STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of 50 LINCOLN ROAD, INC. 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.	:	DETERMINATION DTA NOS. 805954 AND 805955
In the Matter of the Petition of 2121 BEEKMAN PLACE, INC. 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, 50 Lincoln Road, Inc. and 2121 Beekman Place, Inc., c/o Harry J. Petchesky, Esq., 430 Park Avenue, New York, New York 10022, filed petitions 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.

A consolidated hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 23, 1991 at 1:30 P.M., with all briefs to be submitted by May 13, 1991. Petitioners filed their briefs on March 11, 1991 and May 13, 1991. The Division of Taxation filed its brief on April 16, 1991. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioners' sales of residential apartment buildings should be aggregated pursuant to Tax Law § 1440(7).

FINDINGS OF FACT

Petitioners, 50 Lincoln Road, Inc. and 2121 Beekman Place, Inc., were corporations which operated contiguous residential apartment buildings in New York City.

In 1986, an individual approached the shareholders of 2121 Beekman Place, Inc. and 50 Lincoln Road, Inc. with an offer to purchase the apartment buildings. The shareholders agreed to sell the properties at this time because they were concerned with impending changes in the Federal tax law and the Real Property Gains Tax Law.

In a contract dated January 20, 1986, 2121 Beekman Place, Inc. entered into a contract to sell the apartment building it operated to 2121 Realty Co. In a separate contract, also dated January 20, 1986, 50 Lincoln Road, Inc. agreed to sell the apartment building it owned to 50 Realty Co.

At some juncture, each of the foregoing contracts was amended. Under these amendments, 2121 Realty Co. agreed to pay 2121 Beekman Place, Inc. $850,000.00 in cash at closing and all prior references to a purchase money mortgage were deleted. In the other amendment, 50 Lincoln Road, Inc., as seller, agreed to accept a purchase money mortgage of $650,000.00 plus $150,000.00 in cash from 50 Realty Co. The amendment expressly provided that it was to have mortgage clauses similar to the 2121 Beekman Place contract prior to its amendment.

In a contract dated February 5, 1986, 50 Realty Co. sold its interest in the apartment building to Arlene Sardell. In a document dated March 26, 1986, Arlene Sardell assigned her rights as purchaser in the contract dated February 5, 1986 to Lincoln Road Associates, Ltd.[1]

In a contract dated February 5, 1986, 2121 Realty Co. conveyed its interest to Arlene Sardell. In a document dated March 26, 1986, Arlene Sardell assigned her rights as purchaser under the contract dated February 5, 1986 to 2121 Beekman Realty Corp.

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[1]In a document dated July 31, 1986, 50 Realty Co. assigned its interest in the contract dated January 20, 1986 to Lincoln Road Associates, Ltd. Arlene Sardell signed the assignment document on behalf of Lincoln Road Associates, Ltd. She also signed in an individual capacity.

A transferor questionnaire was filed regarding the transfer of 50 Lincoln Road which reported that no tax was due because the consideration was less than $1,000,000.00. It also reported that there was a net loss from the transaction. The Division issued a Tentative Assessment and Return, dated June 20, 1986, which made a series of adjustments and determined that tax was due in the amount of $4,836.00. In order to conclude that tax was due, the Division aggregated the consideration from the sale of 50 Lincoln Road with the sale of 2121 Beekman Place.

On July 31, 1986, 50 Lincoln Road, Inc. sold the premises at 50 Lincoln Road, Brooklyn, New York to Lincoln Road Associates, Ltd., the assignee of the contract of sale dated January 20, 1986. In connection with the transfer, 50 Lincoln Road, Inc. remitted New York State real property transfer gains tax in the amount of $4,836.00.

A transferor questionnaire was filed with respect to the transfer of 2121 Beekman Place which reported that the transaction was exempt because the consideration was less than $1,000,000.00. Although it is not included

in the record, it may be inferred that the Division issued a Tentative Assessment and Return which made a series of adjustments and determined that tax was due. Further, in order to make this determination, the Division aggregated the consideration from 2121 Beekman Place and 50 Lincoln Road.

On September 4, 1986, 2121 Beekman Place, Inc. sold the premises at 2121 Beekman Place, Brooklyn, New York to 2121 Beekman Realty Corp., the assignee of the contract of sale dated January 20, 1986. In connection with the transfer, 2121 Beekman Place, Inc. remitted New York State real property transfer gains tax in the amount of $35,104.80.

Each petitioner filed a claim for refund of gains tax dated April 3, 1987. In essence, each refund claim maintained that the consideration received from the sale of 2121 Beekman Place and 50 Lincoln Road should not have been aggregated for purposes of the gains tax and therefore the sale of the parcels was not subject to gains tax. In separate letters dated July 22,

1987, the Division of Taxation denied the claims for refund on the ground that the transfers were deemed to be a single transfer of real property.

2121 Beekman Place, Inc. acquired its apartment building in 1952. 50 Lincoln Road, Inc. acquired its property at the same time. Each corporation had the same shareholders. The apartment buildings were incorporated separately in order to limit each petitioner's shareholders' liability.

From the time the properties were acquired in 1952 until they were sold in 1986, 2121 Beekman Place, Inc. and 50 Lincoln Road, Inc. operated as separate corporations. They filed separate tax returns for Federal and State purposes.

Mr. Bernard Livingston was the president of 2121 Beekman Place, Inc. and 50 Lincoln Road, Inc. He was also president of Kellner & Livingston, Inc. which was the firm which managed the corporate petitioners. In 1971 Mr. Peter Kraus became an employee of Kellner & Livingston, Inc. In 1979, he became an assistant secretary of each petitioner. It was the management company's function to handle rents, make disbursements and be responsible for repairs.

The apartment buildings were located on separate blocks. The buildings had separate entrances and their own heating systems. There was a separate superintendent for each building who was paid by the respective corporate employer. Repairs to each apartment building were authorized separately. Rent was collected separately and deposited into independent checking accounts. Each corporation had its own records.

Each building was independently registered with the New York City Department of Buildings and the New York State Division of Housing and Community Renewal.

In letters dated June 20, 1986, Mr. Bernard Livingston confirmed the existence of brokerage agreements which obligated each petitioner to pay Mr. Livingston a brokerage commission.

At the closing between 50 Lincoln Road, Inc., as seller, and Lincoln Road Associates, Ltd., as purchaser, on July 31, 1986, 50 Lincoln Road, Inc. appeared by Bernard S. Livingston,

as president. Lincoln Road Associates, Ltd. appeared by Arlene Sardell, as president.

At the closing between 2121 Beekman Place, Inc., as seller, and 2121 Beekman Realty Corp., as purchaser, on September 4, 1986, 2121 Beekman Place, Inc. appeared by Bernard S. Livingston, as president. 2121 Beekman Realty Corp. appeared by Arlene Sardell, as president.

SUMMARY OF THE PARTIES' POSITIONS

It is petitioners' position that it was improper to aggregate the parcels because they were operated as separate and distinct entities. Petitioners maintain that since the sales involved separate parcels as opposed to the subdivision of a single parcel, aggregation was not authorized.

It is the Division of Taxation's position that the successive transfers of real property by petitioners were taxable because they constituted a single transfer of real property pursuant to Tax Law § 1440(7) and 20 NYCRR 590.42. In the alternative, the Division argues that if there were two separate transfers, the gains tax was properly assessed pursuant to Tax Law § 1440(7) and 20 NYCRR 590.43(a).

In their reply brief, petitioners submit that the purchasers were separate corporate entities and that there was no authority to "look through" the corporate entity where purchasers were involved. Further, petitioners contend that these transactions were not structured to avoid gains tax. Lastly, petitioners posit that 20 NYCRR 590.43(b) was directly on point and supports their position.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. However, Tax Law § 1443(1) provides that a partial or total exemption shall be allowed if the consideration is less than $1,000,000.00.

B. The term "transfer of real property" is defined in Tax Law § 1440(7) which provides, in part, as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale..." (emphasis added).

The third sentence of Tax Law § 1440(7) provides:

> "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..." (emphasis added).

C. Petitioners submit that this matter should be decided in their favor based upon a literal reading of 20 NYCRR 590.43(b). This regulation provides, in relevant part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law...applied in the case of:
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> * * *
>
> (b) Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?
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> Answer: The consideration is not aggregated, even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors."

Petitioners argue that the fact that transfers were made by separate corporations must be recognized. In contrast, the Division relies, in the first instance, upon 20 NYCRR 590.42 which provides:

> "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?
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> 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 interests 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.
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> However, if the transferor establishes that the only correlation between the properties is the contiguity or adjacency itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated."

The Division contends that the facts support the conclusion that there was a single transfer of real property to one transferee and that 20 NYCRR 590.42 renders these transactions subject to tax.

D. Before discussing the respective parties' positions, certain underlying principles must be examined. On the basis of an examination of the provisions of the Tax Law and the Commissioner's regulations, the Tax Appeals Tribunal has concluded that the focus of the gains tax is to look through entities to determine the beneficial ownership of real property (see, e.g., Matter of 307 McKibbon Street Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Robert A. Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972). The principle of focusing on the economic reality of the transaction has also been accepted by the courts and applied to corporate entities (see, Matter of Bredero Vast Goed, N.V. v. Tax Commission of the State of New York, 138 Misc 2d 27, 523 NYS2d 754, affd 146 AD2d 155, 539 NYS2d 832, appeal dismissed 74 NY2d 791, 545 NYS2d 105). None of the cases cited by petitioners for the principle that the corporate entity should be recognized concerns gains tax. Therefore, these cases are inapplicable. Further, contrary to petitioners' argument, no basis has been presented for the proposition that the "look through" principle applies only to the sellers of property and not purchasers. Consequently, this argument is also rejected.

E. In this matter, the record shows that the president and assistant secretary of each petitioner were the same. Further, each petitioner had the same stockholders. Under these circumstances, it is reasonable to conclude that beneficial interests were such that the Division properly treated petitioners as one transferor.

F. The record also shows that in the same year a man approached the shareholders of both petitioners to purchase the respective properties and that when the closings occurred, Arlene Sardell appeared as the president of the purchaser in each instance. The inference drawn from these facts is that the beneficial interests of each purchaser were also the same. Thus, the Division properly treated the transactions in issue as a transfer from one seller to one purchaser.

G. Petitioners maintain that the properties were not used for a common or related purpose and were therefore improperly aggregated under 20 NYCRR 590.42. The record shows that each parcel contained a residential apartment building. The apartment buildings were

managed by the same company which collected rents and authorized repairs for each building. As argued by the Division, it is clear from the foregoing that the apartment buildings were operated for the common purpose of obtaining rental income. Thus, the apartment buildings were used for a common purpose and the Division properly aggregated the consideration received from the sale of the apartment buildings (see, Matter of 307 McKibbon Street Realty Corp., supra [where the Tax Appeals Tribunal sanctioned the aggregation of the gain on the sale of two buildings where one building was occupied and the other building was vacant]). It is noted that the differences raised by petitioners, such as separate entrances, heating systems and superintendents, do not warrant a finding that the buildings were not used for a common purpose (see, Matter of 307 McKibbon Street Realty Corp., supra).

H. In view of the foregoing, the Division's remaining argument is academic. Further, the finding that the economic reality of the transfers involved one seller and one purchaser renders petitioners' reliance upon 20 NYCRR 590.43(b) inapplicable.

I. The petitions of 50 Lincoln Road, Inc. and 2121 Beekman Place, Inc. are denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE