STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
LION BREWERY OF NEW YORK CITY	:	DETERMINATION ON REMAND DTA NOS. 807103 AND 807267
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.	:	

Petitioner Lion Brewery of New York City, c/o Coudert Brothers, 200 Park Avenue, New York 10166 filed petitions 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.

A hearing on remand from the Tax Appeals Tribunal was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 13, 1991 at 1:15 P.M., with all briefs and documents filed by October 14, 1992. Petitioner appeared by Coudert Brothers (Emilio A. Dominianni, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth Schultz, Esq., of counsel).

ISSUES

I. Whether the sale of the eighth floor of a building owned by petitioner is exempt from the tax imposed by Tax Law § 1441, the tax on gains derived from the transfer of real property, as the sale of real property occupied by the transferor as his residence pursuant to Tax Law § 1443.2.

II. Whether the sale of the fifteenth floor apartment should qualify for the one million dollar exemption from gains tax on the ground that thesale was not made pursuant to any plan or agreement in accordance with Tax Law § 1440.7, and therewith should not be aggregated with the sale of the eighth floor apartment or any other apartments in the building.

III. Whether the sale of the fifteenth floor apartment should qualify for an exemption under

Tax Law § 1443.2 as the sale of real property occupied by the transferor as his residence.

FINDINGS OF FACT

Included in petitioner's brief, were 30 proposed findings of fact which have been included in the following findings to the extent that they are relevant, not conclusory in nature and fairly reflect the facts in the record. Proposed findings of fact 8, 9, 10, 11, 13, 15, 17, 18, 21, 22, 23, 25, and 29 were extensively edited or deleted to more accurately reflect the records as established at hearing and to avoid the use of conclusory language in the findings.

Petitioner, Lion Brewery of New York City, was a New York real estate holding corporation which owned certain real property located on Fifth Avenue, New York City.

During the 1960s, petitioner's only assets except for cash and securities consisted of two buildings located at 988 Fifth Avenue and 1150 Fifth Avenue.

Petitioner constructed the apartment building at 988 Fifth Avenue in 1925.

Pauline Schmid Murray, the mother of Paula Murray Coudert, was the sole shareholder of petitioner and its first corporate officer. She resided in an apartment in the building and was generally in charge of its management. All other apartments in the building were rented to third parties.

Upon the death of Pauline Schmid Murray in 1931, Paula Murray Coudert inherited all outstanding shares of petitioner's stock from her mother. Soon after, she married Frederick R. Coudert, Jr.

In or about 1940, Frederick R. Coudert, Jr. and Paula Murray Coudert (hereinafter sometimes "Mrs. Coudert") established their residence in the building. They lived in the eighth floor apartment and used rooms located on the fifteenth floor principally to store their furniture, equipment and other property. Some rooms were utilized as living quarters at various times for the children and hired help. Also, Mrs. Coudert's companion lived in a room on the fifteenth floor for fifteen years.

Petitioner had never collected any rent for the eighth floor apartment or the fifteenth floor rooms occupied and used by the Coudert family prior to the sales of the apartments.

Mrs. Coudert's children, Frederick R. Coudert, III, and Paula Coudert Rand, lived in the apartment from birth until 1961 and 1957, respectively, when they were married. They returned to the apartment for family visits. Until Mrs. Coudert's death in September 1985, she continuously resided in the eighth floor apartment. Frederick R. Coudert, III, occasionally utilized a room on the fifteenth floor for study purposes during law school at Columbia University.

Beginning in 1927, the entire building was depreciated for Federal income tax purposes based on a 50-year straight line method. Operating expenses for the entire building were deducted by petitioner annually.

No depreciation expenses were taken on the original structure of the building after 1977.

In the early 1960's, Frederick R. Coudert, III, succeeded his mother, Mrs. Coudert, as the president of petitioner.

In 1971, Mrs. Coudert granted all of her shares of stock in petitioner to two family trusts. Each trust received 195 shares of the capital stock of Lion Brewery of New York City. The grantor's transfers of the shares to the trusts were irrevocable and the trustees were granted the broadest possible powers, authority and discretion in connection with the investment, reinvestment and administration of the trust fund.

One of the two original trustees of the two family trusts was related to the Coudert family, Alexis C. Coudert, and the other trustee, Eugene D. Wadsworth, was a close family friend.

At the time Mrs. Coudert granted the shares to the trust, there was an alleged unwritten understanding among Mrs. Coudert, her children and her trustees that she would be entitled to continue to occupy the eighth floor apartment and the fifteenth floor rooms for as long as she desired. She never paid rent for this privilege.

During all the relevant time periods prior to the sales of the apartments, Mrs. Coudert was involved in all major management decisions of petitioner.

The officers of petitioner and the trustees of the two trusts chose to defer decision-

making authority regarding management of petitioner's assets to Mrs. Coudert before her death, in contradiction of the terms and provisions of the trust documents.

In July 1979, petitioner began to convert the building to condominium ownership pursuant to an Offering Plan (the building is situated on land located at the southeast corner of the intersection of 80th Street and 5th Avenue in Manhattan, with a frontage of 100 feet on 5th Avenue and 51 feet, 2 inches on 80th Street. The building is a 13-story steel frame structure, erected in 1925 by Dwight P. Robinson and Co., Inc. from plans by J.E.R. Carpenter, Architect.

The front facades of the building faced on both 5th Avenue and 80th Street with limestone from the ground floor level up, with decorative limestone fringe on the second, fourth, fifth and eleventh floors. The entrance doors are wrought iron with panels of clear glass. The lobby floors are made of black and white marble squares. The ceiling consists of decorative plaster painted in an off-white and one-third of the west wall of the lobby is covered by mirrors. The intercoms for the apartments and elevator are located in the lobby, which also contains the mailroom. A separate service entrance is located at the easterly end of the 80th Street side of the building, giving access to the ground level and basement of the building. The basement houses the workshop, laundry cages and the mechanical equipment for the building. On the ground floor are two professional offices, both of which are accessible from the street. The office fronting on 80th Street consists of 2 rooms totalling 525 square feet; the office fronting on 5th Avenue consists of 5 rooms totalling 1,000 square feet. Also on the ground floor in the rear is a four-room apartment for the building superintendent, as well as his office and one storage room.

There are 12 residential apartments in the building, with each apartment occupying a full floor with private elevator entry. Each apartment consists of eleven rooms with four baths (with the exception of the twelfth and thirteenth [numbered fourteenth] floor apartments, which each contained eight rooms and four baths), and the building's penthouse floor consists of nine maid's rooms and one bath. Each of the apartment units has a wood-burning fireplace in the dining room, and most apartments have a fireplace in the master bedroom. The kitchen for each

apartment is equipped with a refrigerator, stove, sinks and cabinets. There is also a butler pantry equipped with a sink and cabinets.

Petitioner, the condominium sponsor, offered for sale 12 apartment units, i.e. the apartments occupying floors 2 through 12 and floor 14.

The Offering Plan identified the fifteenth floor unit as the "Sponsor's Retained Unit" consisting of nine maid's rooms and a terrace. The Offering Plan states that the sponsor's retained unit is "not being offered for purchase in this plan."

Petitioner as sponsor did not state any particular use for the nine maids' rooms, one bath and terrace on the fifteenth floor but reserved the right to convert the nine rooms, one bath and terrace into one or more apartment units suitable for residential occupancy and to sell the unit or units to third parties at a later date.

The fifteenth floor rooms allegedly were not in a condition suitable for personal residence at the time of the offering of the other apartments in the building; however no structural changes were made to the fifteenth floor prior to its offering pursuant to the sixth amendment to the Offering Plan on November 29, 1986.

The date of the first offering of the Offering Plan was July 23, 1979. The front cover of the Offering Plan states: "This Offering Plan may not be used after January 23, 1982." The plan was amended at least six times, but the amended Offering Plan in evidence contained only four amendments. The fifth amendment is not included in the record.

By the end of 1981, all of the units in the building, other than the eighth floor apartment and the sponsor's retained unit, had been sold to third parties pursuant to the amended Offering Plan.

After the condominium conversion, Mrs. Coudert continued to reside in the eighth floor apartment and to use the fifteenth floor rooms for storage until her death in September 1985. Lion Brewery paid the common charges for her use of the eighth floor apartment and Mrs. Coudert refused to pay any rent after she conveyed all her right, title and interest in the property to the trusts in 1971.

The eighth floor apartment was sold on August 5, 1986 to an unrelated party for $2,900,000.00, of which $2,633,813.00 was gain for the purposes of the New York State gains tax.

The Division of Taxation ("Division") determined a real property transfer gains tax due of $263,381.00 upon the gain realized on the sale of the eighth floor apartment. Petitioner paid this tax and timely filed for a refund of tax paid.

Petitioner filed the sixth amendment to the Offering Plan on November 24, 1986 in connection with the sale of the fifteenth floor rooms.

The fifteenth floor rooms were never listed with any broker or specifically offered for sale to any buyer prior to sale, although there was much interest in the fifteenth floor by brokers who called Frederick Coudert, III, prior to the sale.

The fifteenth floor rooms were sold without renovation on December 10, 1986 for $499,990.00. The Division aggregated the transfer of the fifteenth floor unit with the transfer of the eighth floor apartment and determined a real property transfer gains tax due of $47,334.00 with respect to the sale of the fifteenth floor unit. Petitioner paid this tax and timely filed for a refund of tax paid.

On August 9, 1988, petitioner filed a claim for refund of real property transfer gains tax paid on the transfer of the eighth floor apartment located in 988 Fifth Avenue, New York, New York seeking a refund in the amount of $263,381.00.

On August 25, 1988, the Division denied said claim stating that petitioner was not entitled to the exemption set forth in Tax Law § 1443.2 since the premises were not occupied by the transferor as his residence. The denial letter makes specific reference to an opinion letter dated July 25, 1986 from Kenneth R. Wekler to Mr. E. A. Dominianni which previously set forth the same opinion of the Division.

On December 12, 1988, petitioner filed a claim for refund of the transfer gains tax seeking refund in the sum of $47,334.00, representing tax paid on the sponsor's retained unit on the fifteenth floor of 988 Fifth Avenue, New York, New York, on the basis that it was a transfer

of real property for a consideration of less than one million dollars, that the unit was specifically not offered for sale as part of the condominium conversion Offering Plan and that the retained unit cannot be aggregated with any other transfer of real property pursuant to Tax Law § 1440.7.

On March 30, 1989, the Division denied said refund claim stating that it was its opinion that the unit was sold pursuant to the Offering Plan and that, in the alternative, the unit could be aggregated with the sale of the eighth floor since they were considered contiguous in sharing the same outside walls of the building.

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 in New York State. Exemptions from this tax are provided for in Tax Law § 1443. Two of these exemptions are requested by petitioner herein, to wit: Tax Law § 1443.1, which provides for an exemption where the consideration for the real property transfered is less than one million dollars; and Tax Law § 1443.2, which provides for an exemption from the tax where the real property consists of premises occupied by the transferor as his residence.

It is noted that statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision proves his entitlement to the exemption. (Matter of Grace, 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027; Matter of Old Nut Co., 126 AD2d 869, 511 NYS2d 161, lv denied 69 NY2d 609; Matter of Bredero Vast Goed N.V. v. Tax Commission, 146 AD2d 155, 539 NYS2d, 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105.)

Petitioner's position is that the beneficial ownership of the eighth floor apartment and the fifteenth floor rooms rested in Mrs. Coudert, who used these premises as her personal residence, thus qualifying the transfer of these properties for the personal residence exemption under Tax Law § 1443.2. Alternatively, petitioner argues that the fifteenth floor unit was not transferred pursuant to the Offering Plan and therefore is not subject to aggregation with any of the other condominium units in the building.

B. The residential exemption set forth in Tax Law § 1443.2 is quite clear in its literal terms that the premises must be occupied by the transferor as his residence. The regulation promulgated pursuant to this statutory provision, 20 NYCRR 590.24(d), provides:

> "Question: Is the sale of the premises which is owned by a corporation and occupied by its sole shareholder as his residence exempt from the gains tax pursuant to section 1443(2) of the Tax Law?
>
> "Answer: No. Generally, a corporation cannot occupy premises as its residence. However, if the transferor can establish through all the facts and circumstances that the ownership and maintenance of the premises related solely to personal use and that the premises were never treated as business property (for example, it was not depreciated for federal income tax purposes), the exemption may be allowed. The exemption will be applied strictly on a case by case basis by taking all facts and circumstances into consideration."

As of the date of the first offering on July 23, 1979, 12 units were offered for sale including the eighth floor apartment occupied by Mrs. Coudert. The fifteenth floor was retained by the sponsor, Lion Brewery of New York City, which reserved in itself the right to change the interior layout of said retained unit to one or more residential units together with the future right to offer said units for sale.

Eight years prior to the offering of the units for sale, Mrs. Coudert executed trust agreements whereby she irrevocably conveyed to certain trusts, all her right title and interest in the premises at 988 Fifth Avenue, New York City, and also specifically provided that the trustees of said trust would have the broadest possible powers, authority and discretion in connection with the corpus of the trust and that said powers, authority and discretion would continue until the actual distribution of the trust corpus. Therefore, as of December 30, 1971, Mrs. Coudert's legal interest in the property at 988 Fifth Avenue was legally extinguished. Mrs. Coudert remained in her eighth floor apartment until her death in September of 1985. During that period between 1971 and 1985, Mrs. Coudert continued to make decisions with regard to the management of the premises but never paid rent or purchased her apartment pursuant to the Offering Plan for the condominium conversion of 988 Fifth Avenue.

Pursuant to the section of the Offering Plan titled "rights of present tenants" on page 33 of said plan, it appears that Mrs. Coudert was not subjected to the literal terms of said plan since

her nonpayment of rent would technically have subjected her to eviction proceedings regardless of the rent control status of the apartment. Furthermore, the common charges assessed to the eighth floor apartment were paid by the sponsor during Mrs. Coudert's tenancy.

The beneficiaries of the trusts are Frederick R. Coudert, III, and Paula Coudert Rand, the children of Mrs. Coudert. Neither of these two individuals resided in the eighth floor apartment, or in the fifteenth floor rooms after 1961.

Petitioner claims entitlement to the exemption provided for in Tax Law § 1443.2 which requires that the transferor occupy a premises as his residence. Although the regulation promulgated pursuant to this section generally denies this exemption to a corporation, it has provided that if the corporation can show that the ownership and maintenance of the premises related solely to its personal use and that the property was never treated as business property, the exemption may be allowed.[1]

Petitioner characterizes Mrs. Coudert as the "beneficial owner" of the premises during her occupancy. Petitioner characterizes Mrs. Coudert as the "beneficial owner" because she enjoyed the benefits of living in the apartment until her death without ever paying any rent and endured the burden of having to make management decisions with respect to the subject premises. Petitioner relies upon the testimony of Frederick R. Coudert, III, which indicated that he took his instructions from his mother while president of petitioner, and that the trustees also deferred to

Mrs. Coudert's discretion with regard to issues regarding the premises. Petitioner urges the position that Mrs. Coudert acted like the sole shareholder of petitioner despite the fact that she transferred her interest in petitioner to the trusts in 1971.

Blacks law dictionary defines a beneficial owner as "one who does not have title to

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[1]It is noted that the question posed by the regulation refers to occupancy by the sole shareholder. This is not repeated in the Answer. For purposes of this determination, it is assumed the occupancy by a corporation is concerned with use by someone with an interest in the corporate entity, in the instant matter, the trusts.

property but has rights in the property which are the normal incident of owning the property. The persons for whom a trustee holds title to property are the beneficial owners of the property, and the trustee has a fiduciary responsibility to them." (Blacks Law Dictionary 142 [5th ed 1979].)

It is also well established that it is essential to the creation of an express private trust that a beneficiary, competent to take the beneficial interests thereof, be designated with sufficient clarity and certainty to be capable of identification, and that the failure to name such a beneficiary is fatal to the creation of a valid trust. (61 NY Jur, Trusts, § 275.)

The trusts to which Mrs. Coudert gave all her shares in Lion Brewery of New York City specifically set forth two separate beneficiaries, Paula Coudert Rand and Frederick R. Coudert, III, respectively. Therefore, the true beneficiaries were Mrs. Coudert's children, who, after the trusts took possession of Mrs. Coudert's shares in Lion Brewery of New York City, continued to allow Mrs. Coudert to exercise the normal incidents of ownership in the property. However, Mrs. Coudert was not the true beneficial owner of the property since the corpus of the trust was not being held for her benefit nor were the trustees legally acting as her fiduciary. In light of the trust documents and the clear terms set forth therein, it is impossible to find Mrs. Coudert the beneficial owner of the eighth floor or fifteenth floor apartments at 988 Fifth Avenue. She was merely permitted by her children and the trustees to occupy the premises, but without any legal authority to do so. When Mrs. Coudert transferred her interest in Lion Brewery to the trusts, her ownership rights were extinguished. Therefore, it would not be proper to apply the "look-through" principle as urged by petitioner. Arguably, since the trusts clearly hold legal title to the premises herein, the focus of any "look-through" would be to the beneficiaries of the trust for whom the property was held, i.e., Mrs. Coudert's children, who had not resided in either of the apartments since 1961.

Therefore, it can not be found that the premises herein were occupied by the transferor (the trusts) as his residence since neither the trusts nor the beneficiaries/beneficial owners resided in either the eighth or fifteenth floor apartments.

It is important to understand that the "look-through" principle focuses on the change in form of ownership. Clearly, the focus of the tax through two tiers of entities has been upheld in various decisions (Bredero Vast Goed, N.V. v. Tax Commn., supra), and beneficial interest has been equated with leasehold interest and title in fee when used in connection with real property. (Tax Law § 1440.4.) Further, the focus of the gains tax through entities is also expressed in the exemption contained in Tax Law § 1443.5, which exempts a transfer to the extent it "consists of a mere change of identity or form of ownership or organization where there is no change in beneficial interest." (Tax Law § 1443.5.) Petitioner urges that there has been no change in the beneficial ownership of the eighth and fifteenth floor apartments. Based upon this assumption, petitioner urges that Mrs. Coudert be found to be the beneficial owner and therefore qualify the trusts for the personal residence exemption. However, as stated above, Mrs. Coudert was not the beneficial owner of the two apartments based upon her 1971 transfer of her interest in the premises to the trusts and the fact that she was allowed to remain in the building by the corporation, its officers and the trustees is of no consequence relative to the issue of whether the corporation qualifies for the exemption set forth in Tax Law § 1443.2.

Although somewhat mooted by the conclusions reached above, an added factor to be considered is whether the property was treated as business property. It was clear that the property (the entire building at 988 Fifth Avenue) was depreciated, albeit prior to the enactment of the gains tax, over a period of 50 years, and that expense deductions were taken on the property during that period as well, leading to an inference that the property was used for business purposes during that period of time, including the eighth and fifteenth floor apartments. The regulation at 20 NYCRR 590.24(d) uses such as an example of property treated as business property, i.e., depreciated for Federal tax purposes. Since the regulation states that a corporation must show that the property was owned and maintained for personal use and never treated as business property, it can be reasonably concluded that the petitioner herein has failed to establish either.

C. With regard to petitioner's argument that the fifteenth floor rooms can not be

aggregated with any other unit because it was not subject to the original Offering Plan dated July 23, 1979, several factors must be addressed.

As noted in the Tax Appeals Tribunal decision in Matter of Lion Brewery of New York City (May 2, 1991), it was found that the fifteenth floor, after having been submitted to the provisions of the Condominium Act, could only be sold by the sponsor pursuant to an offering plan filed with and approved by the attorney general. In fact, the Offering Plan with regard to 988 Fifth Avenue had been submitted to the provisions of the Condominium Act. Further, prior to the sale of the fifteenth floor rooms, petitioner filed a sixth amendment to the Offering Plan, dated November 24, 1986, which clearly stated that the amendment modified and supplemented the terms of the original Offering Plan dated July 23, 1979 and "should be read in conjunction with said plan".

The regulation at 13 NYCRR 19.5 provides that documents which supplement or amend an offering plan shall be deemed part of the Offering Plan. Therefore, it is quite clear from the documents in the record that the fifteenth floor rooms were sold pursuant to the Offering Plan dated July 23, 1979 as amended by the sixth amendment dated November 24, 1986.

Furthermore, it is noted that the earlier decision of the Tax Appeals Tribunal rejected petitioner's contention that it is the Division's articulated policy not to require aggregation of units retained by a sponsor under an Offering Plan with other units sold pursuant to such plan.

Petitioner argues that the fifteenth floor rooms could not have been sold pursuant to the plan since the original Offering Plan dated July 23, 1979 contained language on its cover which stated the following: "This Offering Plan may not be used after January 23, 1982." Petitioner argues that said language precludes the Division from arguing that the fifteenth floor rooms were sold pursuant to the original Offering Plan. However, as noted above, that original language was vitiated by the subsequent amendment which carried out the intent of the language contained in the original plan which envisioned the possible sale of the fifteenth floor rooms as residential unit(s) (cf., Matter of Albe Realty Co., Tax Appeals Tribunal, March 26, 1992 [where the Tax Appeals Tribunal determined that a cooperative conversion plan had not

ended for the purposes of determining gains tax due]).

Therefore, the transfer of the fifteenth floor rooms herein is subject to the aggregation clause of Tax Law § 1440.7, as one of the successive transfers pursuant to the Offering Plan as amended which effectuated by successive transfers a transfer which would otherwise have been included in the coverage of Article 31-B.

D. The petitions of Lion Brewery of New York City are denied, and the Division's denials of petitioner's applications for refund are sustained.

DATED: Troy, New York
January 28, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE