STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ESTATE OF DANIEL D. BROCKMAN :

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 :

RICHARD M. BROCKMAN :

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 :

SUSAN BROCKMAN :

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 :

JOLIE HAMMER :

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. 812111, 812112, 812113 AND 812114

Petitioners Estate of Daniel D. Brockman, c/o Richard M. Brockman, 28 West 89th Street, New York, New York 10024; Richard M. Brockman, 28 West 89th Street, New York, New York 10024; Susan Brockman, 138 Duane Street, New York, New York 10013; and Jolie Hammer, 1172 Park Avenue, New York, New York 10128, filed an exception to the determination of the Administrative Law Judge issued on March 9, 1995. Petitioners appeared by Marcus, Borg, Rosenberg & Diamond (David Rosenberg and Jeffrey M. Diamond, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Susan Hutchinson, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners did not file a reply brief. Petitioners withdrew their request for oral argument on November 2, 1995, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Donald C. DeWitt took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Taxation in calculating consideration for the transfer of certain real property properly included a (proportionate share) of a purchase money mortgage of $8,500,000.00 held by the sellers (which included petitioners) despite the fact that the purchaser subsequently defaulted on such mortgage and the property was reacquired by the sellers through a foreclosure action.

II. Whether the Division of Taxation should be estopped from subjecting the transaction at issue to gains tax because petitioners had no actual income from the transaction but rather suffered a loss, and the Division of Taxation has asserted, in other forums, that the gains tax is an income tax.

FINDINGS OF FACT

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

The four petitioners, along with two others, each owned a certain percentage interest in a 378-acre parcel of unimproved land located in the Town of East Hampton, Suffolk County, New York at Sag Harbor Turnpike and Buckskill Road ("East Hampton parcel") as follows:

Name	Percentage Interest
Estate of Daniel D. Brockman	12.500
Richard M. Brockman	4.167
Jolie Hammer	4.167
Susan Brockman	4.166
Imre J. Rosenthal	50.0
National Investors Fund, Inc.	25.0
	100.0%

The four petitioners and the two other parties noted above, as sellers, each executed a contract dated September 6, 1990 for the sale and purchase of the East Hampton parcel with a purchaser described as "Buckskill Estates, Inc., a New York corporation." This contract provided for a purchase price of $9,500,000.00 with a downpayment of $750,000.00 on the signing of the contract, $250,000.00 at closing and a purchase money note and mortgage from Buckskill Estates, Inc. to the sellers in the amount of $8,500,000.00. The contract noted that the downpayment of $750,000.00 "shall be paid to Seller in accordance with their respective interests in the premises" so that the downpayment was allocated as follows:

Seller	Percentage Interest	Amount
Imre J. Rosenthal	50.000	$375,000.00
National Investors Fund, Inc.	25.000	187,500.00
Estate of Daniel D. Brockman	12.500	93,750.00
Richard M. Brockman	4.167	31,252.50
Jolie Hammer	4.167	31,252.50
Susan Brockman	4.166	31,245.00
	100.000%	$750,000.00

The factual record on submission is limited. However, petitioners noted in their brief that the four petitioners consist of "three children and the estate of their father" (Petitioners' brief, p. 1). The brief also sets forth the additional, albeit unsubstantiated, fact that the purchaser of

the property, Buckskill Estates, Inc., was "an unrelated no-asset corporation which apparently planned to resell or develop the Property" (Petitioners' brief, p. 2). Documents in the record show that an individual named Paul Sweetman of Southington, Connecticut, executed documents on behalf of Buckskill Estates, Inc., as this New York corporation's president.

As noted in above, the four petitioners owned, in total, a 25% interest in the East Hampton property. The relationship between petitioners and Imre Rosenthal is unknown. The record also does not disclose many details concerning National Investors Fund, Inc., although it is observed that it is a Delaware corporation and that its corporate secretary, Robert M. Post, a New York attorney based in Hicksville, Long Island, executed documents on its behalf. It is further observed that the closing of the transaction at issue took place at the Hicksville office of Walter L. and Robert M. Post.

Petitioners each filed, as a transferor of an interest in real property, a Form TP-580, which is a real property transfer gains tax transferor questionnaire. The questionnaires of the Estate of Daniel D. Brockman, Richard M. Brockman and Jolie Hammer were each dated September 25, 1990, and the questionnaire of Susan Brockman was dated September 21, 1990. The questionnaires computed anticipated tax due as follows:

	Estate of Daniel D. Brockman	Richard M. Brockman	Jolie Hammer	Susan Brockman	Totals
Gross Consideration to be paid for transfer by Buckskill Estates	$1,187,500.00	$395,865.00	$395,865.00	$395,770.00	$2,375,000.00
(Less) Brokerage fees to be paid by transferor[1]	(118,750.00)	(39,587.00)	(39,587.00)	(39,577.00)	(237,501.00)
Consideration	$1,068,750.00	$356,278.00	$356,278.00	$356,193.00	$2,137,499.00
Purchase price paid to acquire real property	$ 90,644.00	$ 30,217.00	$ 30,217.00	$ 30,210.00	$ 181,288.00

[1] Brokerage fees represented 10% of the gross consideration to be paid for the transfer. The questionnaires directed that the brokerage agreement should be attached to the questionnaire. However, the record does not include a copy of the brokerage agreement. It is unknown if petitioners were related in some fashion to the broker or if their relationship was at arm's length.

Allowable selling expenses	25,000.00[2]	-0-	-0-	-0-	25,000.00
Original purchase price	$ 115,644.00	$ 30,217.00	$ 30,217.00	$ 30,210.00	$ 206,288.00
Gain subject to tax[3]	$ 953,106.00	$326,061.00	$326,061.00	$325,983.00	$1,931,211.00
Anticipated tax due	$ 95,311.00	$ 32,606.00	$ 32,606.00	$ 32,598.00	$ 193,121.00

The Division of Taxation ("Division") completed a tentative assessment and return dated October 15, 1990 for each petitioner based upon the transferor questionnaires. The tentative assessments and returns were "sworn to and subscribed to", respectively, by the Estate of Daniel D. Brockman and Richard M. Brockman on October 19, 1990 and by Jolie Hammer and Susan Brockman on October 22, 1990. These tentative assessments computed total gains tax due for the Estate of Daniel D. Brockman, Richard M. Brockman, Jolie Hammer and Susan Brockman of $95,310.60, $32,606.10, $32,606.10 and $32,598.30, respectively.

Subsequently, each petitioner filed a Form TP-583, which is a real property transfer gains tax supplemental return, all dated October 22, 1990, which deferred payment of a portion of the gains tax shown due on the tentative assessments and returns noted above. Petitioners calculated amounts to be deferred as follows:

	Estate of Daniel D. Brockman	Richard M. Brockman	Jolie Hammer	Susan Brockman
(1) Gain subject to tax	$953,106.00	$326,061.00	$326,061.00	$325,983.00
(2) Tax due	95,310.60	32,606.10	32,606.10	32,598.30
(3) Cash received	125,000.00	41,670.00	41,670.00	41,660.00
(4) 50% of line 3	62,500.00	20,835.00	20,835.00	20,830.00
(5) Amount to be deferred[4]	32,810.60	11,771.10	11,771.10	11,768.30

Petitioners remitted the amounts shown on line (4) above. Photocopies of four checks in the respective amounts were included in the documents submitted by the Division as part of the

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[2] The record does not disclose the specific nature of this expense and why only the estate incurred such expense.

[3] Consideration less original purchase price.

[4] Line 2 less line 4.

claims for refund. Petitioners also made further installment payments in the following aggregate amounts as admitted by the Division in its answers to the petitions:

	Estate of Daniel D. Brockman	Richard M. Brockman	Jolie Hammer	Susan Brockman
Aggregate Amount of Additional Installment Payments	$22,237.40	$6,776.06	$7,975.93	$7,974.19

As noted above, the property was sold to Buckskill Estates, Inc. for $9,500,000.00 which included a purchase money note and mortgage both in the corresponding amount of $8,500,000.00. This mortgage note, which was dated October 22, 1990, provided for the payment of the note in installments with the first payment of $297,500.00 due on April 1, 1991. Such payment was not made and, as a result, the sellers accelerated and declared immediately due and payable the whole of the principal sum of the mortgage note. Because the default of Buckskill Estates, Inc. was not cured and no other satisfactory arrangements were agreed upon by the sellers and Buckskill Estates, Inc., the sellers commenced a foreclosure proceeding dated June 17, 1991 which sought the following relief:

> "Mr. Rosenthal[5] demands judgment that Buckskill, the People of the State of New York and all persons claiming under it or any of them, subsequent to the commencement of this action and the filing of a Notice of Pendency thereof, be barred and foreclosed of and from all estate, right, title, interest, claim, lien and equity of redemption of, in and to the Mortgaged Premises and each and every part or parcel thereof; that the Mortgaged Premises may be decreed to be sold, according to law . . .; that the monies arising from the sale thereof may be brought into the Court; that Mr. Rosenthal may be paid the amount due on the Mortgage Note and Mortgage as hereinbefore set forth, with interest and late charges to the time of such payment and the expenses of such sale, plus reasonable attorneys' fees, together with the costs, allowances and disbursements of this action, and together with any sums incurred by Mr. Rosenthal pursuant to any term or provision of the Mortgage Note and Mortgage set forth in this complaint, or to protect the lien of the Mortgage or the Mortgaged Premises, together with interest upon said sums from the dates of the respective payments and advances thereof, so far as the amount of such monies properly applicable thereto will pay the same; and that Buckskill may be adjudged to pay the whole residue, or so much thereof as the Court may determine to be just and equitable, of the debt remaining unsatisfied

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[5] As noted above, Imre J. Rosenthal owned a 50% interest in the 378-acre East Hampton parcel. He commenced the foreclosure action as "the mortgage servicing agent for the owners and holders of the mortgage herein foreclosed and of the Mortgage Note secured thereby" (paragraph "8" of the foreclosure complaint).

after a sale of the Mortgaged Premises and the application of the proceeds pursuant to the directions contained in such judgment, and that Mr. Rosenthal may have such other and further relief, as may be just and equitable."

As noted above, few facts can be established from the record on submission. It is observed that petitioners pleaded the following allegations in their petitions, in response to which the Division, in its answer, pleaded that it "lacks knowledge or information sufficient to form a belief as to [such] allegation":

"6. Buckskill defaulted in making the first and each subsequent payment required under the Mortgage. Buckskill never made a single payment under the Mortgage.

"7. As a result of Buckskill's default, a foreclosure action was commenced.

"8. A judgment of foreclosure was entered and a foreclosure sale was held, at which Transferors' bid of $2,000,000.00 was successful.

"9. The Premises were thereafter reconveyed to Transferors by Referee's Deed.

"10. Petitioner incurred legal fees and disbursements with respect to the foreclosure action and the subsequent reconveyance of the Premises to Transferors, in an amount to be established at the hearing on this appeal." (Emphasis in original.)

Petitioners each filed a Form TP-165.8, which is a Claim For Refund Of Real Property Transfer Gains Tax, requesting refund of gains tax paid on the transaction at issue for the following reason:

"As a result of the [foreclosure action noted above], the original transfer has become null and void. Therefore, since no 'transfer of real property' within the meaning of Section 1441 of Article 31-B of the Tax Law has taken place, Claimant has erroneously paid the tax imposed by said Article 31-B and is entitled to a refund of such tax."

By letters dated September 20, 1991, the Division denied petitioners' respective refund claims. The Division's letters provided the same explanation for such denials:

"The original sale involved the fee transfer of vacant land by tenants-in-common. The parties agreed that consideration of $9.5 million would be paid by the purchaser in the form of a $1,000,000 cash payment and a $8.5 million mortgage.

"Section 1440.1(a) of the Tax Law states that 'consideration' means the 'price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property or any other thing of value and including the amount of the mortgage, purchase money mortgage . . . .'

"Section 1440.3 defines 'gain' as 'the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.'

"Since the amount of gain and tax due is computed at the time of transfer, the consideration used in this calculation takes whichever form the taxpayer elects. Because the mortgage is an amount required to be paid, and as the Department lacks the statutory authority to adjust gain based on future occurrence, we must conclude that claimants [sic] tax liability was properly determined at the time of transfer.

"In addition, we must disagree with claimant's contention that the aforementioned foreclosure action renders the transfer null and void.

"Section 1440.7 of the Tax Law provides that 'transfer of real property' means [']the transfer or transfers of any interest in real property by any method including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property.'

"There exists no statutory authority by which a transfer of real property within the meaning set forth above can be declared to be null and void . . . .

"Please be advised that should claimant reacquire the property, either through foreclosure proceedings or by accepting a deed in lieu of foreclosure, this action will constitute a second transfer of real property for gains tax purposes and must be reported to this office." (Emphasis in original.)

OPINION

The Administrative Law Judge held that this matter is controlled by our decision in Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, affd Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121) where we held that, for purposes of calculating the gains tax, consideration is determined at the time of the transfer and includes the face amount of a mortgage. Consequently, the Administrative Law Judge denied petitioners' refund claim and found that the value of the consideration was properly determined at the time of the transfer of title to Buckskill Estates, Inc., and that petitioners properly included the face amount of the purchase money note and mortgage of $8,500,000.00 in their calculation of consideration.

The Administrative Law Judge found no factual support in the record for petitioners' contention that the transaction at issue might be viewed, alternatively, as: (1) the granting of an option which was never exercised; (2) partial or successive transfers which never occurred; or (3) an installment sale where the deed was never delivered. In addition, the Administrative Law Judge found that the East Hampton parcel was sold to Buckskill Estates, Inc., in accordance with a contract for sale of the parcel executed in September 1990, and he also held that the purchaser's subsequent default on the mortgage did not render the original sale null and void.

The Administrative Law Judge rejected petitioners' contention that the gains tax may be applied only in the case of a net profit, citing to our decision in Matter of SKS Associates (Tax Appeals Tribunal, September 12, 1991) for the proposition that petitioners' failure to profit as they anticipated on the real estate transaction at issue "is not relevant for purposes of calculating their gains tax liability." The Administrative Law Judge relied on Matter of Unimax Corp. v. Tax Appeals Tribunal (79 NY2d 139, 581 NYS2d 135) for the proposition that there is no requirement that a taxing statute be fair in application. He held that petitioners did not establish that their rights to equal protection are violated by imposition of the gains tax because petitioners did not show "that imposition of gains tax resulted in palpably arbitrary or invidious discrimination."

The Administrative Law Judge also rejected petitioners' argument that pursuant to Tax Law § 1440 (former [7]) the sale of the East Hampton parcel, the default on the mortgage and the subsequent foreclosure action should be viewed as a series of partial or successive transfers resulting in a single integrated transaction with a consideration of less than $1 million. After reviewing the language of Tax Law § 1440 (former [7]), a 1994 amendment of that provision and the legislative history of the amendment, the Administrative Law Judge concluded that petitioners had "crafted a strained interpretation of the aggregation provisions included in [the former and current statutes]" (Determination, conclusion of law "G").

Finally, the Administrative Law Judge found no merit to petitioners' contention that the Division should be estopped from taking a position before the Division of Tax Appeals that,

according to petitioners, is inconsistent with a prior position taken in a bankruptcy proceeding entitled In Re Williams (173 Bankr 459, affd 188 Bankr 331). The Administrative Law Judge agreed with the Division that the position taken before the bankruptcy court -- that the gains tax is a tax measured on income -- is not inconsistent with the Division's position in this proceeding -- that the gains tax is not calculated on the basis of net income actually recognized by the transferor on a transaction. Furthermore, the Administrative Law Judge held that the basis for an estoppel does not exist here because petitioners did not establish that they suffered an unconscionable injury as a result of their reliance on any action of the Division.

On exception, petitioners continue to argue that the gains tax may not be imposed if the sellers of the real property do not recognize a net profit from the sale. Petitioners disagree with the Administrative Law Judge's conclusion that they did not suffer a net loss on the transaction in issue. They contend that after all expenses are accounted for "[a]ny gain is illusory and non-existent" (Petitioner's exception, p. 3). Based on the Court of Appeals decision in Matter of Trump v. Chu (65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915), petitioners argue, as they did below, that the gains tax may be imposed only in the case of a net profit. They assert that the gains tax is unconstitutional as applied to them because it requires petitioners, who allegedly suffered a net loss on the overall transaction, to pay taxes to the same extent as taxpayers who enjoy a profit.

Petitioners assert that the Administrative Law Judge did not give adequate consideration to their contention that Tax Law § 1440 (former [7]) authorizes them to treat the sale to Buckskill Estates, Inc., and the later foreclosure action as a single integrated transaction. Petitioners argue that their interpretation of Tax Law § 1440 (former [7]) must be accepted because the Commissioner of Taxation and Finance failed to offer a reasonable interpretation of that provision and failed to explain the significance of the 1994 amendments to the statute.

Petitioners also contend that statements made by the attorney representing the Commissioner of Taxation and Finance in In Re Williams (supra) establish that the Commissioner is taking a position in this proceeding which is inconsistent with the position

taken in the bankruptcy case. Addressing the Administrative Law Judge's determination that the basis for an estoppel does not exist here, petitioners state that "the Administrative Law Judge ignored well established law that judicial estoppel is not intended solely to prevent an unfair prejudice to one of the parties but is essential to protect the integrity of the entire judicial process" (Petitioners' exception, p. 4).

The Division, on exception, agrees with the Administrative Law Judge that the consideration for the transfer of real property is properly computed at the time of the transfer and is not affected by subsequent events, such as the purchaser's default on the mortgage. Citing to our decision in Matter of Normandy Assocs. (Tax Appeals Tribunal, March 23, 1989), the Division argues that for purposes of calculating consideration the amount of any mortgage is its face value, not its present value. The Division asserts that gains tax is due even if petitioners did suffer a net loss because of the transferee's failure to remit all consideration due to petitioners. The Division contends that the application of the gains tax to the transfer in issue does not offend either the Federal or State constitutions since it is based on a statutory definition of consideration which applies equally to all similarly situated taxpayers. The Division denies that it has taken inconsistent positions before the bankruptcy court and before the Division of Tax Appeals as petitioners allege.

We affirm the determination of the Administrative Law Judge.

We disagree with petitioners that the gains tax may be imposed only where the transferor earns a net profit from a sale of real property. The gains tax is computed as 10 percent of the gain derived from the transfer of real property in New York State. The gain is the difference between the consideration for the transfer and the original purchase price of the property (Tax Law § 1440[3]). Consideration is defined as "the price paid or required to be paid for real property" (Tax Law § 1440[1][a]). In Matter of Cheltoncort Co. (supra), we held that in calculating the gain on a transfer of real property subject to the gains tax "the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer."

We expanded on this statement in Matter of Starburst Dev. Co. (Tax Appeals Tribunal, May 5, 1994) where we stated:

> "the moment that the taxable event occurs, i.e., the transfer of the real property, is the temporal restriction underlying the entire gains tax. Consistent with this interpretation, we have held that the consideration for the transfer is fixed at this moment and is not reduced by subsequent events. . . . To deviate from this theory, as petitioner suggests, and exclude transactions from the definition of transfer of real property based on subsequent events would, in our view, be contrary to the entire scheme of the tax" (Matter of Starburst Dev. Co., supra).

Two recent court decisions have sustained our conclusion that the amount of gains tax due is finally determined by the amount of consideration paid or required to be paid on the date of the transfer (see, Matter of Wanat v. Tax Appeals Tribunal, ___ AD2d ___ [February 29, 1996], affg Matter of Wanat, Tax Appeals Tribunal, September 15, 1994; Matter of South Suffolk Recreation Ventures v. Tax Appeals Tribunal, ___ AD2d ___ [February 29, 1996], affg Matter of South Suffolk Recreation Ventures, Tax Appeals Tribunal, November 3, 1994). In Wanat, we addressed and rejected the same argument made by petitioners here and held that the amount of the consideration calculated at the time of the transfer is not affected by the transferee's later default on a note and mortgage (Matter of Wanat, Tax Appeals Tribunal, September 15, 1994; see also, Matter of Fazkap Assocs., Tax Appeals Tribunal, October 6, 1994 [where we rejected petitioner's argument that Cheltoncort is not controlling if the consideration determined at the time of transfer is not actually received]). Since subsequent events cannot affect the amount of the consideration calculated at the time of the transfer, whether petitioners suffered a net loss as a result of the purchaser's default in mortgage payments and a later foreclosure proceeding is irrelevant. Therefore, we do not address petitioners' contention that the Administrative Law Judge was wrong in suggesting that petitioners earned a profit on the transaction.

We do not agree with petitioners that imposition of the tax in this case violates the Equal Protection Clause of the United States Constitution and/or Article I, § 11 of the New York State Constitution.

Neither the Federal nor the State constitution require that all taxpayers be treated identically; they only require that those similarly situated be treated uniformly (see, Matter of Foss v. City of Rochester, 65 NY2d 247, 491 NYS2d 128; Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354). Requiring petitioners to pay the gains tax does not violate their constitutional rights because petitioners are being treated the same as all other similarly situated taxpayers -- they are required to calculate the tax based upon the value of the consideration at the time of the transfer (see, (Matter of Rapoport, Tax Appeals Tribunal, August 31, 1995).

We find no reason to disturb the Administrative Law Judge's determination that Tax Law § 1440 (former [7]) does not authorize petitioners to treat the transfer of the East Hampton parcel to Buckskill Estates, Inc., and the later conveyance by foreclosure, as a single integrated transaction. In advancing their position before the Administrative Law Judge, petitioners relied on the language of Tax Law § 1440 (former [7]) which states:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property. . . . Transfer of real property shall also include partial or successive transfers . . ." (emphasis added).

Petitioners argued that the inclusion of "successive transfers" in the definition of a transfer could reasonably be interpreted to mean that the transfer of the East Hampton parcel and its later conveyance in a foreclosure proceeding should be treated as a single transfer for gains tax purposes. Petitioners noted that the term "or transfers" was eliminated from the definition of a transfer by Chapter 170 of the Laws of 1994 and asserted that this amendment supports their interpretation of the former section. The Administrative Law Judge compared the language of the former definition with the extensive revision of section 1440(7) adopted in

1994. He also reviewed the legislative history and quoted from a Memorandum in Support of the bill where the Division stated that "the words 'or transfers' are deleted from the definition of 'transfer of real property' as surplusage" (Memorandum in Support at 19, Governor's Bill Jacket [L 1994, ch 170]). The Administrative Law Judge found no support for petitioners' position in the former statute or in its amendment. On exception, petitioners argue that "[t]he Administrative Law Judge failed to address Petitioners' argument that no word in a statute should be construed as 'surplusage' or construed to serve no purpose" (Petitioners' exception, p. 3).

We agree with petitioners that the words "or transfers" as they appear in Tax Law § 1440 (former [7]) must be read to have had some significance prior to the amendment of the statute by the Laws of 1994. The courts of this State, as well as this Tribunal, have repeatedly held that the words "or transfers" were intended to provide the Division with the authority to aggregate the consideration for separate transfers of real property (Matter of Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127; Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003; Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948). Under Tax Law § 1440 (former [7]), aggregation is appropriate "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" (Matter of Cove Hollow Farm v. State of New York Tax Commn., supra, 539 NYS2d 127, 129). It is clear to us that the sale and later foreclosure were not part of a plan or agreement to dispose of the East Hampton parcel by partial or successive transfers; therefore, the transfers in issue here may not be aggregated under the authority of Tax Law § 1440 (former [7]).

Finally, we address petitioners' contention that the Division should be estopped from taking a position in this proceeding which is contrary to the position taken in the Williams case. The Administrative Law Judge found that the Division did not take inconsistent positions, and

we agree. The issue addressed by the bankruptcy court in that case was whether the real property gains tax is entitled to a priority status under 11 USC 507(a)(8)(A) as "a tax on or measured by income or gross receipts." Addressing that issue in an affirmation filed with the bankruptcy court, the State's attorney asserted that "the Gains Tax is a tax on income" (Sur-Reply Affirmation of Marcie S. Mintz, ¶ 3, December 6, 1993). We do not understand the Division to be taking a contrary position in this proceeding. In its brief on exception, the Division acknowledges that the gains tax is a tax measured on income. It disputes petitioners' claim that subsequent events can reduce the gain which was properly calculated at the time of the transfer. We see no inconsistency in these positions; consequently, we reject petitioners' estoppel argument.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Estate of Daniel D. Brockman, Richard M. Brockman, Susan Brockman and Jolie Hammer is denied;

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

3. The petition of the Estate of Daniel D. Brockman, Richard M. Brockman, Susan Brockman and Jolie Hammer is denied; and

4. The Division of Taxation's denial of petitioners' refund claims is sustained.

DATED: Troy, New York
April 4, 1996

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

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