

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ROBERT ALTMAN :

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 :

CHESTNUT OAKS ASSOCIATES :

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 :

STEVEN C. GREENE :

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 :

JONATHAN P. GREENE TRUST :

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
DTANOS. 814711,
814712, 814713,
814714AND814715

In the Matter of the Petition	:
of	:
KARIN B. GREENE TRUST	:
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.	:

Petitioners Robert Altman, Chestnut Oaks Associates, Steven C. Greene, Jonathan P. Greene Trust and Karin B. Greene Trust, 20 Babbitt Road, Bedford Hills, New York 10507, filed exceptions to the determination of the Administrative Law Judge issued on February 13, 1997. Petitioners appeared by Steven C. Greene, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel).

Petitioners filed a brief in support of their exceptions. The Division of Taxation filed a brief in opposition. No reply brief was filed. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly aggregated the consideration received by a partnership from its sales of twelve condominium units to twelve different purchasers when the partnership had purchased those units for investment purposes at an auction sale.

FINDINGS OF FACT

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

Chestnut Oaks is a condominium project located on North Greeley Avenue in Chappaqua (Westchester County), New York. According to the first page from the Restated Condominium Offering Plan for Chestnut Oaks at Chappaqua, New York, the approximate date of the first

offering to the public was July 15, 1982, and the approximate date of the restated offering was May 22, 1987 with the initial term of the restated offer to end on approximately May 21, 1988. This document identified the sponsor of the condominium as Chappastream Corporation and a total restated offering of 69 homes valued at \$12,957,310.00.

It appears that the sponsor of the condominium project was unable to sell all of the units being offered pursuant to the restated offering plan. Twelve unsold condominium units were rented out to various individuals by Central Federal Savings Bank, which, according to a letter dated December 13, 1993 from attorney Steven C. Greene to a State tax technician, held the 12 units "as rentals until the bank became insolvent."

Chestnut Oaks Associates, a general partnership consisting of the four other named petitioners (Robert Altman, Steven Greene, Jonathan P. Greene Trust and Karin B. Greene Trust) as its partners, purchased the 12 condominium units at an auction of the Resolution Trust Company, as Receiver for Central Federal Savings Bank on June 12, 1992. The partnership, which had no relationship with the original condominium sponsor, purchased the 12 units as an investor. The record does not include a real estate sales contract between Chestnut Oaks Associates and the Resolution Trust Company, as Receiver. Rather, the only sales contract included in the record is an unexecuted contract dated December 1991 between Chappastream Corp. and Chestnut Oaks Associates.

The 12 units purchased by Chestnut Oaks Associates had the following addresses: 305 North Greeley Avenue, 308 North Greeley Avenue, 311 North Greeley Avenue, 318 North Greeley Avenue, 319 North Greeley Avenue, 329 North Greeley Avenue, 335 North Greeley Avenue, 344 North Greeley Avenue, 346 North Greeley Avenue, 348 North Greeley Avenue, 351 North Greeley Avenue, and 369 North Greeley Avenue. The record reveals very little concerning these units and the relationship of their physical locations other than the stipulated fact that the "12 units were located in the same 88 unit condominium project originally sponsored by the Chappastream Corporation." Only the first page of the restated condominium offering plan was included in the record for review, and no affidavit of anyone with knowledge

of the condominium project was provided. Consequently, the factual question concerning the basic nature of these units, for example, whether they were like garden apartments or separate single-family row houses, can only be answered with speculation.

It is observed that petitioners in their briefs recite certain factual allegations which, unfortunately, have not been established by the introduction of any evidence. For example, in their initial brief, petitioners, while conceding that units 318 and 319 are adjacent and contiguous units, contend that the "rest of the units are separated from one another by numerous units owned by other, unrelated individuals who purchased their properties many years earlier." They also assert that the "units are not all situated in one, single building, but rather in several buildings throughout the project" (emphasis added). This suggests that some of the units are situated in a single building, and it is unknown how many of the 12 units at issue are so situated. To add to the confusion, in their reply brief, petitioners assert that, "This condo project is over one mile in length and the subject condo's [sic] are scattered throughout" which is not entirely concordant with their assertions in the earlier brief.

Within months of its purchase of the 12 condominium units, the partnership resold the units to 12 different purchasers, who apparently were then occupying the respective units as tenants. The record does not disclose why the individuals who purchased their respective units from the partnership did not directly purchase their units at the auction. The partnership resold the units as follows:

<u>Unit</u>	<u>Purchaser</u>	<u>Date of purchase</u>	<u>Purchase price</u>
305 N. Greeley Ave.	Karen Shaw	9/15/92	\$ 135,000.00
308 N. Greeley Ave.	Carol Leitner	9/15/92	156,000.00
311 N. Greeley Ave.	Kenneth & Ellen Schwebel	9/24/92	156,000.00
318 N. Greeley Ave.	Ali Javed & Ghazala Ali	7/01/92	164,000.00
319 N. Greeley Ave.	Thomas & Carol Zino	7/12/92	150,000.00
329 N. Greeley Ave.	Joseph Genovese	9/18/92	152,000.00
335 N. Greeley Ave.	Djordje & Marija Pejanovic	9/02/92	130,000.00
344 N. Greeley Ave.	Donald Pettinato	4/30/93	128,000.00

346 N. Greeley Ave.	Katie Gohde	11/02/92	125,000.00
348 N. Greeley Ave.	Andrew Bratt	10/30/92	128,000.00
351 N. Greeley Ave.	Howard Leitner	8/14/92	160,000.00
369 N. Greeley Ave.	Howard Magiliff & Suli Fassler	8/31/92	149,000.00
Total purchase prices			<u>\$1,733,000.00</u>

The Division issued a Statement of Proposed Audit Adjustment dated October 25, 1994 against the partnership, Chestnut Oaks Associates, asserting real property gains tax due of \$34,624.40 plus penalty and interest. An attached work sheet provided the following explanation for the tax asserted due:

"Chestnut Oaks Associates acquired 12 condominium units as an investor from the R.T.C., as receiver for Central Federal Savings Bank in June of 1992. The resale of these units were aggregated pursuant to section 1440.7 of the Tax Law and Regulation 590.40 and the consideration was over 1 million dollars."

The Division computed a gain of \$346,244.00 subject to the 10% gains tax, based upon the deduction of total original purchase price for the 12 units of \$1,386,756.00 from total consideration received on the resale of the 12 units of \$1,733,000.00. The partnership had not filed any pre-transfer gains tax questionnaires with the Division.

A Notice of Determination dated May 1, 1995 was issued by the Division against the partnership, Chestnut Oaks Associates, asserting tax due of \$34,624.40 plus penalty and interest. This notice referenced the previously issued Statement of Proposed Audit Adjustment detailed above. Corresponding notices of determination, each dated May 22, 1995, were issued by the Division against the four partners, Robert Altman, Steven C. Greene, Jonathan Greene Trust, and Karen Greene Trust, respectively.

The parties executed a stipulation of facts, dated June 28, 1996 by the Division's counsel and July 9, 1996 by attorney Steven C. Greene on petitioners' behalf. Relevant portions of this stipulation have been incorporated into these findings of fact.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Relying on 20 NYCRR former 590.43 and the decision of the Tax Appeals Tribunal in ***Matter of Marder*** (Tax Appeals Tribunal, October 5, 1995), the Administrative Law Judge concluded that the partnership purchased these 12 units as an investment, and its subsequent

sales of these units should be deemed to have been a single transfer that should be aggregated for purposes of applying the exemption provided by Tax Law former § 1443(1)¹.

Although the partnership was not the original sponsor of the condominium offering plan, the Administrative Law Judge found this to be of no consequence because the transfers were properly deemed as being pursuant to a condominium plan within the meaning of Tax Law former § 1440(7) based upon the decision of the Tribunal in *Matter of Marder (supra)*.

The Administrative Law Judge rejected petitioners' argument that *Matter of Minzer* (Tax Appeals Tribunal, May 20, 1993) was controlling, finding it distinguishable from the present situation both on the law and on its facts. In *Minzer*, the Administrative Law Judge had determined that condominium units sold by an investor were not sold pursuant to the initial offering plans because the investor was not the sponsor of the condominium project. In its decision, while the Tribunal affirmed the Administrative Law Judge's determination, the Tribunal did not specifically adopt the Administrative Law Judge's conclusion. Further, the condominium units at issue in *Minzer* were from three different condominium projects subject to three respective offering plans. In its decision in *Minzer*, the Tribunal specifically excepted the situation where all the units were in the same condominium project.

In addition, the Administrative Law Judge concluded that there was an alternative basis for aggregating the transfers of the 12 units by the partnership because 20 NYCRR former 590.43 permits the aggregation of "contiguous or adjacent" properties which have been transferred by partial or successive transfers pursuant to a plan or agreement. He concluded that the record revealed very little concerning the condominium units and the relationship of their physical locations. While it appeared that at least some of the units were separated from each other by units that were not part of those at issue, petitioners failed to meet their burden of proof to show which of the 12 units were not adjacent.

¹The 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).

ARGUMENTS ON EXCEPTION

On exception, petitioners make the same arguments that were presented to the Administrative Law Judge. Petitioners maintain that it is only transfers made by the original sponsors or developers of condominium projects which may be properly aggregated under Tax Law § 1440(7). Petitioners argue that they should be treated the same as investors in single family homes. Further, petitioners argue that the condominium units were not contiguous or adjacent to one another.

The Division argues in opposition that the Administrative Law Judge correctly concluded that the consideration received from the transfer of the condominium units was properly aggregated pursuant to Tax Law former § 1440(7) based on the decision of the Tax Appeals Tribunal in ***Matter of Marder (supra)***. Further, the Division argues that the consideration from the transfer of the condominium units at issue was properly aggregated because such units were located within the same project and were, thus, contiguous or adjacent.

OPINION

We affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge adequately and completely addressed all the issues raised by the parties. After reviewing the entire record in this matter, we conclude that petitioners have not directed us to any authority which provides a basis for modifying the Administrative Law Judge's determination in any respect. As a result, we affirm that determination based upon the reasoning stated therein.

Moreover, we reject petitioners' attempt to submit the offering plan as additional evidence with their exception. We have a long-standing policy of not allowing the submission of evidence after the close of the record. This policy is essential in order to maintain a fair and efficient hearing system, to provide definition and finality to the hearing and to protect the adversary's right to question the evidence on the record (*see, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Robert Altman, Chestnut Oaks Associates, Steven C. Greene, Jonathan P. Greene Trust and Karin B. Greene Trust are denied;

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

3. The petitions of Robert Altman, Chestnut Oaks Associates, Steven C. Greene, Jonathan P. Greene Trust and Karin B. Greene Trust are denied; and

4. The notices of determination dated May 1, 1995 against Chestnut Oaks Associates and dated May 22, 1995 against Robert Altman, Steven C. Greene, Jonathan P. Greene Trust and Karin B. Greene Trust are sustained.

DATED: Troy, New York
October 23, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner