STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
HEBARON ENTERPRISES, ORRIN M.C. HEIN, HOLLY HEIN MCCUTCHEN AND MELVIN KLEIN	:	DECISION DTA Nos. 812751 through 812763
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners Hebaron Enterprises, Orrin M.C. Hein, Holly Hein McCutchen and Melvin Klein, c/o Larry Levine, 1700 York Avenue 1T, New York, New York 10128, filed an exception to the determination of the Administrative Law Judge issued on February 22, 1996. Petitioners appeared by Battle Fowler LLP (Richard L. O'Toole, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a brief in reply. Petitioners' request for oral argument was withdrawn.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Pinto took no part in the consideration of this decision.

ISSUE

Whether petitioners' transfer of 13 parcels of real property is subject to the real property transfer gains tax[1] (hereinafter the "gains tax").

[1]The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

FINDINGS OF FACT

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

On June 15, 1995, the parties entered into a Stipulation of Facts with regard to the instant matter. The nine paragraphs constituting the stipulation have been incorporated into the findings of fact below. In addition, petitioners submitted six proposed findings of fact which have been incorporated into the findings of fact below, to the extent they were not duplicative of the stipulated facts or irrelevant and/or immaterial.

On June 11, 1992, the New York City School Construction Authority ("NYCSCA"), by its powers of eminent domain, filed a Notice of Acquisition and a Notice of Entry in the Supreme Court of New York, County of Queens, and acquired all of the lots comprising Tax Block 15820 in the Borough of Queens, City of New York. Petitioners collectively owned 13 of the lots condemned, specifically, lots 1, 11, 18, 21, 25, 29, 30, 33, 188, 190, 191, 192, and 193. The lots are contiguous and they front on 29th Street.

None of petitioners initiated the transfer of the lots to NYCSCA and the compensation negotiations did not yield a settlement until August 5, 1992. Upon reaching the settlement, petitioners complied with the pre-transfer audit process by filing form TP-580, Transferor Questionnaire, for each of the lots, which indicated that the conveyance of each of the lots was exempt from the imposition of the gains tax because the amount of the consideration received by petitioners in connection with each of the lots did not exceed one million dollars.

Upon the Division of Taxation's ("Division") review of the forms TP-580, it concluded that, for purposes of applying the one million dollar exemption, the condemnation award received by each petitioner with regard to his or her tenant-in-common interest in each of the lots should be aggregated with the condemnation awards received by each petitioner in connection with his or her tenant-in-common interests in all other lots located in Tax Block 15820.

On or about October 28, 1992, each petitioner paid, under protest, his or her proportionate share of the gains tax assessed on each form TP-582 with respect to the transfer of the lots. On or about July 26, 1993, each petitioner requested a full refund of the gains tax paid in connection with the transfer of the lots plus interest on such refund at the statutory rate. All said applications for refund were denied by the Division by 13 letters, all dated August 19, 1993.

Petitioners Orrin M. C. Hein, Holly Hein McCutchen and Hebaron Enterprises owned a tenant-in-common interest in all 13 lots. Petitioner Melvin Klein owned a tenant-in-common interest in 11 of the 13 lots; he did not own an interest in lots 11 and 188. Each of the foregoing petitioners acquired a tenant-in-common interest in the lots at different times and through various means. Orrin M. C. Hein and Holly Hein McCutchen, who are siblings, each obtained their tenant-in-common interests by gift from their mother in 1987 and 1988. Hebaron Enterprises obtained its interests by purchase in 1981. Melvin Klein obtained his interests by gift in 1977. George West, who is not a party to this proceeding, obtained his interest by purchase in 1984. Other than the sibling relationship between Orrin Hein and Holly Hein McCutchen, none of petitioners are related to each other.

Following the condemnation of the lots comprising Block 15820, petitioners reported the following amounts as the consideration received as compensation for the 13 lots condemned:

LOT	TOTAL CONSIDERATION
1	$ 939,035.72
11	704,276.79
18	234,758.93
21	328,662.50
25	234,758.93
29	234,758.93
30	234,758.93
33	234,758.93
188	710,990.89
190	25,567.80
191	30,216.49
192	30,216.49
193	31,378.67
TOTAL	$3,974,140.00

In petitioners' real property gains tax filings, the amount received for each condemned lot was further broken down by petitioners, such that the amounts received by each petitioner are as follows:

LOT	Hein	McCutcheon	Klein	Hebaron
1	$156,505.95	$156,505.95	$313,011.91	$ 313,011.91
11	$176,069.19	$176,069.20	-0-	$ 294,029.75
18	$ 39,126.48	$ 39,126.49	$ 78,252.98	$ 78,252.98
21	$ 54,777.08	$ 54,777.08	$109,554.17	$ 109,554.17
25	$ 39,126.48	$ 39,126.49	$ 78,252.98	$ 78,252.98
29	$ 39,126.48	$ 39,126.49	$ 78,252.98	$ 78,252.98
30	$ 39,126.48	$ 39,126.49	$ 78,252.98	$ 78,252.98
33	$ 39,126.48	$ 39,126.49	$ 78,252.98	$ 78,252.98
188	$177,747.72	$177,747.72	-0-	$ 285,765.07
190	$ 4,261.30	$ 4,261.30	$ 8,522.60	$ 8,522.60
191	$ 5,036.08	$ 5,036.09	$ 10,072.16	$ 10,072.16
192	$ 5,036.08	$ 5,036.09	$ 10,072.16	$ 10,072.16
193	$ 5,229.77	$ 5,229.78	$ 10,459.56	$ 10,459.56
TOTALS	$780,295.57	$780,295.66	$852,957.46	$1,432,752.28

On or about October 28, 1992, petitioners paid the gains tax assessed on the transfers of the 13 condemned lots and subsequently filed refund claims on or about July 26, 1993. Each of the refund claims was denied by letter dated August 19, 1993. Attached hereto as Appendix "A" is a schedule of petitioners' lots in issue, the percentage of ownership by each petitioner in each lot, the individual refund claim, the refund claim by the group of individuals and the corresponding assessment number.

Petitioners protested the denials of their refund applications but their requests for a conference before the Bureau of Conciliation and Mediation Services were dismissed by order, dated January 14, 1994, because they were deemed to be untimely. Petitioners appealed this dismissal and the Division agreed to concede the issue of timeliness and proceed on the merits. Therefore, the issue of timeliness is not an issue herein.

Up until the time of the condemnation, no petitioner either in an individual capacity or as part of a group, caused there to be any alterations to, or development of, the lots or surrounding lots. The lots were not leased and did not generate any income.

Petitioners, Orrin M. C. Hein, Holly Hein McCutchen and Hebaron Enterprises, by Larry Levine, submitted affidavits which indicated that each of the parties had ownership interests in the 13 parcels in issue and that they had not intended to transfer their interests in the parcels but for the condemnation proceedings, which proceedings they claim they disputed. However, it is noted that in the Supreme Court Order, entered June 11, 1992, Judge Kassoff stated that no one appeared in opposition to the application by the New York City School Construction Authority to take title and possession of the property, even though notified of the condemnation by the posting of handbills upon or near the property and notices of pendency filed in the office of the Clerk of Queens County on May 22, 1992 against the parcels in issue.

Each of these petitioners considered the investment in the parcels to be long term and averred that the parcels were not used for any purpose during the period when these three petitioners held them and petitioners never made any arrangement to sell their interests in the properties, including listing the properties with a broker or advertising the parcels for sale. Except for the sibling relationship between Orrin M.C. Hein and Holly Hein McCutchen, none of the petitioners had any relationship with any of the other co-owners. Unique to Hebaron was its stated hope that the property would one day be chosen for the site of a gambling casino, should legalized gambling ever become a reality in the State of New York.

Petitioner Melvin Klein had an ownership interest in 11 of the 13 parcels (all except 11

and 188), and like the other petitioners he was holding his interest in the properties as a long-term investment. He stated that the properties were not used for any purpose while being held and that he never listed the properties with a broker or advertised them for sale.

OPINION

Petitioners disagree with the determination of the Administrative Law Judge which found that the Division properly aggregated the consideration received by them as tenants in common in connection with the transfer of a single parcel of real property, and then, without establishing the existence of a plan, aggregated the consideration received by them in connection with the transfer by eminent domain of their separate and distinct tenant-in-common interests in the 13 contiguous or adjacent parcels. Petitioners argue that the cases interpreting Tax Law former § 1440(7) support their position that an involuntary taking of property cannot be a "plan" or "agreement" that invokes the aggregation clause of the statute and regulations.

The gains tax was a 10% tax imposed upon the transfer of real property located within New York State where the consideration received for such transfer was $1 million or more (former Tax Law §§ 1441, 1443[1]). Tax Law former § 1440(7), as amended by Chapter 61 of the Laws of 1989, defined "transfer of real property," in pertinent part, as follows:

> "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 . . . . 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 . . . ."

Thus, it is clear that a taking by eminent domain is a transfer of real property as defined by the Tax Law. Based upon our reasoning in Matter of Tomback (Tax Appeals Tribunal, September 1, 1994), the Administrative Law Judge determined that the multiple tenant-in-common interests should be added together for purposes of determining the consideration

received on the parcels taken by eminent domain.

Petitioners argue that since their property was taken by condemnation, it is clear that they did not have an agreement or plan to dispose of the 13 separate parcels in an attempt to evade the imposition of the gains tax. Petitioners emphasize that title to all of the parcels of real property located at Tax Block 15820 was conveyed to the NYCSCA by court order, pursuant to NYCSCA's power of eminent domain, and without the consent of the transferors. Petitioners state that none of the transferors voluntarily acted nor did they even have an opportunity to act pursuant to a plan or agreement.

Relying on Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127), the Administrative Law Judge concluded that this transaction cannot escape aggregation solely on the basis that the tenants in common lacked a plan or agreement for disposition of the property. Furthermore, the Administrative Law Judge analyzed our decision in Matter of Lee (Tax Appeals Tribunal, October 15, 1992, confirmed Matter of Lee v. Tax Appeals Tribunal, 202 AD2d 924, 610 NYS2d 330) in support of his conclusion. In Lee, we sustained the Division's aggregation of the consideration received for four parcels owned by several tenants in common. The Appellate Division, Third Department, confirmed our decision and stated that based upon the facts presented, it was clear that the conveyance of those parcels resulted in a change of beneficial interest, and the transfer became a single transfer as defined in the Tax Law (Matter of Lee v. Tax Appeals Tribunal, 202 AD2d 924, 610 NYS2d 330). While we agree with the result obtained by the Administrative Law Judge, we nevertheless conclude that the simultaneous conveyance of the 13 parcels from Tax Block 15820, whose transferors were tenants in common, pursuant to identical terms to a single transferee constituted a single transfer regardless of the lack of a plan or agreement by the transferors to dispose of the property. This case does not involve a series of partial or successive transfers to accomplish a transfer otherwise subject to gains tax. However, there was but a single transfer of all the interests of each transferor in each parcel. Thus, there is no need to invoke the "aggregation

clause" of Tax Law former § 1440(7) (see also, Matter of Arbor Hill Assocs., Tax Appeals Tribunal, June 26, 1997).

Petitioners, in further support of their argument, refer to the amendments to the language of Tax Law former § 1440(7) in 1994 as clarifying changes, rather than substantive changes to the statute. Petitioners argue that the Administrative Law Judge's conclusion that the amendments were substantive contravenes well-established principles of statutory construction. Petitioners assert that:

> "'[t]he courts in construing a statute should consider the mischief sought to be remedied by the new legislation.' McKinney's Cons Laws of NY, Book 1, Statutes § 95. In this instance, the 'mischief' that existed prior to the 1994 change was the attempt by the Department to apply aggregation principles to involuntary transfers in eminent domain proceedings" (Petitioners' brief, p. 6).

The amendment to Tax Law former § 1440(7) took effect on June 9, 1994, and was applicable to transactions occurring on or after that date (see, L 1994, ch 170, § 94). New subparagraph (i) to new paragraph (b) of section 1440(7) provided that "transfer of real property" shall include, in pertinent part, as follows:

> "[s]ection 94 amends subdivision (7) of section 1440 of the Tax Law by subdividing its provisions into three separately lettered paragraphs . . .
>
> "In new paragraph (b), the definition of 'transfer of real property' is amended to set forth all of the rules with respect to aggregation of consideration in the case of partial or successive transfers of real property.
>
> "In new subparagraph (i) of paragraph (b), the definition of 'transfer of real property' is amended to require the aggregation of consideration for partial or successive transfers of interests in contiguous or adjacent real property by a transferor or related transferors to one or more transferees if such transfers occur within a three-year period and without regard to the existence of 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, and without regard to the use of the real property. However, the consideration from certain transfers of contiguous or adjacent real property will not be aggregated. A transfer of real property by a transferor will not be aggregated with the consideration from a transfer of real property by such transferor's estate. In addition, the consideration from the following transfers of real property will not be

> aggregated with the consideration from any other transfer for purposes of this subparagraph: . . . A transfer of real property pursuant to a taking by eminent domain . . ." (Bill jacket, L 1994, ch 170, pp. 30-31).

We agree with the stated principle of statutory construction cited by petitioners and find that the 1994 amendments were substantive changes by exempting from taxation those transfers that were previously taxed pursuant to Tax Law former § 1440(7), including the taxable transaction which took place herein. We agree with the Administrative Law Judge that the explicit exclusion of transfers by a taking by eminent domain in the amendment was a substantive change indicating that the prior law contained no such provision. However, the 1994 amendments to the statute do not support petitioners' position in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hebaron Enterprises, Orrin M.C. Hein, Holly Hein McCutchen and Melvin Klein is denied;

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

3. The petitions of Hebaron Enterprises, Orrin M.C. Hein, Holly Hein McCutchen and Melvin Klein are denied; and

4. The notices of disallowance dated August 19, 1993 are sustained.

DATED: Troy, New York
July 10, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

APPENDIX A

Lot 1	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$14,065.10		A-28467-2
Holly Hein McCutchen	16.67%	$14,065.10		
Melvin M. Klein	33.33%	$28,234.53		
Hebaron Enterprises	33.33%	$26,640.52		
Group	100%		$83,006.00	

Lot 11	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	25%	$16,377.23		A-28467-3
Holly Hein McCutchen	25%	$16,377.15		
Hebaron Enterprises	41.75%	$24,758.04		
Group	91.75		$57,512.42	

Lot 18	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 3,516.97		A-28467-4
Holly Hein McCutchen	16.67%	$ 3,516.27		
Melvin M. Klein	33.33%	$ 7,058.63		
Hebaron Enterprises	33.33%	$ 6,660.13		
Group	100%		$20,751.00	

Lot 21	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 4,792.79		A-28467-4
Holly Hein McCutchen	16.67%	$ 4,792.79		
Melvin M. Klein	33.33%	$ 9,622.08		
Hebaron Enterprises	33.33%	$ 9,324.19		
Group	100%		$28,532.00	

Lot 25	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 3,316.27		A-28467-4
Holly Hein McCutchen	16.67%	$ 3,316.28		
Melvin M. Klein	33.33%	$ 6,658.63		
Hebaron Enterprises	33.33%	$ 6,660.13		
Group	100%		$19,951.00	

Lot 29	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 3,394.19		A-28467-4
Holly Hein McCutchen	16.67%	$ 3,394.19		
Melvin M. Klein	33.33%	$ 6,814.46		
Hebaron Enterprises	33.33%	$ 6,660.13		
Group	100%		$20,263.00	

Lot 30	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 3,310.44		A-28467-4
Holly Hein McCutchen	16.67%	$ 3,310.44		
Melvin M. Klein	33.33%	$ 6,646.97		
Hebaron Enterprises	33.33%	$ 6,660.13		
Group	100%		$19,928.00	

Lot 33	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 3,310.44		A-28467-4
Holly Hein McCutchen	16.67%	$ 3,310.44		
Melvin M. Klein	33.33%	$ 6,646.97		
Hebaron Enterprises	33.33%	$ 6,660.13		
Group	100%		$19,928.00	

Lot 188	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	25%	$16,533.07		A-28467-1
Holly Hein McCutchen	25%	$16,533.28		
Hebaron Enterprises	40.19%	$24,062.13		
Group	90.19%		$57,128.48	

Lot 190	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 258.27		A-28467-2
Holly Hein McCutchen	16.67%	$ 258.27		
Melvin M. Klein	33.33%	$ 518.93		
Hebaron Enterprises	33.33%	$ 725.36		
Group	100%		$ 1,760.00	

Lot 191	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 376.93		A-28467-2
Holly Hein McCutchen	16.67%	$ 376.93		
Melvin M. Klein	33.33%	$ 757.22		
Hebaron Enterprises	33.33%	$ 857.24		
Group	100%		$ 2,368.00	

Lot 192	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 335.26		A-28467-2
Holly Hein McCutchen	16.67%	$ 335.26		
Melvin M. Klein	33.33%	$ 673.88		
Hebaron Enterprises	33.33%	$ 857.24		
Group	100%		$ 2,201.00	

Lot 193	Percentage of Ownership	Individual Refund Claim	Group Refund Claim	Petition Notice/Assessment Number
Orrin M. C. Hein	16.67%	$ 321.23		A-28467-2
Holly Hein McCutchen	16.67%	$ 321.24		
Melvin M. Klein	33.33%	$ 645.95		
Hebaron Enterprises	33.33%	$ 890.22		
Group	100%		$ 2,179.00	