STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

VILLAGE ESTATES PARTNERSHIP

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.

In the Matter of the Petition

of

IRA BLAKE

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.

In the Matter of the Petition

of

CHARLES CAPUTO

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.

In the Matter of the Petition

of

JEFFREY CHRISTIANA

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.

DECISION
DTA Nos. 812026, 812027, 812028 and 812029

Petitioners Village Estates Partnership, 1037 Ardsley Road, Schenectady, New York 12308, Ira Blake, 1155 Reef Road, Vero Beach, Florida 32963, Charles Caputo, 7948 Burgoyne Avenue, Hudson Falls, New York 12839 and Jeffrey Christiana, 1037 Ardsley Road, Schenectady, New York 12308, filed an exception to the determination of the Administrative Law Judge issued on December 22, 1994. Petitioners appeared by Lavelle & Finn, LLP (Martin S. Finn, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was heard on August 8, 1995, 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 the transfer of a lot, which is contiguous and adjacent to a lot transferred in accordance with a condominium plan, should be aggregated for transfer gains tax purposes with the condominium sales.

II. Whether certain condominium units distributed to members of a partnership as part of the partnership's dissolution may be valued at the amount assigned to the units at the time of dissolution or whether evidence of their fair market value must be provided

FINDINGS OF FACT

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

Petitioners Ira Blake, Charles Caputo and Jeffrey Christiana were licensed real estate brokers. According to Mr. Christiana's testimony, in 1979 the three petitioners formed petitioner Village Estates Partnership ("Village Estates") for the purpose of purchasing land in Lake George, New York. Mr. Blake and Mr. Christiana each had a 40% interest in the partnership and Mr. Caputo had a 20% interest.

At hearing, Mr. Christiana testified that he and Messrs. Blake and Caputo formed a partnership with no limited partnership interests and that he was authorized to testify at the hearing on behalf of the partnership.

In January of 1979, petitioners Blake, Caputo and Christiana purchased, as tenants-in-common, real property located along the shore of Lake George. Petitioner Christiana submitted into evidence a map of the property that was purchased. The map was prepared by petitioners for the Town of Lake George's zoning approval. The purchased property consisted of lots 1 through 10, all of which were adjacent and contiguous. Lot 1 consisted of 11 cabins that had been used as rental units. Petitioners initially intended to sell this lot as a single unit to be operated as a seasonal rental business and marketed it as such. Lot 10, which bordered Lots 1 and 6 through 9, was essentially an unimproved, commercially-zoned piece of real property. Lots 2 through 9 contained a cabin on each lot.

Initially, petitioners intended to sell lots 1 through 10. They filed a subdivision map with the Warren County Clerk which was approved on December 11, 1979. When lot 1, which contained the 11 cabins, did not sell as a single unit, petitioners decided to sell the 11 cabins as condominium units. A new map was prepared in January of 1982 only for the 11 separate condominium units and their exclusive use areas. The offering plan for Village Estates Condominium went into effect October 1, 1986 and listed petitioners Caputo, Blake and Christiana as the sponsors and selling agents. This plan listed 11 units for a total amount of $1,135,000.00 and did not include lot 10. Petitioners sold 6 of the 11 condominium units shortly after the offering plan went into effect.

Lot 10 was marketed separately as an unimproved, commercially-zoned piece of real property. At the time of the hearing, lot 10 remained unsold.

Petitioners sold lots 2, 5, 6, 7, 8, and 9 prior to March 28, 1983, the effective date of the real property transfer gains tax. After the effective date of the gains tax, the three petitioners sold lot 3 on June 17, 1983 for $60,000.00 and lot 4 on October 22, 1984 for $176,500.00.

The Division of Taxation ("Division") proposed nine findings of fact concerning the sale of lots 2 through 9. These proposed findings are adopted as findings (a) through (i) as follows:

(a) Petitioners[1] acquired the property in question from Michael A. Sinto by deed dated January 18, 1979 and recorded in the Warren County Clerk's Office on January 25, 1979 in Liber 620 of Deeds at page 1060.

(b) Petitioners sold lot 2 for $145,000.00 to Edward Mastoloni by deed dated May 15, 1981. The deed was recorded in the Warren County Clerk's Office on May 15, 1981 in Liber 639 of Deeds at page 179.

(c) Petitioners sold lot 3 for $60,000.00 to Norman G. Olsen, Barbara J. Olsen and Garry H. Olsen by deed dated June 17, 1983. The deed was recorded in the Warren County Clerk's Office on June 20, 1983 in Liber 654 of Deeds at page 129.

(d) Petitioners sold lot 4 for $176,500.00 to Honeymoon Lodge Partnership, et al. by deed dated October 22, 1984. The deed was recorded in the Warren County Clerk's Office on October 31, 1984 in Liber 665 of Deeds at page 995.

(e) Petitioners sold lot 5 for $62,500.00 to John Winslow by deed dated August 1, 1980. The deed was recorded in the Warren County Clerk's Office on August 13, 1980 in Liber 633 of Deeds at page 923.

(f) Petitioners sold lot 6 for $35,500.00 to Robert Faulconer by deed dated August 7, 1980. The deed was recorded in the Warren County Clerk's Office on August 13, 1980 in Liber 633 of Deeds at page 920.

(g) Petitioners sold lot 7 for $30,000.00 to Jeffrey Christiana, et al. by deed dated November 11, 1980. The deed was recorded in the Warren County Clerk's Office on December 2, 1980 in Liber 636 of Deeds at page 45.

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[1]The use of the term petitioners in this finding refers to petitioners Blake, Caputo and Christiana only, inasmuch as the deeds described contained only their names as transferors or transferees. Village Estates was not listed on those deeds.

(h) Petitioners sold lot 8 for $25,000.00 to Barry D. Relyea and Yetta J. Relyea by deed dated September 15, 1980. The deed was recorded in the Warren County Clerk's Office on September 24, 1980 in Liber 634 at page 725.

(i) Petitioners sold lot 9 for $25,000.00 to Theodore Farrell by deed dated August 29, 1980. The deed was recorded in the Warren County Clerk's Office on September 2, 1980 in Liber 634 of Deeds at page 211.

Sometime in 1988, the three partners decided to dissolve the partnership and distribute the five unsold condominium units and lot 10. In December of 1988, Jeffrey Christiana received condo units 1 and 8. Petitioners valued these properties for liquidation purposes at $105,000.00 and $85,000.00, respectively. Charles Caputo received condo unit 7 which was valued at $85,000.00 and Ira Blake received condo units 2 and 10 which were valued at $105,000.00 and $85,000.00 respectively. In addition, petitioners Caputo and Christiana received lot 10 which was valued at $50,000.00. Lot 10 was transferred in March of 1989.

The Division notified Mr. Christiana by letter dated April 17, 1992 that an audit was to be conducted with respect to gains tax on the condominium project. In that letter, the Division noted that the condominium sales might be aggregated with the lot sales made after March 28, 1983. The letter read, in relevant part, as follows:

> "Within the information submitted with the DTF-701 forms, it is indicated that other parcels have been sold that were part of the original parcel purchased. These parcels may have to be aggregated with the condominium project and be subject to tax under Article 31-B.
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> * * *
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> "Regarding the other parcel sales. Sales of lots after March 28, 1983, contiguous or adjacent to the condominium project may have to be aggregated to sales of the condominiums. Based on information reviewed it appears lots 3, 4 and 10 were sold after March 10, 1983. Please send a copy of the contract of sale for these parcels and any others sold after March 28, 1983. Indicate the date of sale for all parcels. Also, indicate if these parcels were sold improved with a residence."

According to the audit summary report, the Division adjusted the consideration for the sale of real property by (1) aggregating with the condominium sales the sale of lot 10 to petitioners Christiana and Caputo for $50,000.00, and (2) disallowing a claimed $16,275.00

brokerage fee on the five units sold to petitioners. Thus, the upward adjustment to consideration was $66,275.00. The Division also adjusted upward the original purchase price by $11,075.00 -- the acquisition cost allocated to lot 10. The Division's auditor accepted the consideration for the five condo transfers to the three individual petitioners because the unit prices approximated the sale prices of the other condo units and because the condos were held for two years and had not been resold. The Division did not aggregate the sale of lots 3 and 4, which were sold after the enactment of the gains tax law, with the condo sales and lot 10. In the brief the auditor prepared for a conciliation conferee, he explained that lots 2 through 9 were not subject to gains tax because they "were sold prior to the enactment of the Gains Tax and/or were improved with a residence. . . ."

The Division issued a Notice of Determination, dated August 7, 1992, to Village Estates for real property transfer gains tax due of $54,884.00, plus penalty and interest. The Division also issued to each of the petitioners Blake, Caputo and Christiana a Notice of Determination, dated August 7, 1992, for gains tax due of $25,223.00, plus penalty and interest, based on their liability as persons responsible for the tax in relation to Village Estates.[2]

On February 8, 1993, the Division's auditor wrote a letter to petitioners' representative confirming that further adjustments were made to reflect additional brokerage amounts and that transfers to the sponsors involved a mere change in identity of ownership of those condo units. The effect of the new calculations with respect to the "change of identity" rule is reflected below:

[2]No explanation has been provided as to how the amount due of $25,223.00 was allocated to each of these petitioners in relation to the $54,884.00 found due from Village Estates.

Condo #	Total Consideration Tax With Minus Brokerage Fee	OPP	Gain	Tax on Gain	Percent Change	Partial Mere Change
3	$ 85,500.00	$ 42,553.00	$ 42,947.00	$ 4,295.00		$ 4,295.00
4	85,500.00	42,553.00	42,947.00	4,295.00		4,295.00
6	85,500.00	42,553.00	42,947.00	4,295.00		4,295.00
9	94,500.00	42,553.00	51,947.00	5,195.00		5,195.00
11	76,500.00	42,553.00	33,947.00	3,395.00		3,395.00
5	85,500.00	42,553.00	42,947.00	4,295.00		4,295.00
1	101,325.00	42,553.00	58,772.00	5,877.00	x 60%	3,526.00
2	101,325.00	42,553.00	58,772.00	5,877.00	x 60%	3,526.00
7	82,025.00	42,553.00	39,472.00	3,947.00	x 80%	3,158.00
8	82,025.00	42,553.00	39,472.00	3,947.00	x 60%	2,368.00
10	82,025.00	42,553.00	39,472.00	3,947.00	x 60%	2,368.00
lot 10	50,000.00	11,075.00	38,925.00	3,893.00	x 40%	1,557.00
Totals	$1,011,725.00	$479,158.00	$532,567.00	$53,257.00		$42,272.00

A conciliation conference was held on February 19, 1993. By Conciliation Order, dated April 9, 1993, the conferee sustained the $42,272.00 recomputation of tax due for Village Estates, plus penalty and interest. The conferee also issued a Conciliation Order for each of the petitioners Blake, Caputo and Christiana sustaining a $14,946.00 recomputation of gains tax due, plus penalty and interest.

Petitioners each filed a petition, dated June 25, 1993, alleging, inter alia, that the Division erred in (1) aggregating the transfer of the condominium units and lot 10 to the partners in liquidation of their partnership interests with the sales of the other condominium units; (2) determining that the sale of the condominium units in 1987 and the transfer of the condominium units and lot 10 in 1989 were "pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be" subject to transfer gains tax; and (3) determining that the value of the vacant commercial land (lot 10) at the time of the transfer to the two partners in liquidation of their partnership interest was $50,000.00.

The Division filed four answers, dated September 14, 1993, affirmatively stating that the Division's determination was in all respects proper and correct and that petitioners bear the burden of proving, by clear and convincing evidence, that the Division erred.[3]

At hearing, petitioners submitted into the record two separate real estate appraisals of lot 10. Both appraisal reports were dated in January of 1994 and compared the property with three comparable properties in the area. The reports did not use the same comparable properties. One appraisal report concluded that the value of lot 10 as of March 2, 1989 was $32,000.00. The other report concluded that the value of lot 10 was $30,000.00.

Mr. Christiana testified that when the partners valued the properties for liquidation purposes, they did not have the property appraised at that time but assigned values based on other condo sales and what they agreed upon as an equitable distribution of each partner's respective interest in Village Estates. He stated that petitioners were overly optimistic about the $50,000.00 value placed on lot 10 but that if they had appropriately assigned a $32,000.00 value to lot 10, this change would have affected only the values assigned to the various properties and not how the properties were actually divided among the partners. Mr. Christiana testified as follows:

> "I think all of the values were high, so I think that if we were going to drop lot 10 we would have just dropped the value on the others to just equal what we could agree to, because what we are winding up with is property, and to do it the accountant said we had to put values on it to make sure everyone was treated fairly" (tr., p. 66).

The following chart reflects the respective sale prices and percentage of common interest of the condo units that were listed in Schedule A of the original offering plan commencing

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[3] At the commencement of the hearing, petitioners objected to the submission of the answers on the ground that they were not filed within 60 days of the filing of the petitions. Inasmuch as petitioners have not addressed this issue in their brief, it is assumed that this argument has been abandoned. In any event, the Tax Appeals Tribunal has held that the 60-day time period imposed by 20 NYCRR 3000.4(a)(1) is directory rather than mandatory and that, absent a showing of substantial prejudice, the delay in serving the answer does not require dismissal of the agency's action (see, Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115; Matter of Festival Leasehold Co., Tax Appeals Tribunal, January 20, 1989). Petitioners have not demonstrated any prejudice as a result of the late-filed answers.

October 1, 1986, the actual prices paid, and the prices assigned to units that were distributed to the three partners:

Unit	Schedule A Price	% of Common Interest	Actual Sale Price	Sale Price Assigned for Purposes of Partnership Distribution
1	$145,000.00	12.78		$105,000.00
2	145,000.00	12.77		105,000.00
3	95,000.00	8.37	$ 95,000.00	
4	95,000.00	8.37	95,000.00	
5	95,000.00	8.37	95,000.00	
6	95,000.00	8.37	95,000.00	
7	105,000.00	9.25		85,000.00
8	85,000.00	7.49		85,000.00
9	105,000.00	9.25	105,000.00	
10	85,000.00	7.49		85,000.00
11	85,000.00	7.49	85,000.00	

In its post-hearing brief, the Division conceded that the transfers of condominium units 1, 2, 7, 8 and 10 and lot 10 are exempt from transfer gains tax as a "mere change in identity" -- i.e., partnership liquidation. Thus, the Division recomputed downward the amount of gains tax to $25,770.00. The Division also agreed that penalties and interest will be recomputed and that the notices of determination of the three partners will be recomputed to reflect this revised amount of gains tax.

OPINION

The Administrative Law Judge determined that the consideration from the condo sales and lot 10 was to be aggregated because of petitioners' plan to dispose of the entire parcel in the form of subdivided lots. The Administrative Law Judge noted that petitioners' subsequent decision to change the form by which lot 1 was to be sold to a condominium plan is not controlling, nor is the fact that lot 10 was not included in the condominium plan. The Administrative Law Judge held that the plan that invokes aggregation is petitioners' plan at the time they purchased the property, which was to sell off the entire parcel in subdivided lots.

Petitioners assert in their exception that whether a plan existed must be determined at the time of transfer of the parcels and not at the time of purchase by the transferor. Petitioner's argue that they had no plan to dispose of the property.

We affirm the determination of the Administrative Law Judge on this issue.

Tax Law former § 1440(7) provides in part that:

> "[t]ransfer 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 . . . provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences . . . shall not be deemed a single transfer of real property."

Former 20 NYCRR 590.43 provides that:

> "[w]hether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated."

We first note that we disagree with petitioners' assertion that the Administrative Law Judge has misstated the correct analysis for aggregation purposes. The Administrative Law Judge did not state that lots will be aggregated based upon a transferor's intent at the time of the purchase of the property. The Administrative Law Judge's point was that petitioners' original plan to dispose of the entire parcel was still in effect at the time of transfer and, therefore, aggregation was warranted. The Administrative Law Judge stated that "[p]etitioners' change in marketing strategies did not change the fact that they intended to sell off the entire tract of land purchased . . . This is not a case where petitioners established different plans for the use of lots 1 and 10" (Determination, conclusion of law "B"). The Administrative Law Judge's reasoning is consistent with our often stated position that aggregation is required where lots have been transferred pursuant to a plan to dispose of the entire parcel (Matter of Deerwood Estates, Tax Appeals Tribunal, November 17, 1994; Matter of Six Stars Realty, Tax Appeals Tribunal, October 7, 1993).

We next address whether the property was exempt because the consideration was less than $1 million (Tax Law § 1443[1]). The Administrative Law Judge held that lot 10 may be valued at $32,000.00 as opposed to $50,000.00. The Administrative Law Judge, distinguishing this matter from our decisions in Matter of Shareholders of Beekman Country Club (Tax

Appeals Tribunal, April 16, 1992, affd Matter of Beekman Country Club v. Wetzler, 199 AD2d 640, 604 NYS2d 989) and Matter of Bridgehampton Investors Corp. (Tax Appeals Tribunal, August 11, 1988), noted that the value of $50,000.00 did not reflect fair market value because it was not a negotiated contract price, nor was it the price at which a willing buyer and willing seller would trade. The Administrative Law Judge found that the appraisal value and the fact that there appears to be no willing buyers to accept the property at $50,000.00 supports petitioners' position that the value of lot 10 at the time of transfer was $32,000.00. The Administrative Law Judge further held that "in order to prevail on the [$1 million] exemption issue, petitioners must prove not only the fair market value of lot 10 but also the fair market values of the condo units that were also transferred as part of the partnership distribution" (Determination, conclusion of law "D"). Absent testimony regarding the values of the condominium units, the Administrative Law Judge held that there was no rational basis for allowing the use of the appraisal value for lot 10 alone to reduce consideration below the $1 million threshold. The Administrative Law Judge found that the "values assigned [by petitioners] to condo units 1, 2 and 7 were substantially below the prices listed in the original offering plan, whereas every other condo unit sold at, or in the case of the other two condo units distributed, was assigned the same price listed in the original offering plan" (Determination, conclusion of law "D").

Petitioners contend that the Administrative Law Judge's conclusion that lot 10 was valued at $32,000.00 was correct. However, petitioners contend that the Administrative Law Judge erred in finding that in order to accept petitioners' valuation of lot 10, the values of the condominium units must have been established as well. Petitioners assert that the values attributed to the condominiums by petitioners were accepted by the Division and that further valuation would have only served to reduce the total consideration further.

We accept the Administrative Law Judge's conclusion that the value of lot 10 at the time of its transfer was $32,000.00 but reverse the determination of the Administrative Law Judge

insofar as she held that petitioners were required to prove the fair market value of the condo units that were transferred as part of the partnership dissolution.

We have in the past stated that where the conclusions of an auditor form the substance for the issuance of a statutory notice, in order for the Administrative Law Judge to reject these conclusions, there must be some showing that the basis for the conclusion does not support the result reached by the auditor (Matter of Reid, Tax Appeals Tribunal, October 5, 1995). In Reid, on the issue of statutory residency, the auditor determined the number of working days the petitioner spent in New York. The Administrative Law Judge, while finding the auditor's conclusion as a fact, nevertheless rejected it because the business logs relied on were not detailed to the satisfaction of the Administrative Law Judge and no one testified as to the logs' contents. This Tribunal held that the Administrative Law Judge erred in rejecting the auditor's conclusions. We further stated that:

> "[t]he auditor's conclusions with respect to petitioner's status as a statutory resident are the basis for the Division's issuance of the notice of deficiency in this matter (Tax Law § 681[a]). These conclusions are part of the record and, therefore, provide the starting point for the Administrative Law Judge's determination. Allowing the Administrative Law Judge to reject the auditor's conclusions would inject an element of uncertainty into petitioner's challenge to the statutory notice" (Matter of Reid, supra).

We find these principles are equally applicable to this matter.

In the matter before us, the auditor accepted the consideration for the five condominium transfers to the individual petitioners as value by petitioners for liquidation purposes because the unit prices approximated the actual sales prices of the other condo units and because the units were held for two years and had not been resold (Determination, finding of fact "10"). As in Matter of Reid (supra), in this case the Administrative Law Judge did not find that the basis for the auditor's conclusion did not support the auditor's result. Rather, she rejected the sufficiency of the proof of the unit values relied on by the auditor, i.e., the Administrative Law Judge found that the values assigned to the distributed units 1, 2 and 7 were substantially below their list prices in the original offering plan, while all of the sold units were transferred at their offering plan prices. The Administrative Law Judge's analysis of the evidence fails to take into

account one of the factors relied on in the audit report, i.e., that at the time of the audit the distributed units had not actually been sold for their offering plan prices. Thus, we conclude that the Administrative Law Judge analyzed the evidence differently from the auditor, but did not establish that the auditor's conclusions were unreasonable. Therefore, petitioners were entitled to rely on the auditor's acceptance of the condominium values used by petitioners for liquidation purposes and petitioners properly sought an appraisal for the only parcel whose value was in dispute, lot 10. As a result, the total consideration for the aggregated transfers of the condominium units and lot 10 was less than $1 million and the subject property is exempt from the transfer gains tax (Tax Law § 1443[1]).

Our conclusion in favor of petitioners means that our decision will not be subject to any further review (Tax Law § 2016). Therefore, any discussion of the remaining issues is unnecessary.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Village Estates Partnership, Ira Blake, Charles Caputo and Jeffrey Christiana is granted

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

3. The petitions of Village Estates Partnership, Ira Blake, Charles Caputo and Jeffrey Christiana are granted; and

4. The notices of determination dated August 7, 1992 are cancelled.

DATED: Troy, New York
February 8, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner