STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LESTER E. TOMBACK	:	DECISION DTA No. 811010
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 Lester E. Tomback, 88 Lake Shore Drive, Eastchester, New York 10709, filed an exception to the determination of the Administrative Law Judge issued on December 9, 1993. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner's reply brief was received on March 16, 1994, which date began the six-month period to issue this decision. Neither party requested oral argument.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly aggregated the consideration received by petitioner on his sale of real property as a tenant in common with the consideration received by other tenants in common on their respective sales to a common transferee when determining the applicability of the $1,000,000.00 exemption from real property gains tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "5" and "6" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Lester E. Tomback, was a partner in a New York partnership known as Narbar Associates ("Narbar"). Narbar's sole asset was real property known as 33 Route 304, Nanuet, New York. The partnership agreement provided that the partnership would continue until terminated by the sale of the partnership property or the written consent of the holders of 75% of the partnership interests or shares.

At the times relevant to this matter, the partners and their interests in the partnership's property, profits and losses were as follows:

Partner	Percent of Interest in Narbar
Nathan R. Schwartz	40%
Stephen D. Shapiro, individually and as Administrator of the Estate of Harold S. Shapiro	30%
Stephen D. Shapiro, individually and as Executor of the Estate of Geraldine Brandman	10%
Lester Tomback	10%
Alvin Schwartz	10%
Total	100%

Pursuant to a stipulation dated December 31, 1988 in settlement of the action Shapiro v. Schwartz (Supreme Court, Rockland County) ("Stipulation in Settlement") it was agreed that Nathan R. Schwartz would purchase the aggregate interest of Stephen Shapiro in Narbar. The stipulation provided that the aggregate interest of Stephen Shapiro in Narbar arose from the interest in Narbar previously owned by Harold S. Shapiro, which was 30%, and the interest in Narbar previously owned by Geraldine Brandman, which was 10%, which were bequeathed to Stephen Shapiro pursuant to their respective last wills and testaments. At the election of Nathan Schwartz, in lieu of purchasing the partnership interests, Stephen Shapiro agreed to transfer title to the real property owned by Narbar to all of the partners of Narbar as tenants in common, each such tenancy in common to constitute an undivided interest in the real property equal to the

respective partner's beneficial interest in the real property. Upon the transfer of the real property to the partners of Narbar, Stephen Shapiro was directed to transfer his aggregate interest in the real property to Nathan Schwartz. The total purchase price for the Shapiro/Brandman-Narbar interests was $1,900,000.00.

The fourth paragraph of the Stipulation in Settlement provided that Lester E. Tomback and Alvin Schwartz each consented to the stipulation "on the condition that Schwartz purchases their partnership interests in Narbar, or in lieu thereof, their interests in Narbar's real property." Paragraph 6(a) of the stipulation set forth the following condition precedent to the obligations of Nathan Schwartz to consummate the contemplated transactions:

> "At or before the Closing, Schwartz shall have acquired all of the partnership interests in Narbar or the respective underlying interests in the real property represented by such partnership interests which are now owned by Alvin Schwartz and Lester E. Tomback, for such price and on such terms and conditions as shall be agreed upon by them. In the event of the failure to consummate either acquisition, Schwartz's obligations hereunder to purchase the Shapiro/Brandman-Narbar Interests shall be deemed terminated and of no further force and effect . . . ."

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

> In a letter dated January 25, 1989 from Alvin Schwartz to Nathan Schwartz it was stated that Nathan Schwartz would acquire the entire 10% partnership interest of Alvin Schwartz to Narbar or, in lieu thereof, at the election of Nathan Schwartz, Alvin Schwartz's entire undivided 10% interest in the real property owned by Narbar in the event Narbar was to distribute the realty to its partners. The letter also provided that the purchase price would be paid by delivery to Alvin Schwartz of Nathan Schwartz's promissory note in the principal amount of $350,000.00 payable to the order of Alvin Schwartz. Paragraph 5(b) of the letter agreement stated that the transaction contemplated by the letter agreement was subject to the condition precedent that all of the other transactions contemplated by the previously mentioned

> Stipulation in Settlement would be consummated prior to or contemporaneously with the transaction therein.[1]

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> In a letter dated March 6, 1989 from petitioner to Nathan R. Schwartz it was agreed that Nathan Schwartz would acquire the entire 10% partnership interest of petitioner in Narbar or, at the election of Nathan Schwartz, petitioner's entire undivided 10% interest in the real property owned by Narbar in the event Narbar was to distribute the realty to its partners. The letter agreement further provided that the entire purchase price would be paid by delivery to petitioner of Nathan Schwartz's promissory note in the principal amount of $350,000.00 payable to the order of petitioner. In the same manner as the letter of January 25, 1989, the letter agreement also stated that the transaction contemplated by the letter agreement was subject to the condition precedent that all of the other transactions contemplated by the previously mentioned Stipulation in Settlement would be consummated prior to or contemporaneously with the transaction therein.[2]

In a letter dated March 8, 1989, the attorneys for Nathan R. Schwartz explained to the Division of Taxation ("Division") that Nathan Schwartz anticipated participating in a series of transactions whereby he would acquire the sole asset of Narbar. Specifically, the letter outlined the transfers which were contemplated in the Stipulation in Settlement, the transfers anticipated by the letter agreement between Nathan Schwartz and Lester Tomback dated March 6, 1989 and the transfers contemplated by the letter agreement between Nathan Schwartz and Alvin Schwartz. The letter included, among other documents, a Transferor Questionnaire and a Transferee Questionnaire which reflected Lester Tomback, as transferor, and Nathan R. Schwartz, as transferee. With respect to the transaction between Nathan R. Schwartz and petitioner, the letter further explained that:

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[1]We modified the Administrative Law Judge's finding of fact "5" by adding the words "in the event Narbar was to distribute the realty to its partners" at the end of the first sentence to more accurately reflect the record.

[2]We modified the Administrative Law Judge's finding of fact "6" by adding the words "in the event Narbar was to distribute the realty to its partners" at the end of the first sentence to more accurately reflect the record.

> "It is anticipated that this transaction will qualify for payment of the Gains Tax in installments. Accordingly, Tomback will file a Form TP-583, Supplemental Return, with the Form TP-582, Tentative Assessment and Return, received from you."

Although a complete set of deeds was not included in the record, the documents show that Narbar distributed to each partner, as tenant in common, an interest in the real property held by Narbar. After the transfer, the interest in the real property held by each partner was equal to that partner's beneficial interest in the partnership. Accordingly, after the foregoing transfer, petitioner received an undivided 10% interest in the property formerly held by Narbar.

After each partner received his respective interest in the partnership property, each partner transferred his interest, as tenant in common, to Nathan R. Schwartz, which resulted in Mr. Schwartz's acquiring an undivided fee interest in the property.

On the transfer of petitioner's interest in the real property, he received a note and mortgage in the amount of $350,000.00.

On May 8, 1989, the Rockland County Clerk's Office received a Tentative Assessment and Return from petitioner which reported, among other things, a tentative assessment of tax due of $25,191.30.

Petitioner applied to pay the gains tax due in installments and, in a letter dated June 12, 1989, the Division agreed to petitioner's request. On May 1, 1990, the Division received its first annual installment payment of $5,038.26. A letter which accompanied the payment explained that the tax was being paid under protest since petitioner believed that the assessment was erroneous.

On June 25, 1990, the Division received a Claim for Refund of Real Property Transfer Gains Tax wherein petitioner requested a refund of $5,038.26. The refund claim alleged that the transfer was only of a 10% interest in the property and was not the sale of a controlling interest. Petitioner also stated that the consideration was only $350,000.00 and that the sale was separate and apart from the other transfers.

In a letter dated July 25, 1990, the Division advised petitioner that his claim for a refund was denied. The letter explained, among other things, that Tax Law § 1440.7 and 20 NYCRR 590.43(d) provide that when several transferors own one parcel of land as tenants in common and transfer the land to one transferee, the consideration paid to each of the transferors will be aggregated.

On July 15, 1992, the Division of Tax Appeals received a petition which challenged the denial of the claim for refund. According to the petition, the amount in controversy is $25,191.30.

OPINION

The Administrative Law Judge held that the Division properly aggregated the consideration received by petitioner with the consideration received by the other transferors pursuant to 20 NYCRR 590.43(d). The Administrative Law Judge, citing Matter of Lee (Tax Appeals Tribunal, October 15, 1992, affd Matter of Lee v. Tax Appeals Tribunal, ___ AD2d ___, 610 NYS2d 330), held that petitioner's argument that his transfer was unrelated to the transfers by the other tenants in common has no bearing on petitioner's liability. Likewise, the Administrative Law Judge held that:

> "a sworn statement that the transfers were 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 Article 31-B of the Tax Law would not have any impact upon petitioner's liability" (Determination, conclusion of law "G").

On exception, petitioner asserts that the transfers by the tenants in common were not a single transaction nor were they pursuant to a plan or agreement to effectuate by partial or successive transfers a transfer which would otherwise be subject to the gains tax. Petitioner asserts that his transfer of his respective interest "was upon entirely different terms than the sale and transfer by Shapiro to Schwartz" (Petitioner's brief on exception, p. 2). Next, petitioner asserts that there is nothing in Tax Law § 1440(7) that requires consideration received by a transferor of an interest in real property be aggregated with the consideration received by other

transferors. Thus, petitioner contends that 20 NYCRR 590.43(d) plainly contradicts Tax Law § 1440(7). Petitioner also contends the mortgage is in default and he faces the possibility of paying gains tax on a gain he will never see.

In response, the Division contends the clear language of Tax Law § 1440(7) clearly supports the Division's interpretation of the statute as found in 20 NYCRR 590.43(d). Likewise, the Division, citing Matter of Blue Spruce Farms v. New York State Tax Commn. (99 AD2d 867, 472 NYS2d 744, affd 64 NY2d 682, 485 NYS2d 526) argues that petitioner has not carried his burden of showing that not only his interpretation of Tax Law § 1440(7) is plausible, but it is the only reasonable interpretation of the statute. The Division also cites numerous Appellate Division, Third Department cases where the Court upheld the Division's aggregation of consideration pursuant to Tax Law § 1440(7). In addition, the Division asserts that the subject transfer was just the type of transaction that Tax Law § 1440(7) was designed to include. Finally, the Division contends it is of no consequence that the mortgage petitioner received as consideration is in default because consideration is determined at the time of transfer and is not affected by subsequent events.

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

We first address whether the consideration received on the transfers by the tenants in common should be aggregated for purposes of determining whether consideration received is less than $1,000,000.00 and, thus, exempt from tax pursuant to Tax Law § 1443(1).

Tax Law § 1441 imposes a tax of 10% upon gain derived on the transfer of real property within New York State. Tax Law § 1443(1) exempts from the tax transfers in which the consideration received is less than $1,000,000.00.

20 NYCRR 590.43 provides, in pertinent part, that:

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

Petitioner argues that the interpretation of Tax Law § 1440(7) contained in this regulation is contrary to the plain meaning of Tax Law § 1440(7). We disagree.

The term transfer, for purposes of applying the gains tax, is defined in Tax Law § 1440(7), and provides in pertinent part that:

> "'[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 . . . . Transfer 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, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety . . ." (emphasis added).

As can be seen, Tax Law § 1440(7) clearly requires that multiple transfers by joint tenants of a single parcel be treated as a single transfer for purposes of applying the gains tax. Accordingly, the Division's regulation in 20 NYCRR 590.43(d) which aggregates consideration received by several transferors who are joint owners of a parcel of land for purposes of applying the million dollar exemption is entirely consistent with Tax Law § 1440(7).

Petitioner also contends that since the transfers to Schwartz were not pursuant to a plan to avoid payment of the gains tax, the consideration he received should not be aggregated with that of the other transferors. We disagree.

"[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 . . ." (Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127, 129). Whether or not the aforementioned transfers were pursuant to a plan or agreement to avoid tax is of no significance because as discussed above, the consideration received by tenants in common upon the transfer of each tenant's respective interest is aggregated for purposes of determining the applicability of the one million dollar exemption without regard to the intention of the transferors.

Finally, petitioner alleges the mortgage is in default and he faces the possibility of paying tax on a gain he will never see. While this is an unfortunate situation, consideration is measured at the time of transfer and not effected by subsequent events (Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lester E. Tomback is denied;

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

3. The petition of Lester E. Tomback is denied and the Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
September 1, 1994

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

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