STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SIX STARS REALTY	:	DETERMINATION DTA NO. 808656
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 Six Stars Realty, c/o Joseph D'Elia, Esq., 790 New York Avenue, Huntington, New York 11743 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 Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 7, 1992 at 9:15 A.M., with all briefs to be submitted by May 7, 1992. Petitioner appeared by Howard M. Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioner's sales of two contiguous parcels of real property to separate transferees were properly aggregated by the Division of Taxation pursuant to Tax Law § 1440(7).

FINDINGS OF FACT

On June 5, 1989, the Division of Taxation ("Division") issued to Six Stars Realty ("petitioner") a Statement of Proposed Audit Adjustment (along with a letter of explanation from the Division's Transaction and Transfer Tax Bureau) which stated as follows:

> "A review of your Real Property Transfer Gains Tax Questionnaire received on June 23, 1986 and March 30, 1987, for the sale of properties located at CR 83, Seldon [sic], NY reveals that these parcels constitute the transfer of contiguous parcels in a taxable transaction. (Please see the attached letter). Also, pursuant to Rider To Contract, dated February 1987, (Thomas Colasanto) purchaser, Page 2,

para (c) discloses purchaser undertaking seller obligations which constitute [sic] additional consideration (which must be documented). This places the consideration one million dollars or over. Therefore the transaction transferring 46 plus acres to Thomas Colasanto is taxable for Gains Tax purposes in [sic] of itself and further will be aggregated to the 25 plus acre transaction.

"Consideration: 1,999,980 - 977,285.50 (O.P.P.) = 1,022,694.50 x 10% = $100,269.45

"Penalty & Interest Penalty (3/30/87 - 7/17/89) 35% x 100,269.45 = 35,094.31

Interest: 335 days @ 7.5% 21,790.42

365 days @ 8.9%

139 days @ 10.2%

839 Total Days $157,154.18"

On September 22, 1989, the Division issued a Notice of Determination to petitioner in the amount of $159,187.69 ($100,269.45 tax, $23,824.05 interest and $35,094.19 penalty) for the tax period ended March 30, 1987.

By a Conciliation Order dated August 17, 1990 (CMS No. 100726), the Bureau of Conciliation and Mediation Services recomputed the determination at issue to $82,965.51, plus interest computed at the applicable rate (penalty was cancelled). This reduction evidently was the result of petitioner's payment of $33,000.00 in June 1990 (see, Exhibit "P").

Pursuant to a contract dated May 9, 1985, petitioner purchased from the executors of the estate of Kenneth Leeds a piece of real property consisting of approximately 71.5 acres on the north side of Bicycle Path and County Road 83 in Selden (Town of Brookhaven, County of Suffolk), New York for the purchase price of $997,285.50.[1] The closing on the property

[1]It should be noted that the record herein does not contain a copy of the contract of sale. The date of the contract was obtained from the affidavit of Leonard Primack, petitioner's managing partner, which affidavit formed a portion of Exhibit "J".

occurred on February 12, 1986.

On June 12, 1985, petitioner submitted an application for consideration of the preliminary layout for the subdivision of land to the Brookhaven Town Planning Board. The site plan, to be known as Bald Hill Office Park, was to consist of 72 acres. On the application, the nature of the business to be conducted at the site was described as follows:

> "The subject parcel is presently zoned by L-1 (Industrial) and J-4 (Business). It is the intent of the developer to subdivide the property for the purpose of developing a high quality office/ industrial park which shall consist of a variety of different size parcels according to market demand according to regulation."

The affidavit of Leonard Primack, managing partner of petitioner (Exhibit "J"), indicates that the land which petitioner purchased consisted of two distinctly different zoned parcels, one parcel being zoned L-1 (light industrial) and the other being zoned J-8 (commercial).

By a contract of sale dated December 20, 1985, petitioner agreed to sell approximately 24 acres of the property (the portion which was zoned L-1) to Leonard Rosenbaum for the price of $960,000.00. As part of this contract, petitioner agreed to construct a road from the purchaser's property to the main road since, without the road, this property was landlocked.

At the hearing, attorney Joseph D'Elia testified on behalf of petitioner. Mr. D'Elia had previously represented a few of petitioner's

members and subsequently represented Thomas Colasanto who, on June 16, 1987, purchased the balance, or approximately 47.5 acres, from petitioner. Mr. D'Elia stated that in order to represent Mr. Colasanto and because of litigation between Mr. Rosenbaum and petitioner, he had to fully familiarize himself with all of the facts concerning petitioner's purchase and subsequent sales of the property at issue.

Mr. D'Elia stated that, prior to petitioner's purchase of the property from the Leeds estate, Joseph Rizzo, one of petitioner's partners, entered into negotiations with Leonard Rosenbaum, president of CVD Equipment Corporation, which led to the contract for the sale of

approximately 24 acres to Mr. Rosenbaum (see, Finding of Fact "7"). Mr. Rosenbaum, in contemplation of his agreement to purchase a portion of the real property, agreed to lend petitioner the sum of $980,000.00 in order that petitioner could purchase the entire 71.5-acre parcel from the Leeds estate. As security for this loan, petitioner, on February 12, 1986 (the date of the purchase of the land by petitioner), executed a mortgage in the amount of $980,000.00 to CVD Equipment Corporation (Mr. Rosenbaum's corporation), as mortgagee. The mortgage covered the entire 71.5 acres purchased by petitioner. As previously indicated (see, Finding of Fact "7"), prior to the execution of the mortgage (on December 20, 1985), Mr. Rosenbaum entered into a contract with petitioner to purchase approximately 24 acres of this tract of land for $960,000.00. The sale by petitioner to Mr. Rosenbaum took place on August 14, 1986 and the actual selling price was $999,990.00 (see, Transferee Questionnaire - Exhibit "D").

Mr. D'Elia testified that Mr. Rosenbaum became displeased with the timing of the construction of the road by petitioner which had been delayed due to the fact that petitioner had encountered difficulty in getting permission to build the road from the Suffolk County Departments of Health and Environmental Conservation. Because of the delay, Mr. Rosenbaum began to hire his own engineers, water experts, ecologists, etc. and subsequently commenced litigation against petitioner.

According to the testimony of Mr. D'Elia and the affidavit of Leonard Primack, the intent of petitioner at the time of its purchase of the 71.5-acre parcel was to sell the 24-acre portion (which was zoned industrial) to Mr. Rosenbaum and then retain the remaining 47.5 acres for the purpose of developing condominiums. However, due to mounting expenses (including the litigation with Mr. Rosenbaum) and the difficulty in obtaining approval of the condominium plan from the Brookhaven Town Board (the plan was not approved until 1990), petitioner was compelled to look for a buyer. Thomas Colasanto, a business acquaintance of John and Joseph Rizzo, two of petitioner's partners, agreed to purchase the remaining 47.5 acres (Mr. Colasanto had a relationship with J. D. Basile Co., Inc., one of the largest road builders in the State)

pursuant to a contract dated March 5, 1987.

Joseph D'Elia was retained by Thomas Colasanto to represent him in the purchase. As part of the agreement between Mr. Colasanto and petitioner, Mr. Colasanto had to agree to assume petitioner's obligation to build the road from the Rosenbaum property. On June 16, 1987, the closing took place at which time Thomas Colasanto purchased the remaining 47.5 acres from petitioner for $999,990.00.

As indicated in Finding of Fact "3", petitioner no longer contests the taxability of its sale of the 47.5 acres to Thomas Colasanto in 1987. Accordingly, payments of gains tax and interest were paid in June 1990, thereby reducing the amount at issue.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that, as evidenced by the contract of sale dated December 20, 1985, it agreed to sell the 24-acre parcel to Leonard Rosenbaum prior to its purchase of the entire 71.5 acres from the Leeds estate on February 12, 1986. Petitioner alleges that Mr. Rosenbaum would have purchased his parcel directly from the Leeds estate, but the executors thereof refused to sell to more than one buyer. Further evidence of the intent of the parties is Mr. Rosenbaum's agreement with petitioner to act as the banker, i.e., to loan the money to petitioner to enable it to purchase the entire 71.5 acres.

In the alternative, petitioner states that the sale at issue, the 1986 sale to Mr. Rosenbaum, was not pursuant to a plan or agreement (Tax Law § 1440[7]). The transferor's intent at the time of the transfer at issue must be examined and the actual intent was to purchase and develop the 47.5-acre parcel as residential condominiums. At the time of the 1986 sale to Mr. Rosenbaum, the sale to Mr. Colasanto in 1987 was not even contemplated and the latter sale occurred only because of substantial and unforeseen costs (including litigation).

The position of the Division may be summarized as follows:

(a) The testimony of Joseph D'Elia, attorney for Thomas Colasanto, should be given little, if any, weight because, admittedly, his knowledge of the history of the transactions at issue was as a result of conversations with principals, not as a result of first-hand

knowledge because he did not become involved until Mr. Colasanto agreed to purchase the 47.5-acre parcel from petitioner. In seeking an exemption from the gains tax under Tax Law § 1443, it is petitioner which bears the burden of proving clear entitlement to the exemption and, absent the testimony of the principals to the transactions at issue, petitioner has failed to carry this burden;

(b) Based upon Tax Law § 1440(7), 20 NYCRR 590.43(g) and relevant case law, these transactions were properly aggregated since they were transfers of subdivided property not improved with residences;

(c) It is not necessary to ascertain petitioner's intent in this matter because the "common or related purpose" language of 20 NYCRR 590.42 refers to situations involving one transferee which is not applicable in this matter; and

(d) Even if the intent of petitioner was relevant herein, its contention that, from inception, it intended to retain the 47.5-acre portion to develop condominiums is contradicted by its application to the Brookhaven Town Planning Board to develop the entire 71.5 acres into an office/industrial park. Regardless of which plan was to be implemented, the intent was to subdivide the 71.5-acre tract and to sell the subdivided parcels.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a 10% tax upon gains derived from the transfer of real property located within New York State. Tax Law § 1443(1) provides for an exemption from gains tax when the consideration for the transfer is less than $1,000,000.00.

Tax Law § 1440(7) defines the "transfer of real property" as:

> "the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property." (Emphasis added.)

B. Because of the possibility of avoiding the imposition of gains tax by subdividing and selling off portions of real property for less than $1,000,000.00 each, Article 31-B of the Tax

Law includes a provision for the aggregation of the consideration received on these multiple transfers. This provision, commonly referred to as the "aggregation clause", is contained within Tax Law § 1440(7) which provides, in pertinent part, 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 . . . ."

20 NYCRR 590.43 provides, in part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
>
> "(a) One transferor, more than one transferee, contiguous or adjacent parcels of land?
>
> "Answer: When the sales are pursuant to a plan or agreement, the consideration for each parcel is to be aggregated in determining whether the consideration is $1 million or more.
>
> "A transferor may furnish, along with his questionnaire, a sworn statement that the sales 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 article 31-B.
>
> "Whether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated.
>
> * * *
>
> "(g) Question: Will the subdividing of real property be subject to aggregation pursuant to section 1440(7) of the Tax Law?
>
> "Answer: Yes. Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans. (See section 590.68 of this Part for information on payment of tax in aggregated transfer situations.)"

C. The Division is correct in its assertion that it is not necessary to ascertain the intent of the transferor in the present matter since what is at issue herein is not a transfer of contiguous or adjacent parcels of land but a subdivision of a single parcel. It is clear, therefore, that 20 NYCRR 590.43(g) is applicable. That regulation (see, Conclusion of Law "B") provides that all subdividing of real property is subject to the aggregation rule, except in the case where the

subdivided property is improved with residences and is used for residential purposes. Transfers pursuant to a condominium plan (such as the one proposed by petitioner prior to its sale to Mr. Colasanto) are excepted from the exclusion for residential subdivisions (see, Tax Law § 1440[7]; 20 NYCRR 590.43[f]).

Even assuming, arguendo, that petitioner's intent was a relevant consideration herein, the facts contradict petitioner's assertion that the transfers at issue were not pursuant to a plan to effectuate, by partial or successive transfers, a transfer which otherwise would have been subject to the gains tax.

If the testimony of Mr. D'Elia and the affidavit of one of petitioner's partners, Mr. Primack, are deemed to be credible, petitioner intended to purchase the entire 71.5-acre parcel, sell 24 acres to Leonard Rosenbaum and then develop the remaining 47.5 acres pursuant to a condominium plan which, undoubtedly, would then have resulted in partial or successive transfers of its interest in the 47.5 acres. While it may not have been petitioner's intention to sell the 47.5 acres to Thomas Colasanto at the time of its purchase from the Leeds estate, nevertheless, it appears clear that petitioner did, in one form or another, intend to purchase the entire 71.5-acre tract and then subdivide and sell the real property. As stated by the Appellate Division, Third Department, in Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127, 129):

> "Therefore, aggregation applies when the seller has adopted an agreement or plan for the disposal of an entire parcel of property, which would have been subject to the real property transfer gains tax, but for the structuring of the disposal of the property into partial or successive transfers."

D. The petition of Six Stars Realty is denied and the Notice of Determination issued September 22, 1989 is sustained, except as modified by the Conciliation Order (see, Finding of Fact "3").

DATED: Troy, New York
December 24, 1992

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE