STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DIMITRI AND TAISA BALABANOW	:	DETERMINATION DTA NO. 808898
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 Dimitri and Taisa Balabanow, 3002 Trinity Street, Oceanside, New York 11572 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, 500 Federal Street, Troy, New York, on November 1, 1991 at 1:15 P.M. Petitioners filed their brief on December 7, 1991 and their reply brief on March 12, 1992. The Division of Taxation filed its brief on February 21, 1992. Petitioners appeared by Herbert Garfinkel, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioners' sales of certain properties should be aggregated pursuant to Tax Law § 1440.7.

FINDINGS OF FACT

Petitioners, Dimitri and Taisa Balabanow, were married in Argentina in 1957. Dimitri Balabanow came to the United States in 1962, followed by his wife, Taisa, in 1965. While employed in the construction business, Mr. Balabanow began to purchase, renovate and sell apartmentbuildings on Long Island. When Taisa Balabanow arrived in this country, petitioners purchased the buildings as husband and wife, thereby establishing their ownership interest as tenants by the entirety. However, in 1978, petitioners started purchasing apartment buildings

individually or as tenants in common. In the same year, they also began to execute deeds which altered their ownership interests in properties they owned as husband and wife to that of tenants in common.

According to the testimony of Mrs. Balabanow, the decision to purchase properties individually and to recast petitioners' ownership interests in various properties from tenants by the entirety to tenants in common was based on several factors. These included attempting to protect the children's beneficiary interest in her property should she predecease her husband, providing for her own financial needs should petitioners divorce and the overall desire to be financially independent of her husband. Mrs. Balabanow wished to insure that the two children would receive their fair share of her investments upon her death. Mrs. Balabanow also explained that owning the investments by herself, individually or as a tenant in common, provided her with a degree of independence as well as a sense of financial security should petitioners divorce.

During the years 1965 through 1973 and 1975 through 1979, petitioners earned the following salaries:

	Dimitri	Taisa
1965	$ 4,949.00	$ 702.00
1966	4,800.00	6,476.00
1967	5,280.00	8,720.00
1968	5,938.00	10,515.00
1969	8,047.00	11,342.00
1970	8,130.00	13,571.00
1971	8,709.00	7,722.00
1972	9,001.00	10,865.00

1973	8,991.00	16,140.00
1975	10,012.00	9,530.00
1976		23,606.00
1977		24,366.00
1978		27,887.00
1979		15,992.00

Petitioners were unable to produce salary information for the year 1974. In addition, Mrs. Balabanow testified that following 1975, the majority of Mr. Balabanow's income was from real estate. Mrs. Balabanow's salary income derived from her employment as a chemist for and later director of research and development of a pharmaceutical company located in Inwood, New York. She had earned her degree in pharmacy while residing in Argentina.

During the years 1975 through 1987, petitioners maintained both individual and joint bank accounts. The interest income earned from these accounts was (in rounded amounts) as follows:

	Dimitri	Taisa	Joint
1975	$	$ 111.00	$
1976		21.00	
1977		510.00	759.00
1978		765.00	1,009.00
1979	69.00	492.00	1,862.00
1980	222.00	238.00	1,999.00
1981	928.00	735.00	4,237.00
1982	1,940.00	1,914.00	5,343.00
1983	16,565.00	14,289.00	9,685.00
1984	7,774.00	19,647.00	5,289.00
1985	3,237.00	6,384.00	6,136.00
1986	14,800.00	16,847.00	6,068.00
1987	8,084.00	10,545.00	6,496.00

On April 20, 1979, petitioners entered into a contract of sale to purchase three lots located at 215, 225 and 235 West Broadway, Long Beach, New York. The three parcels of property were adjacent, with Lot 225 having a common boundary with both Lots 215 and 235. All three buildings were used as rental property, with the building on Lot 215 having 25 apartments and the buildings situated on Lots 225 and 235 having 12 apartments each. At the time of the sale, Lot 215 was owned by Sea Island Apartments, Inc. and Lots 225 and 235 were owned by Louis Katz. Louis Katz represented Sea Island Apartments, Inc. in the negotiations and executed the contracts of sale on behalf of the corporation. The purchase price of the three

lots was $425,000.00, which included a note secured by a purchase money first mortgage in the amount of $300,000.00. The contract of sale provided that, at the time of closing, the sellers would execute three deeds to the premises. Lot 215 was to be conveyed to petitioners, Lot 225 to Dimitri Balabanow and Lot 235 to Taisa Balabanow. Petitioners wished to have the ownership interests in the three buildings set up along these lines to avoid the imposition of rent stabilization, which, according to the testimony of Mrs. Balabanow, was imposed by the Village of Long Beach on an individual or entity which owned more than 25 apartment units. In addition, petitioners were required to prepare three separate mortgage instruments covering the three parcels not to exceed in the aggregate $300,000.00. The contract further provided that in the event the sellers were unable to convey title to any of the three parcels, petitioners had the absolute right to terminate the contract. Both petitioners participated in the negotiations which resulted in the purchase of the three buildings.

On June 30, 1979, petitioners executed a note and purchase money first mortgage payable to Sea Island Apartments, Inc. in the amount of $75,000.00, relating to the sale of Lot 215. On the same date, Taisa Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 225. Finally, on the same date, Dimitri Balabanow executed a note and purchase money first mortgage to Louis Katz in the amount of $112,500.00, relating to the sale of Lot 235.

The three parcels were transferred to petitioners on June 28, 1979. The remaining portion of the purchase price was paid by a promissory note in the amount of $25,000.00, signed by Dimitri Balabanow, a cash payment of $10,000.00, made by Taisa Balabanow, and several bank checks, the source of which was funds obtained by petitioners through the remortgaging of certain of their properties.

Following the purchases, petitioners continued to use the buildings on the three lots as rental properties. Petitioners created a management company to collect the rents, to pay all debts, including the mortgages, and to take care of the maintenance and repairs relating to the three buildings. Any extra money in the management company account was divided equally

between Taisa and Dimitri Balabanow.

On December 20, 1985, petitioners entered into a contract of sale to sell the Lot 215 property to Stewart Dickler for $934,000.00. The contract provided that petitioners would take back from the purchaser a purchase money note and mortgage in the amount of $675,000.00. On the same date, Taisa Balabanow contracted to sell the Lot 225 property to Fred Pilevsky for $490,000.00. The contract provided that petitioner Taisa Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $320,000.00. On the same December 20, 1985 date, petitioner Dimitri Balabanow entered a contract of sale to sell the Lot 235 property to Allen Pilevsky for $635,000.00. The contract of sale provided that Dimitri Balabanow would take back from the purchaser a purchase money note and mortgage in the amount of $464,000.00. Both petitioners participated in the negotiations and discussions with the buyers concerning the sale price of the three buildings.

The process of selling the properties commenced when petitioners were approached by a broker familiar with the lots at issue. Prior to contact by the broker, petitioners had not offered the properties for sale. In fact, the purchase contracts for each of the properties in issue call for the purchasers to pay the brokerage commission.

Each of the contracts of sale contained a provision which stated that the purchasers could assign the contract on or before the closing of title. Immediately prior to the closing of title on June 25, 1986, the purchasers assigned the three contracts of sale to Herbert Tessler. Petitioners then transferred title to Lots 215, 225 and 235 to Herbert Tessler on the same June 25, 1986 date. At the closing, petitioner Dimitri Balabanow was represented by Robert S. Breitbart, Esq., while petitioner Taisa Balabanow was represented by Saul S. Le Vine, Esq. At the time of the closing, the office address for both attorneys was 287 Northern Boulevard, Great Neck, New York 11021.

The proceeds from the sale of the three lots were deposited into the individual accounts of each petitioner as follows:

Petitioner	Amount	Source (Lot)

Dimitri	$ 30,000.00	235
Dimitri	59,500.00	235
Dimitri	50,000.00	215
Taisa	30,000.00	225
Taisa	58,500.00	225
Taisa	168,000.00	215

Proceeds from the sale which had been placed in escrow and paid to petitioners at the time of closing were paid out of special accounts of both Mr. Le Vine and Mr. Breitbart. Mr. Le Vine's special account was the source of funds paid to Taisa Balabanow, while the special accounts of both attorneys were used to transfer funds to Dimitri Balabanow.

On March 23, 1987, Herbert Tessler satisfied the three purchase money notes and mortgages executed at the time of the sale of the property in issue. The proceeds relating to Lot 235 were paid to, and deposited in an account of, Dimitri Balabanow. The proceeds relating to the mortgage on Lot 225 were paid to, and deposited in an account of, Taisa Balabanow. Finally, the proceeds relating to the mortgage on Lot 215 were paid in equal amounts to each petitioner and deposited in their respective accounts.

Petitioners filed New York State resident income tax returns for the years 1985 and 1986 on a married filing separately on one return basis. For Federal purposes, petitioners filed jointly for the same two years.

On the 1985 New York State Resident Income Tax Return, petitioners divided the income earned from capital gain and rents and the losses incurred from partnerships equally between husband and wife. Petitioners combined on the Federal Schedule E, Supplemental Income Schedule, the rents, expenses, depreciation and resulting income arising from all of the properties owned by petitioners as tenants in common as well as the individually owned properties. The Schedule E also included two partnerships whose combined losses were split equally between Dimitri and Taisa Balabanow.

Accompanying petitioners' 1986 New York State Resident Income Tax Return were three Federal Schedule D's, Capital Gains and Losses. The first indicated the combined capital gains and losses of petitioners. The second and third related to the individual assets of each petitioner. Under Long Term Capital Gains and Losses, the sale of the lots in issue was

summarized, with the sales price, cost or other basis and gain realized split equally between Dimitri and Taisa Balabanow. On the attached Federal Schedule E, all of the properties which petitioners owned as tenants in common and individually were listed as one entry. The rents, expenses and depreciation from all petitioners' rental properties were combined and the resulting income split equally between petitioners. In addition, the losses from two partnerships and a subchapter S corporation were evenly divided between husband and wife.

On March 30, 1989, the Division of Taxation issued to petitioners a notice of determination asserting real property gains tax due in the amount of $205,900.00, plus penalty and interest. In its Conciliation Order dated August 31, 1990, the Bureau of Conciliation and Mediation Services recomputed the amount of tax due to $159,796.80, plus penalty and interest.

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 emphasized term, "transfers", indicates that "the sale of more than one parcel may be treated as a single transaction" (Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003). Furthermore, the definition of "transfer of real property" goes on to include the following under the so-called "aggregation clause":

> "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 . . . ." (Tax Law § 1440[7].)

C. Petitioners submit that this matter should be decided in their favor based upon 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:

* * *

"(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 that the fact that transfers were made by separate individuals 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?

"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.

"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 property to one transferee and that 20 NYCRR 590.42 renders these transactions subject to tax.

D. In Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), the Tribunal discussed the distinction between the regulation at 20 NYCRR 590.42, which treats as a single transfer the transfers by one transferor to one transferee of certain adjacent or contiguous properties, and 20 NYCRR 590.43, which interprets the so-called "aggregation clause" of Tax Law § 1440(7):

"As we held in Matter of Thomas Iveli and Robert Sigmund, the interpretation set forth at section 590.42 of the regulation that the transfer by one

> transferor to one transferee of contiguous or adjacent properties used for a common or related purpose is well within the statutory language of the first sentence of section 1440.7. Applications of this interpretation have been sustained in Matter of Sanjalyn v. State Tax Commn., [141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950] and Matter of Bombart v. State Tax Commn., 132 AD2d 745 [516 NYS2d 989].
>
> "Accordingly, we need not address what additional authority the Commissioner of Taxation may have pursuant to section 1448.1 to treat as taxable transfers primarily formulated to evade or avoid gains tax. Nor need we address the language of the aggregation clause that treats as a single transfer partial or successive transfers made pursuant to a plan or agreement [20 NYCRR 590.43]."

E. Petitioners have established that each had individual sources of income for the years prior to the purchase and sale of the lots in issue. However, this is not determinative of the question of whether they acted separately and independently in the management and in the sale to Mr. Tessler of their respective interests in Lots 215, 225 and 235. After reviewing the facts surrounding the purchase of the lots, the management of the premises, the negotiation and sale of the lots, the purpose of the separate ownership and the treatment of the income from the lots, it is concluded that petitioners were properly treated as one transferor with regard to the sale of the lots in issue.

Petitioners purchased the buildings as tenants in common and individually to avoid the effects of rent stabilization, for estate planning purposes and to protect Mrs Balabanow and the children in case of petitioners' divorce. These factors do not establish the separateness and independence of petitioners in the management of their business properties but do provide reasons for the form of ownership other than allowing petitioners the opportunity to manage their own affairs. Their capital investment in the purchase of the lots was not based upon the resulting ownership interests. Petitioners formed a management company to handle the maintenance of the lots, to collect the rents and to make the payments of the mortgages and other bills relating to the three properties. Any amounts remaining were split equally between husband and wife, regardless of the source or use of the funds. Thus, there was joint management of the premises by petitioners. On the tax returns for the years 1985 and 1986, petitioners reported all rents, expenses, depreciation and income together on one Federal Schedule E, with the income being divided equally on the New York State returns, illustrating

the sharing by petitioners of the premises' profits and losses. After being approached by the real estate broker, both petitioners participated in the negotiations and in determining the sales price of the three lots. They were each involved in discussions relating to the three buildings. The three contracts were signed on the same day and the closings took place at the same location and on the same day. Although petitioners claim to have each been represented by their own attorney, the two attorneys operated out of the same office and funds paid to petitioner Dimitri Balabanow came from escrow accounts of both attorneys. It thus appears that petitioners acted jointly in the negotiation and sale of the premises. On their 1986 income tax returns, Federal Schedule D, petitioners divided the sale price, cost and gain equally between them, despite the fact that the costs and sales prices of the premises owned individually were different. Although the payments to husband and wife were based, in part, upon their respective ownership interests, petitioners did not treat the three premises separately in determining and reporting the gain realized on the sale, a further illustration that they shared in the profits and losses of the three rental properties.

Under these circumstances, it is concluded that petitioners were the beneficial owners of the three lots sold and were properly treated by the Division as one transferor (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972).

F. Prior to the transfer of the lots pursuant to the contracts of sale executed on December 20, 1985, the contracts were assigned to Herbert Tessler. At the closing, petitioners transferred ownership of the three lots to Mr. Tessler. Therefore, it is concluded that one purchaser was involved in the transactions at issue and the Division properly treated the transfers as being from one seller to one purchaser.

G. As a result, in order for petitioners to avoid the aggregation of the consideration received from the transfers of the three properties, they must meet the dual requirements of 20 NYCRR 590.42 and show 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." Where multiple transfers are made to a single transferee, the showing required by the taxpayer

under the regulation is much more demanding than in the case of transfers to multiple transferees (Matter of Eff & Zee Company, Tax Appeals Tribunal, April 16, 1992).

Each parcel contained a residential apartment building. The apartment buildings were managed by the same company which collected rents, paid bills and maintained the premises. It is clear from the foregoing that the apartment buildings were operated for a common purpose of generating rental income (Matter of Sanjalyn v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, lv denied 72 NY2d 950, 533 NYS2d 55; Matter of Bombart v. State Tax Commn., 132 AD2d 745, 516 NYS2d 989; Matter of Calandra, supra).

Thus, as the apartment buildings are located on contiguous or adjacent parcels and were used for a common purpose, the consideration received from the sale of the lots is properly aggregated (Matter of Sanjalyn v. State Tax Commn., supra; Matter of Albany Public Markets, Tax Appeals Tribunal, August 27, 1992).

H. The petition of Dimitri and Taisa Balabanow is denied, and the notice of determination dated March 30, 1989 is sustained.

DATED: Troy, New York
October 22, 1992

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE