STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MATTHEW AND MARILYN MINZER	:	DETERMINATION DTA NO. 807437
for Revision of a Determination or for Refund of Real Property Transfer Gains Tax under Article 31-B of the Tax Law.	:	

Petitioners, Matthew and Marilyn Minzer, 40 Dickinson Place, Great Neck, New York 11023, filed a petition for revision of a determination or for refund of real property transfer gains tax under Article 31-B of the Tax Law.

On September 25, 1991 and September 27, 1991, respectively, petitioners by their representative Carol A. Hyde, Esq., and the Division of Taxation by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel) consented to have the controversy determined on submission without hearing, with all briefs due by January 31, 1992. On November 1, 1991 the Division of Taxation submitted documentary evidence. Petitioners submitted their brief and exhibits on December 6, 1991. The Division submitted its brief on January 8, 1992. After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the consideration for the transfer of seven condominium units located in three separate condominiums should be aggregated for purposes of the real property transfer gains tax.

FINDINGS OF FACT

Petitioners submitted 22 findings of fact that have been incorporated in the following findings of fact unless otherwise indicated.

Petitioners, Matthew and Marilyn Minzer, purchased the following seven condominium

units on the dates and from the purchasers listed below:

Unit	Date Purchased	Seller(s)
19 78th Street	4/21/80	Cloverdale Realty at Howard Beach, Inc.
25 77th Street	7/31/84	Warren and Mindy Chervin
27 77th Street	2/5/85	Steven and Laura Pegalis
7 78th Street	4/21/80	Cloverdale Realty at Howard Beach, Inc.
15 79th Street	approx. 11/1/82	Beaufort Cloverdale Realty Co., Inc.
(Petitioners purchased a ½ interest in this unit in November 1982. The other interest was purchased by Harvey and Kathryn Wachsman at the same time. In November 1986, the petitioners purchased the Wachmans' ½ interest.)		
33 79th Street	2/25/85	Beaufort Cloverdale Realty Co., Inc.
23 79th Street	approx. 11/1/82	Beaufort Cloverdale Realty Co., Inc.
(Petitioners purchased a ½ interest in this unit in November 1982. The other interest was purchased by Steven and Laura Pegalis. In February 1985, the petitioners purchased the Pegalis' ½ interest.)		

The seven condominium units each consist of a two-family house located within three different condominiums. Each condominium is bordered by 156th and 157th Avenues and is separated from the others by a public street (78th and 79th Streets).

Two units, (19 78th Street and 7 78th Street) were located in Cloverdale at Howard Beach Condominium ("Cloverdale I"); two other units (25 77th Street and 27 77th Street) were located in Cloverdale at Howard Beach Condominium II ("Cloverdale II"); and three units (15 79th Street, 33 79th Street, and 23 79th Street) were located in Cloverdale at Howard Beach Condominium III ("Cloverdale III").

Cloverdale I was sponsored by Cloverdale Realty at Howard Beach, Inc., pursuant to an offering plan dated December 14, 1978. Cloverdale II was sponsored by Sapphire Cloverdale

Realty Co., Inc., pursuant to an offering plan dated September 22, 1979. Cloverdale III was sponsored by Beaufort Cloverdale Realty Co., Inc., pursuant to an offering plan dated November 15, 1980. In the respective offering plans, all three sponsors had their principal office listed at 142-12 41st Avenue and had the same three stockholders: Eli Bluestone, Norman Bluestone and Harold Bluestone.[1]

In the offering plans, it was provided that the purchaser of a unit would own the unit in fee simple absolute and that the common elements of the community would consist of:

> "all of the Community, except the Homes, including but without limitations, outside walls and roofs of Homes, the land, buildings and improvements (other than the Homes) comprising the Community (including the land under the Homes and under the improvements), front, rear and side yards irrevocably restricted in use to certain Home Owners, and all utility or other pipes and material located outside of the Homes."

Of the seven units, only two units within a single condominium are located next to each other (25 77th Street and 27 77th Street). The two units located in Cloverdale I and three units located in Cloverdale III are separated by other units within the respective condominiums.[2]

On October 5, 1988, petitioners entered into an agreement granting to Business & Brokerage Placement Associates, Ltd. an option to purchase, expiring on March 31, 1989, one or more of nine units, seven of which were the units described in Finding of Fact "2" and two of which were located respectively at 79-15 157th Avenue, Howard Beach, N.Y. and 156-11 79th

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[1]In its proposed finding of fact "9", petitioners stated that the three condominiums each had their own bylaws, Board of Managers, officers, budget, bank accounts, insurance, and house rules. In support of these allegations petitioners refer to the three offering plans submitted into evidence by the Division. However, while each offering plan has provisions concerning the individual condominium's by-laws, Board of Managers, officers, budget, bank accounts, insurance and house rules, it cannot be concluded from these offering plans alone whether each condominium had, in fact, its own Board of Managers, officers, budget, bank accounts, insurance, and house rules that did not overlap with each other.

[2]In their proposed finding of fact "10", petitioners stated that only two of the seven units were contiguous or adjacent to one another and that the other five units were neither contiguous nor adjacent to the other units owned by them. This finding of fact is rejected only to the extent it referred to the terms "contiguous" or "adjacent" inasmuch as these terms are terms of art involving a legal interpretation discussed infra in the Conclusions of Law.

Street, Howard Beach, N.Y. The purchase price for each condominium unit was $290,000.00 for a total consideration of $2,610,000.00 if the purchaser bought all nine condominium units.

By letter agreement, dated November 1, 1988, the option contract was amended to exclude the two units located at 79-15 157th Avenue and 156-11 79th Street. The purchase price for each of the remaining seven units remained at $290,000.00. It is unclear from the record whether petitioners still retained ownership of these two units or whether they own any other units in the three condominiums other than the nine units described in Findings of Fact "2" and "7". In their petition dated October 4, 1989, petitioners allege that, except for the seven units at issue, the remaining units in each condominium were owned by persons having no relation to them. The petition was signed by petitioners' representative, Carol A. Hyde. No further proof was offered by way of affidavit or documentary evidence to support this statement.

On November 17, 1988, petitioners sold three of the condominium units to Business & Brokerage Placement Associates, Ltd., pursuant to the amended option agreement. The three units sold at that time were 19 78th Street, 25 77th Street, and 27 77th Street.

On February 28, 1989, petitioners sold the remaining four condominium units to Business & Brokerage Placement Associates, Ltd., also pursuant to the amended option agreement. The four units sold were 7 78th Street, 15 79th Street, 33 79th Street, and 23 79th Street.

Prior to these sales, petitioners and Business & Brokerage Placement Associates, Ltd., filed gains tax questionnaires with respect to the purchase of 19 78th Street showing gain in the amount of $176,841.00. They also filed questionnaires with respect to the purchases of 25 77th Street and 27 77th Street aggregating the gain for both in the amount of $228,882.00. Separate transferor questionnaires were also filed with respect to the purchases of 7 78th Street and 15 79th Street.

The Division of Taxation ("Division") issued a tentative assessment and return, dated November 16, 1988, computing gains tax in the total amount of $86,109.50 as follows:

Assessment	Property Address	Amount of Tax
C40271-0001	Cloverdale at Howard Beach Condominium I 19 78th Street Howard Beach, NY	$18,600.00

C40271-0002	Cloverdale at Howard Beach Condominium II 25 77th Street Howard Beach, NY	$11,750.00
C40271-0003	Cloverdale at Howard Beach Condominium II 27 77th Street[3]	$12,250.00
C40271-0008	Cloverdale at Howard Beach Condominium I 7 78th Street Howard Beach, NY	$17,450.80
C40271-0009	Cloverdale at Howard Beach Condominium III 15 79th Street Howard Beach, NY	$ 7,544.50
C40271-0010	Cloverdale at Howard Beach Condominium III 33 79th Street Howard Beach, NY	$ 8,575.80
C40271-0011	Cloverdale at Howard Beach Condominium III 23 79th Street Howard Beach, NY	$ 9,938.40

Petitioners paid gains tax at the time of the sale of the seven units in the total amount of $86,109.50. On July 11, 1989, petitioners submitted a refund claim to the Division for the full amount of the tax paid alleging that there was no basis for aggregating the sales under the theory that they were contiguous or adjacent or the theory that the transfers were

made pursuant to a cooperative or condominium plan. Petitioners contended that the

[3]In its proposed finding of fact "2", petitioners mistakenly referred to this condominium unit as located at 27 78th Street (instead of "77th" Street) at Howard Beach Condominium I (instead of Condominium "II").

aggregation clause under the statute only applies to sponsors of a condominium plan and not to purchasers under the plan who are not affiliated with the sponsors and who subsequently sell their interest. Petitioners also argued that because the units sold were located in three separate condominiums, and with the exception of two units (25 77th Street and 27 77th Street), were not located next to each other within the same condominium, five of the units were not contiguous or adjacent for purposes of aggregation.

By letter dated August 23, 1989, the Division denied the refund claim. It stated that the sales of the condominium units by the taxpayers were still made pursuant or subject to the condominium plan even though they were not the sponsors. The Division also contended that the condominium units were adjacent to each other because the units within a single condominium shared common areas and that the three condominiums in which the units were located were contiguous or adjacent to each other, separated only by a public street and were sponsored by corporations all owned by the same people.

By petition dated October 4, 1989, petitioners challenged the denial of refund stating, inter alia, that only two of the seven condominium units are adjacent or contiguous to one another and that the aggregate consideration for the two adjacent units did not exceed $1 million.

The Division filed an answer dated April 26, 1990. In its answer, the Division denied knowledge or information sufficient to form a belief as to whether the units, other than the seven sold, were owned by persons, other than petitioners, having no relation to petitioners.

SUMMARY OF THE PARTIES' POSITIONS

In brief, petitioners argued that the Division's reliance on Tax Law § 1440(7) for the proposition that sales made pursuant to a "condominium plan" must be aggregated was flawed for two obvious reasons. First, argued petitioners, "the statutory reference to transfers pursuant to a cooperative or condominium plan covers only transfers by the original developer or sponsor of the cooperative or condominium"; and second, even if the

Division's statutory interpretation were correct, "there is no basis in law for aggregating shares of stock owned in different cooperatives or units owned in different condominiums" (Pet. Brf. at 10). Petitioners further asserted that the words "contiguous" and "adjacent" do not appear in the statute itself but only in the regulations (20 NYCRR 590.42) which interpret the meaning and intent of Tax Law § 1440(7), and that if the units sold are not contiguous to each other, they "must be so close together as to be essentially contiguous" before they may be aggregated within the meaning of the statute (Pet. Brf. at 20).

In brief, the Division's counsel argued that petitioners failed to establish their entitlement to an exemption from gains tax under Tax Law § 1443(1). He noted that when a transfer of a condominium unit is made, the unit's undivided proportionate interest in the common elements of the condominium also is being transferred. He therefore contended that because these common elements were separated only by 78th and 79th Streets, the units transferred were nearby or adjacent to each other for purposes of gains tax.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposed a 10% tax upon gains derived from the transfer of real property located within New York State. Section 1440(7) defines a "transfer of real property" to mean:

> "a transfer of any interest in real property by any method, including but not limited to sale...or acquisition of a controlling interest in any entity with an interest in real property...."

Such transfers, however, are exempt from gains tax when the consideration is less than one million dollars (Tax Law § 1443[1]).

Because a transferor could avoid gains tax by subdividing or selling off portions of the property for less than one million dollars each, section 1440(7) also includes an "aggregation clause" which permits the aggregation of the consideration received on multiple transfers (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, 356, appeal dismissed 75 NY2d 946, 555 NYS2d 692).

The aggregation clause of section 1440(7) provides as follows:

> "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...provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property. For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property."

The regulations concerning the aggregation clause of section 1440(7) set forth hypothetical questions and answers. In one set of questions and answers, 20 NYCRR 590.42 provides as follows:

> "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.
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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."

B. There is no question that the transfer of the properties at issue concerns the transfer by one transferor to one transferee and that the properties may have been used for a common or related purpose. The aggregation issue here, however, involves the threshold requirement concerning whether the condominium units sold were "contiguous or adjacent" for gains tax purposes. The closest case on point is the Tax Appeals Tribunal's decision in Matter of Calandra (September 29, 1988), which was cited by the Division in support of its position. In Calandra, four parcels of land were transferred in a single transaction by a single purchase and sale agreement between one seller and one purchaser. The Tribunal held that two of the parcels were subject to aggregation under the gains tax statute because they were "adjacent" within the meaning of the regulations. In making this determination, the Tribunal referred to the definition of adjacent in Webster's New Collegiate Dictionary noting that the term "adjacent" encompasses

properties that may not be touching but are "nearby". In that case, the properties at issue were directly across from each other separated only by a two-lane country road and its shoulders. The Tribunal reasoned that the public way did not hinder intercourse between the two properties nor create a barrier between them that would negate the conclusion that the properties existed and were transferred as a single economic unit. However, the Tribunal also noted in Calandra that "[t]he Division did not seek to treat as adjacent the other properties that were transferred by the petitioner in this transaction but which were separated from each other by privately owned property."

In the present case, while the three condominiums are separated only by two public streets, as in Calandra, the seven condominium units themselves are separated from each other, with the exception of those at 25 and 27 77th Street, by other privately-owned condominium units.[4] These condominium units are owned in fee simple absolute and not by common ownership with the other owners of the condominium units. The fact that the owner of a condominium unit also has an undivided interest in, and the right in common to use, the common elements of the respective three condominiums (see 19 NY Jur 2d, Condominiums and Co-operative Apartments §9) which are separated only by two public streets, is not a sufficient basis for finding the seven condominium units themselves adjacent or existing as a single economic unit.

In Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127), the court specifically noted that consideration for the sales of seven lots was aggregated without inquiring whether the lots were contiguous or adjacent because the sale of the lots was part of a subdivision plan, albeit filed prior to the enactment of the gains tax statute. The court reasoned that because the plan was to sell an entire tract of real property, within which the seven lots were located, by partial

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[4]Although there is no evidence in the record to support the statement in the petition that the other units in the three condominiums were owned by persons other than petitioners, the Division does not contest this statement and, thus, it was not an issue in the case.

or successive transfers, the subsequent transfers of the seven lots were to be treated as a single transfer under the plan for purposes of the aggregation clause. As noted by petitioners, this type of reasoning does not apply here inasmuch as the seven condominium units were not sold pursuant to the initial offering plans but, instead, involved a subsequent sale by a purchaser under the plan.

However, the Cove Hollow court also stated that "[t]he apparent legislative purpose of the aggregation provision was the common one of using broadly inclusive language to defeat tax avoidance schemes and to cover transactions taxed essentially the same as others and which should, therefore, be taxed as a matter of economic justice" (id., 539 NYS2d at 129, citing, Matter of Chemical Bank v. Tully, 94 AD2d 1, 3, 464 NYS2d 228). Here, there is no doubt that the two units that petitioners aggregated on the questionnaire should have been aggregated and if the other five units had been similarly contiguous they also should have been aggregated. Instead, petitioners cleverly invested as they did and, as a result successfully avoided gains tax upon sale to a third party. Despite the fact that petitioners may have fashioned their purchases partly as a tax avoidance scheme, such motive is not enough to hold petitioners liable for the tax if the properties at issue are not part of an offering plan or contiguous or adjacent within the meaning of the regulation.

C. The petition of Matthew and Marilyn Minzer is granted and the Division is directed to refund $86,109.50 together with such interest as is lawfully due and owing.

DATED: Troy, New York
July 2, 1992

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE