

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| KIM POY LEE, EUNICE TAN, HUGH KEE LEE, ET AL. | : | DETERMINATION DTA NO. 808244 |
| 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, Kim Poy Lee, Eunice Tan, Hugh Kee Lee, Bob Y. Lee, Douglas Yuen, Hong Wah Lee and David Lee, c/o Barbara Boner, Esseks, Hefter & Angel, 108 East Main Street, Riverhead, New York 11901, 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.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on June 25, 1991 at 1:15 P.M. Petitioners filed a letter in lieu of a brief on July 29, 1991 and a reply letter on September 20, 1991. The Division of Taxation filed a brief on September 11, 1991. Petitioners appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioners' sales of certain lots should be aggregated pursuant to Tax Law § 1440(7).

FINDINGS OF FACT

The real property involved in this matter consists of four parcels of land located in East Moriches, New York. Three of the parcels are situated side by side with frontage on one side of Head of Neck Road. The fourth parcel fronts on Head of Neck Road across from the other three parcels.

Parcel 1 was transferred from Hannah Edgerton to Hugh K. Lee, Yuet Ling Eng and Lillian M. G. Yuen by deed dated September 16, 1966. Lillian M. G. Yuen transferred her interest in Parcel 1 to Douglas Yuen and Eunice Tan by deed dated June 3, 1972. Information in the record indicates that Yuet Ling Eng's interest was transferred by deed dated April 17, 1979, but there is nothing in the record which indicates the identity of the transferee involved.

Parcels 2 and 4 were transferred from Paul R. Warner to Lee Yick, Inc. by deed dated March 4, 1964. Parcel 4 was conveyed from Lee Yick, Inc. to Douglas and John, Inc. by deed dated June 10, 1964. Pursuant to plans of liquidation dated December 24, 1985, Lee Yick, Inc. and Douglas and John, Inc. transferred Parcels 2 and 4, respectively, to petitioners on December 22, 1986.

Parcel 3 was transferred by Lila Barber, et al., to George K. Lee, Hugh K. Lee and Kim Poy Lee by deed dated May 25, 1966. George K. Lee, at the time of his death in 1981, was married to Eunice Tan.

The corporations Lee Yick, Inc. and Douglas and John, Inc. filed their certificates of incorporation with the Department of State on December 10, 1963 and February 20, 1964, respectively. Both certificates were signed and filed by George K. Lee. Sang Lee Farms, Inc. filed its certificate of incorporation on March 23, 1955. The certificate indicated that the directors and equal shareholders of the corporation were George K. Lee, Kim Poy Lee and Lew Yoke Foon. At the time of the transfer involved in this matter, the three shareholders of Sang Lee Farms, Inc. were Hugh Lee, Eunice Tan and Kim Poy Lee.

Prior to the transfers involved herein, the four parcels were leased by petitioners to Sang Lee Farms, Inc. which used them in a farming operation that raised Chinese vegetables. Rent was not charged to the corporation, but the corporation paid the insurance and real estate taxes and generally maintained the property. There were no fences which separated the parcels and none of the petitioners used any of the parcels as their residences.

David Lee and Kim Poy Lee are brothers as was the late George K. Lee. As previously mentioned, Eunice Tan was married to George K. Lee and is also the sister of Douglas Yuen.

Hong Wah Lee, Bob Y. Lee and Hugh K. Lee are not related to each other or to any other petitioner.

On December 26, 1985, four contracts of sale were executed for the sale of Parcels 1 through 4 to John and J. Scott Prudenti. The seller(s) and purchase price for each parcel as indicated by the contracts of sale were as follows:

| <u>Parcel</u> | <u>Price</u> | <u>Seller(s)</u> |
|---------------|--------------|---------------------------------------|
| 1 | \$152,217.91 | Hugh K. Lee, Eunice Tan, Douglas Yuen |
| 2 | 986,679.00 | Lee Yick, Inc. |
| 3 | 151,723.99 | Hugh K. Lee, Eunice Tan, Kim P. Lee |
| 4 | 361,260.00 | Douglas and John, Inc. |

The contracts were identical in form. The four contracts were signed by David Lee under a power of attorney from the other petitioners. The same real estate broker was utilized for all sales. All four contracts contained cross-default provisions, making a default on one of the contracts a default on all the contracts. Each contract was contingent upon the purchasers obtaining conditional final approval for a major subdivision of the four parcels. The closings of title were contingent upon each other and were to occur simultaneously. The sellers had an option, under each of the contracts, to take back one purchase money mortgage to encumber all four parcels. The contracts also provided that the purchaser was to continue to rent the parcels to Sang Lee Farms, Inc., at no cost, until April 15, 1987.

On February 26, 1987, the closings of title occurred simultaneously on the four parcels. Petitioners were represented by the same attorney. Appearing at the closing on behalf of petitioners were Douglas Yuen and David Lee, pursuant to the aforementioned power of attorney. The attorney for petitioners received the proceeds of the sale and then distributed it to the individual petitioners based upon their respective interests in the parcels being sold. At the time of the closing, the transferors of each parcel were as follows:

| Parcel <u>1</u> | Parcel <u>2</u> ¹ | Parcel <u>3</u> | Parcel <u>4</u> ² |
|---|---|---|---|
| Eunice Tan Hugh K. Lee Douglas Yuen | Eunice Tan Hugh K. Lee Douglas Yuen Kim P. Lee | Eunice Tan Hugh K. Lee Kim P. Lee | Eunice Tan Hugh K. Lee Douglas Yuen Kim P. Lee |
| | Bob Y. Lee Hong Wah Lee David Lee | Bob Y. Lee Hong Wah Lee David Lee | |

The Division aggregated the consideration from all four parcels for purposes of the real property transfer gains tax. On August 15, 1988, petitioners filed a claim for refund in the amount of \$159,687.19. The

basis of the claim was that (1) the Division improperly aggregated the consideration received on the sale of the four parcels, and (2) the original purchase price ("OPP") of \$217,296.82 was not claimed by petitioners on pre-audit. In response to the claim for refund, the Division allowed the OPP as claimed, resulting in a refund of \$489.08. The aggregation of the four parcels was upheld by the Division, which explained its reasons as follows:

"[T]he Department takes the position that where there is mutuality of interest between transferors or where one transferor is controlling the acts of another transferor, such transferors are treated as a single transferor unless it can be shown otherwise.

The facts presented in this case indicate a mutuality of interest existed, as supported by the following:

- 1) The four contracts of sale were executed on the same date and were identical, in form, except for property description and purchase prices.
- 2) The same broker was utilized for all four sales with all broker agreements dated January 9, 1987.
- 3) All four contracts were contingent upon the purchaser obtaining conditional final approval for a major subdivision of the four parcels.

¹Interests were distributed by Lee Yick, Inc. to petitioners on December 22, 1986 (see, Finding of Fact "1").

²Interests were distributed by Douglas and John, Inc. to petitioners on December 22, 1986 (see, Finding of Fact "1").

- 4) All four parcels were leased to Sang Lee Farms, Inc. by sellers and would continue to be leased to Sang Lee Farms, Inc. by purchasers.
- 5) A default by purchaser on any one of the contracts constitutes a default on all four contracts.
- 6) The closings of title were contingent upon each other.
- 7) The closings did in fact occur on the same date, February 26, 1987."

SUMMARY OF THE PARTIES' POSITIONS

Petitioners allege that it would be inappropriate to aggregate the transfers herein, citing specifically to 20 NYCRR 590.43(b). In fact, petitioners' case rests almost entirely on their reading of such gains tax regulation to the effect that aggregation is not proper where contiguous parcels are sold to one transferee and such parcels are owned by several transferors, 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. Petitioners also maintain that where there are contiguous parcels and multiple owners of the parcels, "aggregation is appropriate only on a transferor-by-transferor basis", citing Matter of Howes (Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972).

The Division of Taxation argues, by contrast, that aggregation is proper in this matter. The Division maintains that there was an action in concert by the transferors in this case, pointing to the relations between some of the petitioners, the common use of the property before the sale and the use of two of the petitioners to represent the interests of all the petitioners in the transfer of the parcels involved. The Division argues that it is clear that these petitioners were acting as a single entity for mutual gain, thus acting in concert. In addition, the Division contends that 20 NYCRR 590.43(b) is not applicable to the present case, as that regulation is concerned with the situation where several transferors are acting independently of each other in selling their respective properties to one transferee.

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, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety...."

This is referred to as the "aggregation clause". The aggregation clause affects the application of the \$1,000,000.00 exemption because the consideration received from multiple transfers is aggregated to determine whether the \$1,000,000.00 exemption has been met (see, Executive Land Corp. v. Chu, 150 AD2d 7, appeal dismissed 75 NY2d 946; Cove Hollow Farm, Inc. v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127). Further, Tax Law § 1440(7) has been interpreted to include the transfers of any interest in real property, indicating that transfers of more than one parcel may be treated as a single transaction (Matter of Sanjaylyn v. State Tax Commission of the State of New York, 141 AD2d 916, appeal dismissed 72 NY2d 950; Matter of Bombart v. Tax Commission of the State of New York, 132 AD2d 745).

C. Petitioners would have this matter decided in their favor based upon a strictly literal reading of 20 NYCRR 590.43(b). This regulation, put forth in question and answer form 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:

* * *

(b) Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?

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, in essence, that the Division may not ignore the existence of the individual persons separately holding title to the parcels transferred. Petitioners assert the independent status of each petitioner in arguing that aggregation is not proper. In response, the Division argues that this regulation was, and is, intended to afford exemption in cases of multiple individual transfers of contiguous or adjacent parcels by separate transferors to a common transferee where such transferors were separate in fact and were not acting in common (for example, a co-op developer acquiring an entire city block of properties owned by several separate and independent individuals and/or entities).

D. Upon examination of the facts and circumstances, it is apparent that the several transferors cannot be considered separate and independent with respect to each of the four transfers. Rather, the facts establish that the transferors acted together in leasing the four parcels to Sang Lee Farms, Inc. and later acted together in selling the four parcels to one transferee. All of the facts surrounding the transfers at issue indicate a commonality of purpose, and there are no significant facts which tend to establish independence of thought, action or control of the owners of each parcel or show any separation, in fact, among the petitioners.

It is noted that two of the petitioners were brother and sister (Douglas Yuen and Eunice Tan) and that Eunice Tan was married to George K. Lee, the deceased brother of two other petitioners (Kim Poy Lee and David Lee). George K. Lee formed and was a shareholder of the two corporations which held title to Parcels 2 and 4, and also held a one-third interest in Parcel 3, prior to his death. The shareholders of Sang Lee Farms, Inc., which leased and operated the four parcels as a farm, were Kim Poy Lee, Eunice Tan and Hugh K. Lee. All seven petitioners had an interest in two of the parcels, two petitioners had an interest in three of the parcels, although not the same three parcels, and two petitioners had an interest in all four parcels. The four contracts of sale were identical in form, were dated the same day and were

signed by David Lee under a power of attorney to represent all petitioners in the negotiation and sale of the parcels. The closings of title for the four parcels occurred on the same day and at the same location. All petitioners were represented by the same attorney. All four contracts provided an option whereby the sellers could take back one purchase money mortgage to encumber all four parcels.

E. Gains tax regulation 20 NYCRR 590.43(b) applies to the situation involving several transferors who each own a separate parcel of property, although the parcels are contiguous and/or adjacent and are being transferred to one transferee. The use of the words "several" and "separate" in the regulation indicates that it is aimed at the situation where independent and separate owners of contiguous and/or adjacent parcels are sold to an individual needing to purchase all the parcels for a particular real estate project. This interpretation is supported by the additional language of the regulation which states that the consideration will not be aggregated even if the sale of each parcel is contingent upon the sale of all the parcels.

The case at hand is not the situation contemplated by the regulation. The transferors are not separate and distinct as to each parcel or to each other. Each of the transferors had an ownership interest in at least two of the parcels. Two transferors had an interest in three parcels and two other transferors had an interest in all four parcels. In addition, there are not separate owners of the individual parcels, but numerous owners with interests in two, three or four of the parcels involved.

In addition, there are various marital, blood and business relationships among the transferors. Prior to the transfer at issue, the four parcels were used for a common purpose, and the entity to which the parcels were leased included as its shareholders a transferor and a relative of some of the transferors. Two of the transferors were appointed to represent all the transferors in the sale of the parcels. It is clear that for many years prior to the transfer and for the period involved in the transfer petitioners were not acting independently of each other but as a single entity for mutual economic gain. Therefore, 20 NYCRR 590.43(b) is not applicable to the present situation.

F. In order for aggregation to occur, section 1440(7) requires that there be:

"partial or successive transfers...pursuant to an agreement or plan to effectuate...a transfer which would otherwise be included in the coverage of this article" (Tax Law § 1440[7]).

Thus, it must be determined whether the transfers of Parcels 1, 2, 3 and 4 were made pursuant to an agreement or plan to make partial or successive transfers of the property within the meaning and intent of section 1440(7). In making this determination, the intent of the transferors at the time of each transfer must be examined (20 NYCRR 590.43). Intention will be manifested by petitioners' actions and the facts and circumstances surrounding the transfers (20 NYCRR 590.43).

As previously detailed, petitioners are related by various means. They each have ownership interests in some or all of the parcels transferred. Petitioners appointed two of their group to represent them in the negotiations, sale and closing of title of the parcels. The four contracts of sale were executed by the same petitioner (pursuant to a power of attorney) on the same day and were interdependent and interrelated. Petitioners had the option of taking back one purchase money mortgage to encumber the four parcels. The parcels continued to be leased to Sang Lee Farms, Inc. for a period of approximately two months after the transfer. All of these circumstances support the conclusion that the sale of these parcels was made pursuant to an agreement or plan. As the sale of the four parcels were pursuant to an agreement or plan to effectuate their transfer, which would otherwise have been subject to the real property transfer gains tax, aggregation was proper.

G. Petitioners' reliance on Matter of Robert A. Howes (supra) for the proposition that where there exist contiguous parcels and multiple owners of the parcels transferred, aggregation is appropriate only on a transferor-by-transferor basis, is misplaced. The issue in Howes involved the interaction of the exemption for transfers for less than \$1,000,000.00 and the exemption for premises, or the portion thereof, that are the transferor's residence. The Howes case involved one building with five apartments. As the court in Howes stated, "petitioner's building constituted a single parcel of property." Mr. Howes resided and owned one apartment

while a general partnership owned the other four apartments and leased them to third parties. Mr. Howes had a 97.78% interest in the capital of the partnership. The resolution of the case depended upon a determination of the ownership of the beneficial interests in the real property transferred, not whether the subject transaction involved two transfers or just a single transfer. The Tribunal determined that the taxpayer's 97.78% beneficial interest in the business portion of the property was to be combined with the taxpayer's 100% interest in the residential portion of the property in determining whether the consideration received on the sale of the property exceeded the \$1,000,000.00 threshold. The amounts received upon the sale of the property were combined because Mr. Howes had a beneficial interest in both the residence portion and business portion of the property transferred. The Howes case did not involve multiple owners of multiple parcels, as exists in the present matter, but, in effect, one owner of the residential and business portions of a single building.

H. The petition of Kim Poy Lee, Eunice Tan, Hugh Kee Lee, et al., for refund of real property transfer gains tax, as it relates to the issue of aggregation, is denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE