STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MALRATH REAL ESTATE DEVELOPMENT CORP.	:	
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. 815683 AND 815684
In the Matter of the Petition	:	
of	:	
MICHAEL MALARKEY	:	
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 Malrath Real Estate Development Corp., 709 Taft Avenue, Endicott, New York 13760-7202, and Michael Malarkey, 715 Columbus Avenue, Endicott, New York 13760, filed exceptions to the determination of the Administrative Law Judge issued on November 5, 1998. Petitioners appeared by Hinman, Howard & Kattell, LLP (Frederick A. Griffen, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exceptions. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUES

I. Whether certain sales made by petitioner Malrath Real Estate Development Corp. (hereinafter "Malrath") should be exempt from the imposition of the real property transfer gains tax[1] (hereinafter the "gains tax") by virtue of the fact that the parcels of real estate were sold with residential homes thereon.

II. Whether Malrath's transfer of three lots to certain investors or co-venturers in the subdivision were exempt from the imposition of gains tax as transfers to persons with a prior beneficial interest.

III. Whether the Division of Taxation erred in not allowing certain additional costs in determining gain subject to tax.

IV. Whether two lots in another subdivision which were sold by Malrath should be excluded from aggregation for gains tax purposes.

V. Whether petitioner Michael Malarkey timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "28" and "29" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

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[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).

On January 9, 1995, the Division of Taxation ("Division") issued a Notice of Determination to Malrath which assessed gains tax in the amount of $78,798.00, plus penalty and interest, for a total amount due of $130,714.93 for the period ended December 14, 1990. The Notice of Determination was issued to Malrath at its address of 709 Taft Avenue, Endicott, New York 13760-7202.

A Notice of Determination dated January 19, 1995 was issued by the Division to Michael Malarkey at 715 Columbus Avenue, Endicott, New York 13760-2221. This Notice of Determination assessed the same amount of gains tax as was assessed against Malrath ($78,798.00), plus penalty and interest, for a total amount due of $130,969.56. The notice stated that petitioner Michael Malarkey was being assessed as an officer or responsible person of Malrath.

Michael Malarkey incorporated Malrath in 1986. At all times since its incorporation, he has been its sole officer, director and stockholder. Prior to 1986, Mr. Malarkey was engaged in the business of remodeling and building homes. The homes were built on land owned by third parties.

In 1986, Malrath purchased a tract of land located on upper Taft Avenue in Endicott, New York (Broome County). The land, known as Felicia Estates, was comprised of some 43 to 47 acres of land and was purchased by Malrath for $250,000.00.

Malrath subdivided the land into 20-acre parcels. Plot plans were prepared and zoning permits were obtained by Malrath. Originally, Felicia Estates consisted of 110 lots; however, the frontage of some of the lots was increased so the total number of lots was between 95 and 99. Sewer and water lines were installed inside the lots approximately 20 feet from the front property

line. In some instances, Malrath put in a foundation on the lots as sales materialized. Malrath also built roads and curbs and installed lines for electric, cable, telephone and gas.

A few of the lots were sold to other builders. However, Mr. Malarkey approved these builders and their building plans, and he oversaw the construction of the foundations on these lots.

Malrath built approximately 60 to 70 percent of the total homes in Felicia Estates. In order to obtain financing to purchase the lot and have Malrath build the residential home, some of the buyers were required to present proof that a foundation had been constructed and that a current survey had been prepared. Each of these tasks was performed by Malrath prior to the transfer of title to the purchaser.

In January 1988, Malrath executed a Declaration of Restrictions "in order to insure the most beneficial development of said area mainly as a residential subdivision and to prevent any such use thereof as might tend to diminish the valuable or pleasurable enjoyment thereof." Pursuant to this Declaration of Restrictions, no building or improvement of any kind could be erected or maintained on the premises until the plans for the design and location were first submitted to and approved by Malrath.

Letters were submitted from two purchasers, Gary T. Crooks and Robert P. Tenant, who indicated that in order to obtain financing, the lots were transferred to these purchasers before building of the homes thereon. The letters further stated that Malarkey Building and Remodeling (Mike Malarkey) was the general contractor in charge of the building of the homes and that this company did, in fact, build the homes. Petitioner Michael Malarkey asked other purchasers to write similar letters, but they indicated that they did not want to get involved in a tax issue.

Lots 52 and 71 were traded in August and November 1989, respectively, for other parcels of real estate. Lot 52 was traded for a lot approximately 1 ½ miles from Felicia Estates; lot 71 was traded by Malrath in return for some land in Owego, New York. As of the date of the hearing, Malrath had not sold either of the lots which were acquired in these exchanges. The prices assigned to the lots which were traded by Malrath, i.e., lots 52 and 71, were determined by Bruce O. Becker, attorney for Malrath. Michael Malarkey stated that he did not know how the attorney determined these prices.

Helen Russ was a real estate agent who built houses on speculation and then sold them to third persons. Malrath sold lots 23, 24 and 34 in Felicia Estates to Helen Russ. Pursuant to the contracts of sale for each of these lots, Malrath was to act as the general contractor for the house constructions in return for a fee ($5,000.00 for lots 23 and 24; $4,000.00 for lot 34). For lot 23, the contract of sale also provided that Malrath was to supply all of the subcontractors for the construction of the home on the lot. The contracts of sale relating to lots 23 and 24 provided that before any contract was entered into between Ms. Russ and a contractor unrelated to Malrath, she was to give the first option to Malrath or its designee (Mr. Malarkey) to build the residence.

Helen Russ obtained construction loans from Endicott Lumber and Box Company. In return for the funds advanced to her, Ms. Russ agreed to purchase all of the building materials from the company. In order for Endicott Lumber and Box Company to provide Helen Russ with financing, the lot had to be in her name. Prior to transferring the lot to Ms. Russ, Malrath approved the plans, excavated the lot, put in the foundation and obtained a survey. Additionally, 75% to 85% of the house was framed before the lot was transferred to Helen Russ.

Malrath also took advantage of the financing made available by Endicott Lumber and Box Company for homes which it built prior to entering into a contract of sale with third parties. In order to obtain the financing, Malrath transferred the lots to Michael Malarkey individually. Lots 19, 41, 45, 48, 12 and 13 were transferred to Michael Malarkey by Malrath for purposes of obtaining financing from Endicott Lumber and Box Company. These lots were originally included in the assessment by the Division's auditor but were later omitted since they were transferred solely to obtain financing.

Felicia Estates West was a second parcel of land purchased by Malrath on August 14, 1989 for approximately $50,000.00. The parcel was owned by the same party (Gerald Talandis) who sold Felicia Estates to Malrath in 1986. Felicia Estates West consisted of approximately 14 acres. Felicia Estates West adjoins Felicia Estates, they share a common street, Donna Avenue. Felicia Estates West required the same permits and subdivision requirements as Felicia Estates. Michael Malarkey testified that at the time Malrath purchased Felicia Estates in 1986, there were no plans or intentions to purchase the land subsequently named Felicia Estates West. The sale of lots 126 and 129 in Felicia Estates West by Malrath were included in the assessment of gains tax by the Division.

In 1987, Malrath entered into agreements with John Crooks, Michael Frey and Donald Mastro whereby each of those individuals invested the sum of $30,000.00 with Malrath in return for which each was to receive the sum of $750.00 for each lot sold by Malrath up to a total of 50 lots and, in addition thereto, was to receive an inside lot of his choice. Each of these investors received his lot (Mastro received lot 28; Frey received lot 25; and Crooks received lot 97). Upon the sale of the 50 lots pursuant to the agreement with each of the investors, Malrath was to pay

each the sum of $750.00 per lot or $37,500.00 in total. When Malrath fell behind in these payments, two of the investors (Frey and Mastro) commenced a lawsuit in the Supreme Court, County of Broome, against Malrath and on May 11, 1994, judgment was entered in favor of the plaintiffs in the amount of $42,000.00 ($21,000.00 per plaintiff), plus interest at the statutory rate.

On the original assessment, tax in the amount of $1,642.20 was assessed on Malrath's sale of lot 97; tax in the amount of $1,742.20 was assessed on each of the sales of lots 28 and 25. Subsequently, the tax on lot 97 was reduced to $899.56 and tax on each of lots 28 and 25 was reduced to $974.56 by the Conciliation Conferee (as will be discussed in a later finding of fact). On the closing statements relating to the transfer of these lots by Malrath to the three investors, Attorney Becker assigned a consideration of $29,000.00 for lot 97 transferred to Crooks and a consideration of $30,000.00 for each of lots 28 and 25 transferred to Mastro and Frey, respectively. Michael Malarkey stated that he did not know the manner in which the prices for these lots were arrived at by his attorney.

William Starring, CPA, was in charge of Malrath's accounting matters from the start of Malrath's existence in 1986. The attorney for Malrath, Bruce O. Becker, referred Michael Malarkey to Mr. Starring. The offices of Messrs. Becker and Starring were located in the same building. Michael Malarkey stated that Attorney Becker was noted for his expertise in matters of construction and in all matters relating thereto, including taxation. Michael Malarkey also stated that William Starring was hired by Malrath because Mr. Malarkey was told that he was an expert in the fields of construction, development and subdivision. Mr. Starring assisted in organizing Malrath and he assisted in preparing all corporate tax returns.

Upon the sale of each parcel by Malrath, Messrs. Becker and Starring would prepare a closing statement which reflected various payment including amounts due to Dolores O'Hora, the holder of the mortgage on Felicia Estates. Mr. Starring kept a cumulative total of lots sold by Malrath including all of the information contained on the closing statements.

Michael Malarkey stated that prior to the audit of Malrath which commenced in 1994, he never heard of or knew anything about the gains tax or "Cuomo tax." He stated that he expected William Starring to be aware of and to provide for payment of all taxes.

In a letter from Attorney Bruce O. Becker to William Starring, CPA, dated October 26, 1992, Mr. Becker stated that he had done some research on the "Cuomo tax" and that based on the regulations and the law, he felt that Malrath had some liability for the tax. The letter stated that "[s]ales of lots with houses are exempt from the tax." The last sentence of the letter stated, "Sorry about this." There is no indication on the letter that a copy was sent to either petitioner.

When the audit commenced, petitioner Michael Malarkey conferred with William Starring. Mr. Malarkey stated that, at this time, he was unaware of the letter from Bruce Becker to William Starring. He stated that he first became aware of the letter when the auditor informed him of its existence and then provided him with a copy. Prior to receiving a copy from the auditor, neither Mr. Becker nor Mr. Starring informed him that such a letter had been written.

Attorney Bruce O. Becker performed all legal duties regarding Malrath including determining what taxes were due and owing by the corporation. In 1994, when petitioners were advised of the audit, Mr. Malarkey conferred with Attorney Becker. He indicated to petitioner Michael Malarkey that he did not know if Malrath was subject to the gains tax. Mr. Malarkey stated that Mr. Becker never mentioned his October 26, 1992 letter to William Starring, CPA.

Malrath did receive the Notice of Determination issued by the Division on January 9, 1995 (***see*** above). It was immediately turned over to Malrath's attorney for a response.

In response to the Notice of Determination issued by the Division to Malrath, a Request for Conciliation Conference was timely filed. The Report of Tax Conferences, prepared by the conciliation conferee subsequent to a conciliation conference held on October 11, 1996, indicates that the tax due was revised from the original assessment of $78,798.00 to $58,401.80 as the result of a meeting held on April 26, 1995. The report states that additional costs were allowed in calculating the revised tax. At the conciliation conference, the consideration on lots 25, 28, and 97 was reduced to $28,000.00 per lot on the transfers to the investors. An exemption of 25% of the tax on those lots was granted due to a "beneficial interest" in the lots. Finally, the consideration for lot 47 was reduced to $3,500.00. Accordingly, the Conciliation Order (CMS No. 145430) issued January 31, 1997, recomputed total tax due to $57,077.26, plus penalty and interest computed at the applicable rate. This recomputation was the result of the conciliation conferee's determination that, from February 18, 1988 through September 21, 1993, Malrath sold a total of 48 lots with a total consideration received of $1,400,300.00. Malrath's original purchase price was found to be $816, 281.76, with a resulting gain of $584,018.24.

As to petitioner Michael Malarkey, no response to the Notice of Determination dated January 19, 1995 was received by the Division until a Request for Conciliation Conference was received on October 24, 1996 (the Request for Conciliation Conference was sent by certified mail on October 22, 1996). Attached thereto is a letter from the Division's auditor, George Mastrianni, to Frederick Griffen, Esq., petitioners' representative, which states that, in response to questions raised at a meeting between Messrs. Mastrianni and Griffen in July 1996, Mr.

Mastrianni was enclosing a copy of the Notice of Determination issued to Michael Malarkey as well as a copy of certain mailing records purporting to show that the notice was mailed by certified mail to Mr. Malarkey on January 19, 1995. Also attached to the Request for Conciliation Conference is a letter to Mr. Griffen from Michael Malarkey, dated September 18, 1996, in which he states that he never received a "90-day letter" from the Division.

On December 6, 1996, the Division's Bureau of Conciliation and Mediation Services (hereinafter "BCMS") issued a Conciliation Order Dismissing Request (CMS No. 158045) which stated that since the notice was issued on January 19, 1995, but the request was mot mailed until October 22, 1996, or in excess of 90 days, the request for a conciliation conference was denied. On February 26, 1997, the Division of Tax Appeals received a timely petition from Michael Malarkey seeking administrative review of the conciliation order.

At the hearing, the Division submitted the affidavits of Geraldine Mahon and James Baisley, employees of the Division, as well as a copy of the certified mail record containing a list of the notices of determination allegedly issued by the Division on January 19, 1995, including one addressed to petitioner Michael Malarkey.

Geraldine Mahon, Principal Clerk of the Division's CARTS Control Unit (CARTS is an acronym for Case and Resource Tracking System and refers to the Division's computer system for generating statutory notices, among other things), states that she supervises the processing of notices of deficiency and notices of determination prior to their shipment to the Division's Mechanical Section for mailing. Ms. Mahon receives a computer printout, entitled Assessments Receivable, Certified Record for Non-Presort Mail, which the Division refers to as its "certified mail record" ("CMR"). The statutory notices listed on the CMR and generated by CARTS are

also forwarded to Ms. Mahon's unit. The computer generated notices are predated with the anticipated date of mailing and each notice is assigned a "certified control number." The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO."

The CMR for the notices issued on January 19, 1995, including the notice issued to Michael Malarkey, consisted of 12 fan-folded (connected) pages. Ms. Mahon states that all pages of a CMR are connected when the document is delivered into the possession of the United States Postal Service ("USPS"). The pages remain connected when the postmarked document is returned to her office after mailing and they stay connected unless she requests that they be separated.

On the CMR issued by the Division on January 19, 1995, including the Notice of Determination issued to Michael Malarkey, the certified control numbers run consecutively and there are no deletions. Each of the pages consists of 11 entries, with the exception of page 12 which contains 10 entries.

In the upper left-hand corner of the CMR, on page 1, the date 01/09/95 was manually changed to 1-19-95. The original date, 01/09/95, was the date that the CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular notices so that there is sufficient lead time for the notices to be manually reviewed and then processed for postage, etc. by the Mechanical Section. The handwritten date change on the CMR was made by personnel in the Division's mail room, who changed the date so that it conformed to the actual date that the notices and the CMR were delivered into possession of the USPS.

We modify finding of fact "28" of the Administrative Law Judge's determination to read as follows:

> Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who then affixes his or her initials/ signature and/or a United States postmark to a page or pages of the CMR. In the present matter, the USPS representative initialed page 12 of the CMR, circled the "Total Pieces and Amounts Listed" and affixed a postmark to such page of the CMR. On page 11 of the CMR, it indicates that a Notice of Determination, Notice Number L010003896, was sent to Malarkey-Michael, 715 Columbus Ave., Endicott, NY 13760-2221, by certified mail using control number P 911 205 160. Although the Mahon affidavit states that there was a United States postmark affixed to each page of the CMR, this is not accurate. Although all 12 pages of the CMR contain a marking that could possibly represent a postmark, the markings on certain pages are too faint to affirmatively conclude that they are, in fact, postmarks from the Roessleville Branch of the USPS indicating a date of January 19, 1995. It is clear, however, that pages 1, 2, 3, 10 and 12 contain a date-stamp from the Roessleville Branch of the USPS of January 19, 1995.
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> Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail. She indicates that the procedures followed and described in her affidavit were the normal and regular procedures of the CARTS Control Unit on January 19, 1995.[2]

We modify finding of fact "29" of the Administrative Law Judge's determination to read as follows:

> The affidavit of James Baisley, Chief Processing Clerk, in the Division's Mail Processing Center, states his regular duties include the overall supervision of the entire Mail Processing Center staff, including the staff that delivers outgoing mail to branch offices of the USPS. After a notice is placed in the "Outgoing

[2]We have modified the first paragraph of finding of fact "28" to more accurately reflect the information contained in the CMR.

> Certified Mail" basket in the Mail Processing Center, a member of Mr. Baisley's staff weighs and seals each envelope and affixes postage and fee amounts to them. A mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information on the CMR.
>
> Mr. Baisley states that a member of his staff delivers the CMR and the stamped envelopes to the Roessleville Branch of the USPS where a postal employee affixes a postmark or his or her signature or both to the CMR indicating receipt by the USPS. In the present case, the postal employee affixed a postmark to certain pages of the CMR, circled the total number of pieces and initialed the CMR to indicate that this was the total number of pieces received by the USPS. Mr. Baisley states that his knowledge that the postal employee circled the "total number of pieces" for the purpose of indicating that 131 pieces were received by the USPS is based on the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the CMR.[3]

Mr. Baisley states that the CMR is the Division's record of receipt by the Roessleville Branch of the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the USPS the following day and delivered to the originating office by a member of Mr. Baisley's staff.

Mr. Baisley read and reviewed the affidavit of Ms. Mahon and the exhibits attached to the affidavit and states that he can determine that on January 19, 1995, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Malarkey-Michael, 715 Columbus Ave., Endicott, NY 13860-2221, to the Roessleville Branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by certified mail. Based upon his review of the CMR, Mr. Baisley states that he can determine that a member of his staff obtained a copy of

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[3]We have modified the second sentence in the second paragraph to more accurately reflect the record.

the CMR with the postmarks, delivered to and accepted by the USPS on January 19, 1995, for the records of the CARTS Control Unit.

Mr. Baisley indicates that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and, furthermore, that such procedures were followed in mailing the notice to petitioner Michael Malarkey on January 19, 1995.

With respect to the issuance and mailing of the Notice of Determination to Michael Malarkey, this petitioner points out the following:

(a) The CMR, on the last page thereof, does not have either a signature of a postal employee with the number of pieces marked or have filled in the "Total Pieces Received at Post Office";

(b) The Division does not retain or request return receipts from certified or registered mail; and

(c) Page 11 of the CMR, the page containing petitioner Michael Malarkey's name, does not have a full postmark.

At the hearing, the Division acknowledged that the effective date of the statute which imposed personal liability for gains tax upon a responsible person or officer was April 19, 1989. Accordingly, the Division conceded that petitioner Michael Malarkey would be liable for gains tax due from Malrath only for periods subsequent to that effective date. As a result, the Division agrees that the assessment against petitioner Michael Malarkey must be reduced to $39,883.78, plus penalty and interest.

As previously noted (***see*** above), the total assessment being asserted by the Division against petitioner Malrath is $57,077.26, plus penalty and interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded lots 9, 16, 28, 29, 30, 42, 49, 92 and 66 were properly aggregated by the Division since, at the time that these lots were transferred by Malrath, the lots did not have homes built thereon. The Administrative Law Judge relied on our decision in ***Starburst Dev. Co.*** (Tax Appeals Tribunal, May 5, 1994) where we held that Tax Law § 1440(7) required that the real property be improved with a residence prior to its transfer in order to escape aggregation.

Next, the Administrative Law Judge addressed the argument that petitioners were entitled to an exemption on the transfers of lots 28, 25 and 97 based on a mere change in beneficial ownership. The Administrative Law Judge noted that, at BCMS, the conferee allowed a 25% exemption on the transfer of the three lots, however, he stated that it was not apparent from a review of the record why such an adjustment was allowed. Petitioners argued for a complete exemption. The Administrative Law Judge determined that based on the evidence, petitioners failed to prove entitlement to any further adjustment.

Petitioners also argued that the total tax should have been reduced by the amount of $4,430.00. Since petitioners failed to explain their calculation and reasoning, the Administrative Law Judge found no basis whatsoever for any further reduction of the gains tax calculated.

The Administrative Law Judge next addressed the issue concerning the aggregation of lots 52 and 71. These lots were exchanged by Malrath for other lots from third parties and these lots remain unsold. The Administrative Law Judge held that the Division properly aggregated these

lots since Tax Law former § 1440(7) provided that the term *transfer of real property* included the transfer of any interest in real property including an exchange of properties. Petitioners did not take an exception with respect to this conclusion reached by the Administrative Law Judge.

The Administrative Law Judge also reviewed petitioners' argument that the consideration received from the sale of lots 126 and 129, located in Felicia Estates West, should not be aggregated with the consideration received from the sale of lots in Felicia Estates. The Administrative Law Judge stated that the burden of proof was on petitioners to show that there was no intent or plan to purchase the second parcel consisting of the two lots in Felicia Estates West when the original lots were purchased three years previously. In referring to the language in 20 NYCRR 590.43(a), the Administrative Law Judge noted that petitioners cannot simply say that they did not have a plan or any intention to dispose of the property. In this case, the Administrative Law Judge concluded that petitioners have fallen short of demonstrating that the sale of the lots was not part of a plan for development and sale as residential lots.

The next issue involved the question of whether petitioners demonstrated that penalties assessed against them should be abated based upon reasonable cause. The Administrative Law Judge stated that both Malrath and Michael Malarkey reasonably relied on the advice of their attorney and accountant who they felt were experts in their respective fields in matters of taxation. Accordingly, the Administrative Law Judge abated penalties with respect to both petitioners.

With respect to the Notice of Determination issued to Michael Malarkey, the Administrative Law Judge found that the Division met its burden to show proper mailing of the notice. Specifically, the Administrative Law Judge concluded that the Division demonstrated

that it properly mailed the notice by certified mail to Mr. Malarkey by showing evidence as to the general mailing procedure of the notice and that this procedure was, in fact, followed in this case.

Lastly, the Administrative Law Judge addressed the issue concerning the personal liability for gains tax upon responsible persons such as Michael Malarkey. Petitioner Malarkey argued that since the statute which created responsible person liability for the gains tax was not enacted until April 19, 1989, there should be no liability whatsoever imposed upon petitioner since total sales by Malrath after April 19, 1989 were less than $1 million. Therefore, since the $1 million threshold was not met, there cannot be any tax liability. The Administrative Law Judge noted that the imposition of the gains tax resulted from the transfer of real property by Malrath. The responsible person liability statute merely created alternative avenues for the collection of taxes upon responsible persons, officers or employees in cases where the actual transferor failed to pay its gains tax liability. Clearly, the $1 million threshold was met by Malrath on the transfers of the real property and, as such, Michael Malarkey, as a responsible person, became liable for any tax due and owing upon transfers of that real property that occurred after April 19, 1989. However, the Administrative Law Judge noted that since petitioner Malarkey did not timely protest the notice issued to him, the notice was fixed and final and the Division of Tax Appeals was prohibited from addressing the underlying merits of the notice.

ARGUMENTS ON EXCEPTION

Petitioner Malrath continues to argue that lots 9, 16, 28, 29, 30, 42, 49, 92 and 66 should be exempt from gains tax since, although they were transferred to the purchasers without residential homes thereon, the purchasers needed title to the lots with proof that a foundation had been constructed and that a current survey had been prepared in order to obtain financing. Furthermore, with respect to lots 28, 25 and 97, Malrath urges that these lots are also exempt from gains tax since the transferees were beneficial owners of the lots both before and subsequent to the transfer of the lots. Petitioner also argues that the tax should be reduced by the amount of $4,430.00 for "beneficial ownership of 48 lots that Petitioner had to reimburse payees for" (Malrath's exception, p. 2). Lastly, petitioner continues to argue that lots 126 and 129 which are located in Felicia Estates West should not be aggregated with the lots in Felicia Estates since there was no plan to develop both adjoining parcels at the time that the first parcel was purchased.

With respect to the exception of Michael Malarkey, he continues to argue that the Division has failed to prove proper mailing of the Notice of Determination to him on January 19, 1995. Petitioner argues that he timely filed his request for a conciliation conference. Lastly, he continues to maintain that he is not liable for any taxes as a responsible person since, subsequent to April 19, 1989, sales by Malrath failed to exceed the $1 million threshold.

The Division asserts that the determination of the Administrative Law Judge was correct in every respect and, therefore, it respectfully requests that the determination be sustained.

OPINION

We begin by addressing the arguments set forth in Malrath's exception. Malrath continues to argue that lots 9, 16, 28, 29, 30, 42, 49, 92 and 66 should not be subject to gains tax because these lots were transferred to the purchasers so that such purchasers could obtain the necessary financing.

Tax Law former § 1440(7) provided for an exemption from aggregation of partial or successive transfers where the subdivided parcels were improved with residences and were transferred to transferees for use as their residences. Malrath emphasizes that homes were required to be built on the nine lots in issue.

As mentioned by the Administrative Law Judge, we have held that the homes are required to be completed prior to transfer of the property in order for a transferor to avoid aggregation of the parcels (***Starburst Dev. Co.***, ***supra***). In ***Starburst***, we stated that:

> The gains tax is imposed "on gains derived from the *transfer* of real property within the state" (Tax Law § 1441, emphasis added). We conclude that 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 (citations omitted). 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.

Therefore, the fact that homes were later built or that homes were required to be built is irrelevant since, at the time that the lots were transferred, there were no homes on the lots. Thus, the lots enumerated above are not exempt from the gains tax and were properly aggregated by the Division in order to determine tax due.

Malrath also takes an exception to the Administrative Law Judge's conclusion that it failed to show that lots 28, 25 and 97 were exempt from taxation based upon its allegation that the transferees were 100% beneficial owners of the lots, that it is entitled to a further reduction in the gains tax asserted by $4,430.00 and that lots 126 and 129 should not be aggregated. Other than making these bare assertions, petitioners have not provided proof nor any argument to explain why we should make any modification to the conclusions reached by the Administrative Law Judge. Accordingly, since the Administrative Law Judge adequately and completely addressed each of these issues, we sustain this portion of his determination for the reasons set forth therein.

We now turn our attention to the issue of whether petitioner Michael Malarkey timely filed a request for a conciliation conference. In his determination, the Administrative Law Judge found that the CMR introduced into evidence by the Division contained a United States postmark on each page. The Administrative Law Judge stated that while some of the postmarks were illegible, it was clear to him that, in fact, each page contained a United States postmark. We disagree. In reviewing each page of the CMR, there are several pages that do not contain a clear postmark. Although, from the markings indicated on the pages, it would be a probable assumption that the markings represent postmarks, such markings, in fact, are illegible and, thus, we cannot conclude that each page contains a postmark. However, we do not find that the lack of a United States postmark on each page of the CMR to be fatal in this case.

Petitioner argues that the Division has failed to prove that it mailed the notice to him since the page of the CMR which includes the notice allegedly mailed to him does not contain a clear postmark. Furthermore, he asserts that the Division did not introduce Postal Service Form 3877

which would clearly demonstrate whether the notice was, in fact, mailed to him on the date claimed.

It is well settled that a properly completed Postal Service Form 3877 or its counterpart "represents direct documentary evidence of the date and the fact of mailing" of the assessment (***Wheat v. Commissioner***, T.C. Memo 1992-268, 63 TCM 2955, ***citing Magazine v. Commissioner***, 89 TC 321, 324). "Exact compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of the division" (***Wheat v. Commissioner***, ***supra***, ***citing United States v. Zolla***, 724 F2d 808, 84-1 USTC ¶ 9175, ***cert denied*** 469 US 830). "A failure to comply with the form 3877 mailing procedures may not be fatal if the evidence adduced is otherwise sufficient to prove mailing" (***Wheat v. Commissioner***, ***supra***, ***citing Coleman v. Commissioner***, 94 TC 82).

In ***Matter of Katz*** (Tax Appeals Tribunal, November 14, 1991), we held that the Division failed to introduce adequate proof of mailing. In ***Katz***, the CMR submitted by the Division, as in this case, did not contain a postmark on every page. In fact, the CMR in ***Katz*** contained a postmark on the last page only. We refused to accept that one postmarked page as proof of mailing with respect to the other pages lacking postmarks due to the fact that: there was no indication on the last page of the CMR that that page related to any of the other pages of the mailing record; there was no indication on the postmarked page as to the total number of documents received by the USPS; and the postmarked page indicated that certain pieces of mail were, in fact, deleted from the CMR without stating which pieces were deleted.

However, in this case, as indicated in the Mahon affidavit, the CMR for the notices issued on January 19, 1995 consisted of 12 fan-folded pages. On the CMR, the certified control

numbers run consecutively and there are no deletions. Each of the pages consists of 11 entries, with the exception of page 12 which contains 10 entries. This CMR contained the notice issued to petitioner. As indicated in the Baisley affidavit, the CMR listed a total of 131 pieces of mail and that was the amount of pieces received by the USPS as demonstrated by the circled number of pieces received and the initials of the USPS representative in this case. Although the United States postmark appears on only a few pages of the CMR, we find that in a single CMR, it is unnecessary for each and every page to include a United States postmark. It is enough that the CMR contains a single United States postmark where, as here, the CMR is a single, fan-folded document that indicates on its final page the correct total number of pieces listed by sender and total number of pieces received by the USPS and that such USPS representative has initialed the total on the final page.[4] In short, we find that the CMR and affidavits introduced by the Division are sufficient to prove mailing in this case.

Petitioner also argues in his exception that the affidavits do not explain what the USPS employee *actually* did insofar as initialing, signing or circling the CMR. However, there is no statutory requirement that the Division must witness the USPS performing its duties nor do either State or Federal case law impose such a requirement. To the contrary, in ***Epstein v. Commissioner*** (T.C. Memo 1989-498, 58 TCM 128, 134), the Tax Court stated:

> [e]ven if Postal Service regulations are not complied with, an otherwise valid notice of deficiency is not rendered ineffective. This court only requires respondent to introduce evidence showing

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[4]This situation can be contrasted with the practice and procedure followed by the issuance of conciliation orders by BCMS. At BCMS, each page of a CMR is, in fact, its own individual CMR since, at the bottom of each page, it indicates the total amount of pieces listed by sender as well as the total number of pieces received at the USPS. In such case, since each page is its own CMR, each page would have to include a United States postmark (***see***, ***Matter of Huggins***, Tax Appeals Tribunal, April 8, 1999; ***Matter of Wetherby***, Tax Appeals Tribunal, March 4, 1999).

> that the notice of deficiency was properly delivered to the Postal Service for mailing. We do not require respondent to establish that the Postal Service personnel performed their official duties.

As explained in detail by the Administrative Law Judge, the affidavit of James Baisley states that his knowledge that the postal employee circled the "total number of pieces" for the purpose of indicating that 131 pieces of mail were received by the USPS is based upon the fact that the personnel of the Mail Processing Center specifically requested that the USPS representative either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the CMR. The circled number along with the initials of the postal employee are clear indications, based upon the Baisley affidavit, that the standard procedure of the Division was followed and that 131 pieces of mail were actually received at the USPS for mailing. Therefore, we agree with the conclusion reached by the Administrative Law Judge that the Division has proven proper issuance and mailing of the notice to petitioner Michael Malarkey. Since petitioner failed to file his request for a conciliation conference within 90 days of the issuance of the notice, we find that he failed to file a timely request and his notice has been fixed and cannot be considered on the merits.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Malrath Real Estate Development Corp. is denied;

2. The exception of Michael Malarkey is denied;

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

4. The petition of Malrath Real Estate Development Corp. is granted to the extent indicated in conclusion of law "H" of the Administrative Law Judge's determination, but in all other respects, is denied;

5. The petition of Michael Malarkey is dismissed; and

6. The notices of determination dated January 19, 1995, as modified by: the conciliation conferee; the subsequent reduction made by the Division of Taxation at hearing with respect to petitioner Michael Malarkey; and, further modified in accordance with paragraph "4" above, are sustained.[5]

DATED: Troy, New York
July 15, 1999

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

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

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner

[5]Although the notice issued to petitioner Michael Malarkey became fixed and final since he failed to timely protest it within 90 days of its issuance, the notice necessarily will decrease and be adjusted to reflect the same amount as the notice issued to petitioner Malrath due to the fact that the notice issued to petitioner Michael Malarkey is based upon his status as a responsible person. As a responsible person, his liability for the taxes due and owing for Malrath cannot exceed the tax found due and owing by Malrath in this proceeding. Additionally, the Division agreed to a further reduction to the notice as indicated in the findings of fact.