

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
FRED M. CALANDRA AND SALVATORE C. CALANDRA	:	DETERMINATION
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.	:	

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Petitioners, Fred M. Calandra and Salvatore C. Calandra, 4700 Genesee Street, Cheektowaga, New York 14225, filed a petition 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 (File No. 801978).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 6, 1987 at 1:15 P.M., with all briefs to be submitted by April 7, 1987. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear (Mark S. Klein, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly aggregated the consideration received by petitioners upon their transfer of two properties, thereby subjecting such transfers to tax under Tax Law Article 31-B.

FINDINGS OF FACT

1. Petitioners, Fred M. Calandra and Salvatore C. Calandra, were the owners of four parcels of real property referred to herein as 160 Sugg Road, 195 Sugg Road, 80 Sugg Road and 132 Cayuga Road. All four parcels are located in Cheektowaga, New York.

2. The four above-referenced parcels were transferred in 1984 in a single transaction by a single purchase and sale agreement between petitioners, collectively as "seller" and MZM Capital Corporation, as "purchaser". Each of the transferred properties had a separately allocated purchase price, to wit:

<u>Property</u>	<u>Allocated Purchase Price</u>
195 Sugg Road	\$ 860,000.00
160 Sugg Road	3,500,000.00
80 Sugg Road	890,000.00
132 Cayuga Road	750,000.00

3. The total purchase price of \$6,000,000.00 for the properties was paid as follows:

- (a) \$1,100,000.00 by promissory note allocable to 132 Cayuga Road and 80 Sugg Road;
- (b) \$2,480,000.00 by assumption of existing first mortgages held by Manufacturers & Traders Trust Company; and
- (c) \$2,420,000.00 by purchase money notes secured by purchase money mortgages covering all four properties.

4. Immediately after the sale, MZM Capital Corporation transferred the properties to Airport Park Associates, a limited partnership.

5. The Audit Division subsequently determined that the consideration received by petitioners for the sale of 160 Sugg Road and 195 Sugg Road should be aggregated for gains tax purposes and, on February 14, 1985, issued a Notice of Determination of Tax Due under Gains Tax Law to petitioners indicating gains tax due of \$35,146.80, plus penalty and interest. The Audit Division also determined that the consideration received by petitioners with respect to the sale of 80 Sugg Road and 132 Cayuga Road was properly not aggregated with the other two properties for purposes of gains tax. It is noted that the consideration received by petitioners for 160 Sugg Road exceeded the \$1,000,000.00 gains tax threshold; therefore, at issue herein is whether the 195 Sugg Road property should be aggregated with 160 Sugg Road, thereby subjecting the consideration received by petitioners for 195 Sugg Road to gains tax.

6. Petitioners purchased the property designated herein as 160 Sugg Road in July 1968.

At the time of acquisition the property was improved by a farmhouse and barn. Petitioners developed the property by a series of buildings added to the farmhouse. The property was leased by petitioners for office space and warehousing, with approximately 75 percent of the available space used for offices and 25 percent used for warehousing.

7. Petitioners acquired the property designated herein as 195 Sugg Road in July 1969. At the time of its acquisition, this parcel was improved by two small structures located approximately 1,200 feet from Sugg Road itself. Petitioners subsequently improved the property by making additions onto the existing structures. This property was held for rental by petitioners to various tenants for warehousing and office space, and had a higher ratio of warehousing to office space than the 160 Sugg Road property.

8. Both the 160 Sugg Road property and the 195 Sugg Road property were managed on petitioners' behalf by one property manager.

9. The 160 Sugg Road property and the 195 Sugg Road property were located across Sugg Road from each other. The property designated herein as 80 Sugg Road was located approximately 500 to 600 feet south of 160 Sugg Road. The property designated herein as 132 Cayuga Road was located approximately 1½ miles from the 160 and 195 Sugg Road properties.

10. The property line of 195 Sugg Road extended to a point approximately 15 feet west of Sugg Road. This 15 foot parcel, which extended across the entire front of the property, was originally part of the 195 Sugg Road property, but was transferred to the County of Erie by warranty deed in 1941. The County of Erie has continued to maintain ownership of this 15 foot parcel, which extended to the edge of Sugg Road itself, through the present time.

11. Until the closing of the transfer at issue herein, the property line of 160 Sugg Road extended to a point 25 feet east of Sugg Road. This 25 foot parcel, which extended across the entire front of 160 Sugg Road, was transferred by warranty deed to the County of Erie in 1941. The county has maintained ownership of this parcel through the present time.

12. Located between the county-owned 15 foot and 25 foot parcels in front of 195 Sugg

Road and 160 Sugg Road, respectively, is Sugg Road itself. Sugg Road was at all times relevant herein a two-lane county road approximately 25 feet wide.

13. At a point in time prior to the closing of the sale at issue herein, petitioners decided to reserve from the 160 Sugg Road property, title to a one-foot strip across that portion of the front of the property which was situated directly across Sugg Road from 195 Sugg Road. This modification to the transfer of the properties was made subsequent to discussions with representatives of the Gains Tax Section of the Audit Division and represented an effort on petitioners' part to avoid an Audit Division determination that the consideration received by petitioners from the sale of 160 and 195 Sugg Road be aggregated for gains tax purposes.

14. Petitioners granted an easement for use of the one-foot strip to the purchaser. Additionally, petitioners agreed to pay all future real property tax applicable to this one-foot strip.

15. Petitioners timely filed all returns as required under Article 31-B with respect to the transaction at issue. They subsequently entered into an installment payment arrangement with the Audit Division and pursuant to that plan have made timely payments of the tax asserted due herein by the Audit Division. In light of these facts, at hearing, the Audit Division conceded that the notice of determination improperly asserted penalty against petitioners and improperly demanded payment in full of the tax at issue. Further, inasmuch as petitioners have entered into an installment payment arrangement, they seek, in their petition, refund of amounts previously paid with respect to the gains tax asserted due on the sale of 195 Sugg Road pursuant to the installment payment arrangement, together with cancellation of the notice of determination and the amounts remaining due with respect to taxes asserted due arising from the sale of 195 Sugg Road.

#### CONCLUSIONS OF LAW

A. Article 31-B of the Tax Law, which became effective March 28, 1983, imposes a tax on gains derived from the transfer of real property within New York State. However, Tax Law §

1443(1) provides that no tax shall be imposed under this Article if the consideration is less than one million dollars. This matter presents the issue of the applicability of Article 31-B's so-called "aggregation clause" (Tax Law § 1440[7] under circumstances wherein the parcels of property at issue are at no point in physical contact with each other.

B. Specifically, section 1440(7) of the Tax Law defines "transfer of real property" for purposes of Article 31-B as including, inter alia:

"[p]artial 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,..."

C. The regulations provide the following with respect to Tax Law § 1440(7):

"Question: Is the consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee added together for purposes of applying the \$1 million exemption?

Answer: Generally, yes. A transfer of real property is defined in section 1440(7) of the Tax Law to mean 'the transfer or transfers of any interest in real property.' Thus, the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property. It is the consideration for the interest in a single transfer, regardless of the number of deeds used to transfer the property, that is used to determine the application of the \$1 million exemption." (20 NYCRR 590.42)

D. Additionally, section 1448(1) of the Tax Law provides, in pertinent part, the following:

"Where the tax commission finds that the transfer of any real property or an interest therein has been so formulated that the primary purpose of such formulation is the avoidance or evasion of the tax imposed by this article, rather than for an adequate business purpose, the tax commission shall treat such transfer as subject to the tax imposed by this article."

E. Relevant to the determination of the application of the aggregation clause is whether or not the parcels at issue were contiguous or adjacent within the meaning of the regulation. In this determination the following principle of statutory construction is noted:

"Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended." (McKinney's Cons Laws of NY, Book 1, Statutes § 232).

F. The 160 Sugg Road and 195 Sugg Road parcels were "adjacent" to one another within the plain meaning of that word and within the meaning of 20 NYCRR 590.42. The term adjacent "may or may not imply contact but always implies an absence of anything of the same kind in between." (Webster's Ninth New Collegiate Dictionary 56 [1984]). In the context of 20 NYCRR 590.42 the term is used as an alternative to the more rigidly defined "contiguous" which "implies having contact" (Webster's Ninth New Collegiate Dictionary 56 [1984]). Thus, in the present context the term adjacent refers to circumstances wherein properties are not physically in contact but which are in close proximity with an "absence of anything of the same kind in between". In the situation at issue, the parcels are indeed in close proximity as they are separated only by approximately 65 feet of county-owned property consisting of a two-lane county road and its shoulders.<sup>1</sup> The county road is certainly not "of the same kind" as the properties at issue, inasmuch as petitioners had immediate access to the road and had the right to use the road at all times. Sugg Road and its shoulders do not, therefore, separate the properties to a degree which would result in a finding of nonadjacency.

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<sup>1</sup>The transfer of the "one foot strip" of property along the front of 160 Sugg Road does not enter the discussion of the contiguity or adjacency of the properties at issue for two reasons. First, petitioners' grant of an easement to the purchaser in the use of the one-foot strip constituted the transfer of an interest in real property within the meaning of sections 1440(4) and 1440(7) of the Tax Law and therefore constituted a transfer for gains tax purposes. With the easement, the purchaser gained a beneficial interest in the property pursuant to Tax Law 1440(4). This portion of the transfer is therefore properly regarded as part of the transfer of the 160 Sugg Road property.

Second, and alternatively, this portion of the transaction was formulated solely to avoid gains tax. This transfer is therefore properly subject to aggregation pursuant to section 1448(1) of the Tax Law.

G. It is noted that the foregoing interpretation of 20 NYCRR 590.42 is in accord with the broad statutory language of Tax Law §§ 1440(7) and 1448(1) and the legislative purposes underlying the enactment of Article 31-B ( see Louis Bombart v. State Tax Commission, 516 NYS2d 989).

H. Having made a determination as to the adjacency of the properties, the question of the application of the aggregation clause under the circumstances presented herein must be determined. The two properties were transferred in a single transaction to a single purchaser; they had mortgages securing the same promissory note used to finance the purchase of both properties; they were held for a common or related purpose, that is, to generate commercial rental income; and they were managed on petitioners' behalf by one property manager. Under these circumstances the Audit Division properly aggregated the consideration received by petitioners with respect to their sale of the 160 and 195 Sugg Road properties ( see Louis Bombart v. State Tax Commission, 516 NYS2d 989; Matter of Sanjaylyn Co., State Tax Commission, December 23, 1986; 20 NYCRR 590.42).

I. That the petition of Fred M. Calandra and Salvatore C. Calandra is in all respects denied and the notice of determination dated February 14, 1986, as amended to provide for payment pursuant to the terms of the installment payment plan and the cancellation of penalty (Finding of Fact "15"), is sustained.

DATED: Albany, New York  
November 13, 1987

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ADMINISTRATIVE LAW JUDGE