 NYCRR 590.42 only if the petitioner intended to transfer the properties to a single transferee. We remanded the matter to the Administrative Law Judge to make a decision

on this basis. In addition, we directed the Administrative Law Judge to make a determination as to whether the transactions were taxable pursuant to 20 NYCRR 590.43 because there was a plan or agreement to make the transfers.

Relying on Matter of General Builders Corp. (Tax Appeals Tribunal, December 24, 1992), the Administrative Law Judge in his determination on remand stated that "the determination of taxability under 20 NYCRR 590.42 depends upon whether the transferor intended to transfer the properties to the single transferee" (Determination, conclusion of law "E"). The Administrative Law Judge found that petitioners established that they did not intend to transfer the three parcels to one transferee, but instead they intended to make three separate transfers to three transferees. The Administrative Law Judge found nothing in the record to show that petitioners had any business dealings with Mr. Tessler, had ever met him or that they participated in the assignment of the contracts.

The Administrative Law Judge next determined that petitioners did have a plan or agreement to dispose of the three lots by partial or successive transfers. The Administrative Law Judge found that "petitioners herein intended to sell all three parcels at the time of their initial discussions with Mr. Dickler and this intention continued right up to the time when the three contracts were executed" (Determination, conclusion of law "F"). The Administrative Law Judge thus found that the parcels should be aggregated because the transfer was pursuant to a plan or agreement even though the transfer was from one transferor to more than one transferee (20 NYCRR 590.43).

On exception, petitioners continue to argue that the transfers were independent of each other, were not pursuant to a plan or agreement to avoid gains tax and should not be aggregated.

In response, the Division continues to argue that "[b]y introducing the transferor intent requirement into the Regulation, the Tribunal in its August 19, 1993 decision has 'prescribed a different rule from that duly enacted'" (Division's letter brief, p. 2). The Division also continues

to argue that "there is no justification for treating a single transfer set up by assignments differently from a single transfer resulting from a direct contract between the transferor and the transferee" (Division's letter brief, p. 2).

After reviewing the allegations presented to us on exception and the record before us, we find no basis for modifying the Administrative Law Judge's determination on remand in any respect. The Administrative Law Judge adequately and correctly addressed the same allegations presented on exception to this Tribunal. Therefore, we affirm the determination of the Administrative Law Judge on remand for the reasons stated in said determination.

However, the Division has asked that an error made in Matter of Balabanow (Tax Appeals Tribunal, August 19, 1993) be corrected. In that decision, we asked the Administrative Law Judge in his determination on remand to address "whether petitioners transferred the property by partial or successive transfers pursuant to a plan or agreement to avoid the gains tax within the purview of 20 NYCRR 590.43." As the Court in Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127) stated:

> "[t]he Legislature clearly did not intend that aggregation under Tax Law § 1440(7) is to be triggered only if the transferor engages in partial or successive transfers for purposes of tax avoidance, since respondent is otherwise statutorily authorized to ignore such devices (see, Tax Law §1448[1])."

We agree that an error was made insofar as our decision stated that there must be a plan to avoid the gains tax. This error has no impact on the matter before us.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dimitri and Taisa Balabanow is denied;

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

3. The petition of Dimitri and Taisa Balabanow is denied; and

4. The Notice of Determination dated March 30, 1989 is sustained.

DATED: Troy, New York
July 14, 1994

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

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