

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>TROUTMAN STREET ASSOCIATES</b>	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 811104
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 19, 1994 with respect to the petition of Troutman Street Associates, c/o Rothwood Real Estate Services, 80 Cutter Mill Road, Great Neck, New York 11021. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a brief in opposition. Oral argument was heard on December 15, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUE***

Whether the Division of Taxation properly aggregated the consideration from two sales of adjacent, vacant land with a third improved parcel such that the \$1,000,000.00 threshold for gains tax liability was met under the theory that such were "partial or successive transfers" pursuant to a plan or agreement which otherwise would have been subject to gains tax.

***FINDINGS OF FACT***

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

Petitioner, Troutman Street Associates ("Troutman"), is a real estate investment project owned by The Regency Group ("Regency"). Regency, a privately held investment/development company specializing in the acquisition and development of income-producing properties, maintained the controlling interest (more than a 50% interest) in Troutman, a partnership. A Regency promotional brochure introduced into evidence indicated that the property which comprised Troutman was a 115,000-square foot industrial complex in Maspeth, New York. Petitioner acquired the subject property, 1948-68 Troutman Street, on June 3, 1988 for \$3,275,000.00. The conveyances which are the subject of the Division of Taxation's ("Division") proposed aggregation in this matter involve three contracts:

(a) The first contract, which Troutman entered into on October 18, 1988, involved the sale of a 5,000-square foot section of vacant land to Philip Sacco for \$150,000.00. The Sacco deal closed in February 1989. This is referred to as "Unit F" on the Division's Exhibit G.

(b) The second contract entered into was between Troutman and Gilrose Trading, Inc. on April 18, 1989 for the purchase of approximately 22,500 square feet of space within the building structure at 1948-68 Troutman Street. The original contract price for such premises exceeded \$1,400,000.00. According to a contract modification executed January 9, 1990, the purchase price was changed to \$1,372,393.75. This sale closed in February 1990. Applicable real property gains tax was paid on this transfer. This section of the building is "Unit D" on Exhibit G.

(c) The third contract involved a sale of approximately 28,000 square feet of vacant land which was physically located between the portion of the building sold to Gilrose Trading and the small vacant parcel sold to Sacco. The contract for such land was between Troutman and Cloverdale Ridge Realty, Ltd. (later assigned to NHE Realty Co.) entered into on June 16, 1989 for a net purchase price of \$832,124.00. This sale also

closed in February 1990. This vacant land was designated as "Unit E" on Division's Exhibit G.

The Division's Exhibit G, referred to above consists of two documents depicting the property from which the transfers in issue were made. The first is a Proposed Tenant Subdivision map prepared by an engineering firm on December 29, 1988. Absent any detail as to measurement, the document sets forth the positioning of the units under discussion and handwritten designations of Units A-F appear thereon (referred to above).

The second document, a title survey and subdivision, is a larger version of the property map with specific measurements and notations. It was prepared by surveyors on May 19, 1989 and bears parcel designations which differ from those in the other Exhibit G document.

As previously stated, applicable real property gains tax was calculated and paid on the transfer of Unit D. The Division takes the position in this matter that the two transfers of vacant land described above should be aggregated with the sale of Unit D, resulting in additional gains tax. If the sales of Units E and F alone are aggregated, the \$1,000,000.00 threshold is not met.

Petitioner provided the testimony of Susan McGuire, the director of financial management for Regency from September 1986 to May 1993. Her responsibilities included involvement in the purchase of properties, management of properties and post-acquisition follow-up. She described Regency as a long-term real estate investor/developer. Its primary goal was to create added value to property by choosing land and buildings which required renovations, or by converting property to establish a situation where it could result in long-term appreciation. She testified that the company's goal was always to look at each project as a long-term investment. During the eight years Ms. McGuire was employed by Regency, the only project that was owned by Regency in which there was a sale of a portion of property was the Troutman project. The remainder of the real estate portfolio was retained as a long-term investment. Ms. McGuire stated that the goals in place for Troutman were consistent with the traditional goals sought to be achieved by Regency as a whole. Ms. McGuire testified that she did not have any ownership interest in Regency.

A statement describing the history of Troutman was prepared by Ms. McGuire in April 1992, prior to petitioner's conciliation conference. Consistent with the hearing testimony, the background information provided that when petitioner purchased 1948-68 Troutman Street its original intent with regard to the property, which had under-market leases, was to upgrade the building and "develop a higher and better use for the property." Initially, a conversion of the front 21,000 square feet of space in the building to an outlet center was planned. In addition, Troutman had also planned to construct an industrial building extension on the vacant land (which was eventually sold to Cloverdale). At the time of the preparation of the statement, Ms. McGuire indicated that Troutman "own[ed] an industrial building consisting of 63,165 square feet which [was] currently leased to two tenants . . . ."

Petitioner submitted the sworn affidavit of Ken Roth, the managing partner of Troutman, dated November 1, 1990, submitted to the Division in support of its claim for refund, and attached to its request for a conciliation conference. It provided the following:

"I, Ken Roth, am the managing partner of Troutman Street Associates. The unimproved land at Troutman Street was originally purchased by Troutman Street Associates for development and expansion of the contiguous improved property.

"We sold 5,000 square feet of the property to our neighbor, Philip Sacco, since it was an appendage that did not conform to a regular shaped parcel and was not required for development.

"Subsequent to the sale of the 5,000 square feet, we were approached by a developer who induced us to sell him the remainder of the unimproved property rather than develop it ourselves. Accordingly, these two sales were separate and apart and not part of an overall plan of sale. Nor were such transfers pursuant to a plan or agreement to effectuate by partial or successive transfers a transfer which would otherwise be covered by Article 31B of the Tax Law."

Susan McGuire described the parcel of property that was the subject of the first transfer in issue (Unit F) as "a small piece that stuck off of the rest of the vacant land . . ." (Tr., p. 20). She additionally provided the following testimony regarding this contract:

Susan McGuire: "We were approached by Sacco because they were interested in using it and we sold off the piece of land because it would have been no use to us when we did the expansion on the building" (Tr., p. 21).

With regard to the second contract (Gilrose contract for Unit D), Ms. McGuire explained that the building had been fully rented until one of the tenants vacated after the expiration of its

lease. Petitioner claims to have attempted to actively market the space in order to secure another lease. However, what little interest was shown was not financially feasible. Gilrose Trading initiated discussions with petitioner regarding the space but was interested only in making a purchase of the building space, not leasing the same. Due to financial constraints petitioner was under at that time as well as the market conditions, petitioner agreed to sell off such portion of the building.

Turning to the contract representing the transfer of the large parcel of vacant land (Unit E), petitioner explained that its original intention was to expand the existing building from its original approximate 85,000 square feet to 115,000 square feet onto the vacant land. Having explored the market conditions, it was apparent to petitioner that it would not be able to lease at a rental sufficient to support the cost of construction, and petitioner had already spent a considerable amount of time attempting to pre-lease such proposed construction without success. Petitioner was approached by Cloverdale Ridge Realty and agreed to sell the 28,000 square feet. Although the contract between Troutman and Cloverdale Ridge Realty reflects a contract price of \$925,000.00, revision of the same was made based on the actual square footage of the premises after it was surveyed. The gross contract price was reduced to \$896,874.00, less brokerage commissions of \$64,750.00, resulting in a purchase price of \$832,124.00 which is the amount reflected as "consideration" on the transferor questionnaire submitted into evidence.

Petitioner seeks a refund in this matter (\$20,426.00) of tax paid which is attributed to the aggregation of the two parcels of vacant land with the portion of the building sold to Gilrose Trading.

Petitioner received correspondence from the Division dated February 20, 1991 acknowledging its claim for refund in the amount of \$63,901.31. The Division indicated that a refund to petitioner had been recommended in the amount of \$30,224.14. However, such refund adjustment did not include any adjustment with respect to the aggregation. The Division

continues to maintain the position that the two vacant parcels (Units E & F) should be aggregated with the improved parcel (Unit D).

***OPINION***

The Administrative Law Judge found that the transfers of real property were not made pursuant to a plan or agreement, were independent transfers and, therefore, were not subject to aggregation. The Administrative Law Judge found the testimony of petitioner's witness to be credible and unequivocal that "the motive behind Regency's business as a whole, and the Troutman project specifically, primarily centered around long-range investment" (Determination, conclusion of law "B"). The company's brochure describes long-term development plans for several properties. The Troutman project is described in the brochure as a "115,000 square foot industrial complex" and the Administrative Law Judge stated in this regard that:

"[i]f Regency had a plan for the property which included selling off the vacant land and a portion of the improved property, or if it had already done so, it is unlikely that it would promote it in a printed brochure as a complex of such proportion, and run the risk of misrepresenting a property in what could be deemed a material misrepresentation to its investors" (Determination, conclusion of law "B").

With respect to the Astoria Blvd. Associates ("Astoria") project which yielded a relatively quick investment return through the sale of 32% of the facilities, the Administrative Law Judge found that this project was unique and that the majority of the projects described in the brochure were long-term investment goals. The Administrative Law Judge further found that while the Astoria project was handled in this manner, absent evidence of such, a like plan could not be attributed to the other projects (Determination, conclusion of law "B").

Next, the Administrative Law Judge rejected the Division's position that Regency's plan "was to take 'whatever steps where necessary to make a project profitable, including going into a deal with the intent to sell off portions of the property to either turn a short-term profit or fund the intended development, or both'" (Determination, conclusion of law "B"). The Administrative Law Judge found that petitioner absorbed short-term losses in some cases but,

when these losses were prolonged by stressful market conditions, a different investment approach was reasonable.

The Administrative Law Judge then found that the transfers here were not part of a subdivision plan and aggregation was not required. In this regard, the Administrative Law Judge found that petitioner's intentions with regard to the three transfers were different. Petitioner was approached by Mr. Sacco regarding the vacant 33,000 square feet, and the contract of sale with Mr. Sacco was entered into after petitioner decided the vacant parcel was not necessary to its projected building extension. With regard to the Gilrose sale, petitioner entered into a contract of sale only after Gilrose made it known that it was only interested in purchasing the space, not leasing it. With regard to the sale of the other vacant land to Cloverdale, market conditions influenced petitioner's decision to sell that parcel.

With respect to the Proposed Tenant Subdivision map, the Administrative Law Judge found this document to be "consistent with petitioner's stated goals of upgrading the property . . . and leasing the property to other industrial tenants" (Determination, conclusion of law "C"). In addition, the Administrative Law Judge found that the map contained no mention or implication that a parcel might be sold.

Finally, the Administrative Law Judge rejected the Division's argument that a plan existed because the parcels were sold within a relatively short period of time and were adjacent to each other. The Administrative Law Judge, citing Matter of General Builders Corp. (Tax Appeals Tribunal, December 24, 1992), stated that the Division's interpretation would irrefutably presume the existence of a plan whenever contiguous or adjacent properties are sold and had the Legislature intended this, the exception to aggregation for transfers not pursuant to a plan need not have been included in the statute (Determination, conclusion of law "D"). The Administrative Law Judge found that while petitioner had a plan, this plan did not initially call for the "disposal of the parcels in question, but rather one which envisioned expansion and development" on a long-term basis (Determination, conclusion of law "D").

On exception, the Division continues to argue that petitioner had a plan to subdivide the property and sell some of the parcels, and that aggregation is proper in this matter. The Division argues that petitioner would not have had subdivision maps drafted if it had intended to retain ownership of the land and develop it. Further, the Division argues that the Administrative Law Judge never addressed the relevance of the subdivision plans.

The Division next argues that petitioner's stated goal of long-term investment and tolerating short-term losses to achieve that goal is not the "complete picture." The Division argues that the Astoria project, where property was sold to refund the cash investment, "demonstrates another aspect of the multi-faceted project financing repertoire employed by Regency -- the sale of portions of an acquired parcel to re-coup a portion of the initial investment" (Division's brief, p. 10). The Troutman project, where property was sold four months after being acquired to cover short-term losses, argues the Division, is also inconsistent with petitioner's stated goal. In addition, the Division argues that the Astoria project cannot be distinguished from the matter before us.

The Division then goes on to argue that any plan for a 115,000 square foot industrial complex was abandoned when petitioner contracted to sell unit "F" to Sacco. In this regard, the Division also argues that "it would have been physically impossible for Regency to expand the existing structures" because a contract of sale was entered into to sell unit "D," the parcel that separated unit "E" from the retained building (Division's brief, p. 13).

Finally, the Division argues that the self-serving testimony of petitioner's witness is insufficient to satisfy petitioner's burden of proof and that petitioner has produced no contemporaneous documentation relating to:

"the alleged plans Regency had for the parcel; the extension 10+ year projections relating to the plan; the alleged change in plans for the parcel; the new projections which formed the basis for Regency's alleged change in strategy; the original financing plan with the 10+ year projections, showing how Regency planned to absorb 3+ years of losses . . . and the new financing plan" (Division's brief, p. 15)

In response, petitioner argues that the determination of the Administrative Law Judge should be affirmed. Petitioner states that "[t]his case turns on the credibility of witnesses,



which . . . is the province of the trier of fact" and the Administrative Law Judge found petitioner's witness to be credible (Petitioner's brief, p. 1). Petitioner also argues that the cases cited by the Division are inapposite and the "controlling precedent" is Matter of General Builders Corp. (*supra*).

The Administrative Law Judge correctly and adequately addressed all of the issues raised before her and we find no basis in the record before us for modifying the Administrative Law Judge's determination on these issues in any respect. Therefore, we affirm the determination of the Administrative Law Judge on these issues for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Troutman Street Associates is granted.

DATED: Troy, New York  
June 1, 1995

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

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