STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EVANGELINE G. CAREY	:	DETERMINATION DTA NO. 808933
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, Evangeline G. Carey, 505 North Lake Shore Drive, Suite 214, Chicago, Illinois 60611, 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 November 22, 1991 at 1:15 P.M. Petitioner filed a brief on January 9, 1992. The Division of Taxation filed a letter in lieu of a brief on February 10, 1992. Petitioner filed a reply brief on February 27, 1992. Petitioner appeared by Eugene S. Gaffney, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioner has established entitlement to the personal residence exemption from the real property transfer gains tax pursuant to Tax Law § 1443(2).

FINDINGS OF FACT

On September 20, 1982, petitioner, Evangeline G. Carey, entered into a contract of sale to purchase 961 shares of capital stock of 870 EastTower, Inc. and the accompanying proprietary lease for Apartment 26E at 870 United Nations Plaza, New York, New York ("Apartment 26E") for a purchase price of $1,050,000.00. The property was acquired on December 14, 1982.

On November 1, 1985, petitioner entered into a non-exclusive listing agreement with J.

Rodman & Associates, a real estate broker. The agreement related to Apartment 26E,[1] had a term of 90 days and provided for a listing price of $2,250,000.00.

On March 7, 1986, petitioner, as lessor, entered into a Sublease Agreement for Apartment 26E. The term of the Sublease Agreement was one year and provided for rental payments of $12,000.00 per month. The sublease began on April 15, 1986 and ended on April 14, 1987. Paragraph 33 of the Sublease Agreement provided as follows:

> "During the term of this Sublease or any renewal thereof, Overtenant [petitioner] or her agent shall have the privilege of showing the demised premises to prospective purchasers, tenants or lenders at reasonable times upon reasonable telephone notice."

For the years 1986 and 1987, petitioner filed a U.S. Individual Income Tax Return on a married filing separate return basis. During these years, petitioner received rental income from Apartment 26E of $98,000.00 and $42,000.00, respectively. Petitioner reported this income on the appropriate returns and claimed deductions for expenses attributable to the period during each taxable year that the apartment was rented as follows:

Expense	1986	1987
Advertising	$ 146.00	$
Cleaning & Maintenance	86.00	
Legal & Other Prof. Fees	5,681.00	
Insurance		369.00
Interest	29,096.00	2,039.00
Repairs		607.00
Taxes	10,465.00	11,051.00
Assessments	27,924.00	10,212.00
Miscellaneous	200.00	47.00
Total	$73,598.00	$24,325.00

In addition, petitioner claimed depreciation deductions of $41,686.00 for 1986 and $55,768.00 for 1987, utilizing the straight-line method, a 19-year useful life for the apartment, and a 5-year useful life for the carpeting.

On the Supplemental Income Schedule for 1986, petitioner reported rental income from

[1]The listing agreement refers to Apartment "26-C", but this appears to be a typographical error.

five other properties in addition to the Apartment 26E premises. These five condominiums were located in Chicago, Illinois (3), Ft. Lauderdale, Florida, and Lakewood, Ohio. On the Supplemental Income Schedule for 1987, petitioner reported rental income from three additional properties, as two of the condominiums had been sold in 1986.

On December 1, 1987, petitioner entered into a contract of sale to sell the 961 shares of capital stock of 870 East Tower, Inc. allocated to Apartment 26E in the cooperative apartment building located at 870 United Nations Plaza, New York, New York for a selling price of $2,000,000.00. The cooperative apartment was transferred on January 29, 1988.

On February 22, 1988, petitioner filed with the Department of Taxation and Finance a Real Property Transfer Gains Tax Affidavit relating to the sale of the cooperative apartment. The affidavit indicated that the apartment had been wholly occupied and used by petitioner exclusively as her residence.

The Division of Taxation issued to petitioner, on February 16, 1989, a Notice of Determination of Real Property Transfer Gains Tax Due in the amount of $136,224.64. The amount due consisted of tax of $95,000.00, interest of $8,924.64 and penalty of $32,300.00.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State. Tax Law § 1443(2) provides for the following exemption from the tax imposed by section 1441:

> "If the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes)."

B. The Division's regulations offer the following (relevant) guidance with respect to the applicability of the personal residence exemption:

> "(a) Question: Is the sale of an individual's personal residence subject to the gains tax where the consideration received is in excess of $1 million?
>
> Answer: No. Section 1443(2) of the Tax Law specifically exempts from the gains tax the sale of premises occupied by the transferor exclusively as his residence.
>
> (b) Question: Is the sale of the premises occupied and used solely by the

transferor as his summer residence subject to the gains tax?

Answer: No. The exemption does not state that it must be the transferor's primary residence. Thus, a summer residence qualifies for the exemption." (20 NYCRR 590.24.)

"(b) Question: Will the renting out of a personal residence prior to its sale disqualify the transfer from the residential exemption?

Answer: Yes. However, if the transferor can establish that the personal residence was only temporarily rented while it was offered for sale the residential exemption may still apply. The department will look at all of the facts and circumstances in each case to determine the taxability of the transaction. Generally, it will be the transferor's intent as manifested through his actions that determines the character of the property.

In order to support a claim for personal residence exemption where the property has been rented while offered for sale, the transferor must prove that the property was used as his residence.

The following facts will support the conclusion that the property retained its residential character, even though such property was temporarily rented:

(1) The property was not depreciated for Federal income tax purposes.

(2) The property was only rented as a last resort due to the transferor's inability to sell the property because of the market conditions.

(3) The terms of the lease are in accord with the transferor's intention to sell, e.g., the lease allows the property to be shown to prospective purchasers.

(4) No significant profit was realized from the rental.

(5) No bona fide reasonable offers to buy have been received." (20 NYCRR 590.25.)

C. Preliminarily, it should be noted that Tax Law § 1443(2) authorizes an exemption from the gains tax. As such, this statute should be strictly and narrowly construed against the petitioner, since an exemption is not a matter of right, but is allowed only as a matter of legislative grace (Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 196, 371 NYS2d 715, 718). In addition, petitioner bears the burden of showing clear entitlement to the exemption at issue (Matter of Lever v. State Tax Commn., 144 AD2d 751, 535 NYS2d 158, 160).

D. Pursuant to the foregoing, it is apparent that petitioner has failed to establish clear entitlement to the exemption claimed herein.

Petitioner claims that she used the apartment as her personal residence prior to its rental and sale, that the property was listed with several real estate brokers, that she was unable to sell the property because of the weak real estate market, that the tenant intended to purchase the apartment but wished to lease it on a trial basis and the tenant did purchase another apartment in the same building.

There is minimal evidence in the record to support petitioner's contentions. Petitioner only introduced a non-exclusive listing agreement entered into with one real estate brokerage firm, two letters from other real estate brokerage firms, an affidavit of an individual claiming to be the Secretary of the Board of Directors of the cooperative apartment development located at 870 United Nations Plaza and petitioner's Real Property Transfer Gains Tax Affidavit. Petitioner did not offer the oral testimony of any witnesses, but instead relied on documents and affidavits to sustain her position. Affidavits are clearly admissible in administrative hearings (cf., Flanagan v. State Tax Commn., 154 AD2d 758, 546 NYS2d 205; Mira Oil Company v. Chu, 114 AD2d 619, 494 NYS2d 458, appeal dismissed 67 NY2d 756, 500 NYS2d 1027, lv denied 68 NY2d 602, 505 NYS2d 1026). However, petitioner places herself in a difficult situation by seeking to utilize affidavits and hearsay evidence to shoulder her burden of showing clear entitlement to the residential exemption. The determination of the issue of whether a residence was only temporarily rented and thus retained its residential character is based on the intent of the taxpayer. As the regulations state, "generally, it will be the transferor's intent as manifested through her actions that determines the character of the property" (20 NYCRR 590.25). The intent of the taxpayer is determined by reviewing the facts and circumstances surrounding the transactions at issue and by evaluating the credibility of the taxpayer's testimony as it relates to the reasons for renting the property, the reasons for being unable to sell the property, the intended future use of the premises at the time it was leased, etc. The evaluation of the credibility of a witness is an important part of the hearing process (cf., Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809), and the evaluation of the taxpayer's testimony extremely important to the determination of the issue at hand. Consequently, statements contained in the affidavits and letters can be given little weight, except for those statements which are supported by documentary evidence. In addition, the Division of Taxation's lack of an opportunity to cross-examine the affiants is an important consideration in deciding to give minimal weight to the statements contained in the affidavits.

Petitioner has failed to establish that the cooperative apartment was only temporarily rented while it was offered for sale. Petitioner has failed to establish that the property was used as her residence, that the property was rented as a last resort due to an inability to sell because of market conditions, and that no bona fide reasonable offers to buy had been received. Therefore, the renting of the property and the taking of the depreciation for Federal income tax purposes disqualifies petitioner from the residential exemption (Tax Law § 1443[2]; 20 NYCRR 590.25).

E. Petitioner's reliance on Bolaris v. Commissioner (81 TC 830, affd 776 F2d 1428) and Clapham v. Commissioner (63 TC 505) is misplaced. Both cases involve Internal Revenue Code § 1034 which provides for nonrecognition of gain realized on the sale of property used by the taxpayer as her principal residence to the extent that the sales price does not exceed the cost of purchasing or constructing a new residence, but only if the new residence is purchased or constructed within a specified period of time. It was found in each case that the taxpayers were entitled to the nonrecognition treatment of section 1034 because they had established that the rental of the property was temporary in nature and thus the property had not lost its residential character.

Central to the decisions that the properties had not lost their residential character was the establishment by the taxpayers of certain facts which led the courts to conclude that the renting of the properties was temporary in nature. The taxpayers established that they had no intention of returning to their old residences, that they intended to sell the respective properties, that the inability to sell was due to real estate market conditions, that no reasonable offers to sell were refused, that financial circumstances dictated the need to rent the properties and, in one case, the lease contained an option to purchase.

In the present matter, the record is insufficient to establish any of the facts and circumstances discussed by the courts in Bolaris and Clapham. Petitioner presented no evidence as to her intentions, that financial circumstances forced her to rent out her home or that the real estate market was depressed for the years in issue. In short, petitioner has not shown that her dominant motive in leasing the premises was anything other than for the "business" purpose of producing income (see, Rogers v. Commissioner, 45 TCM 318).

F. The petition of Evangeline G. Carey is denied and the notice of determination dated February 16, 1989 is sustained.

DATED: Troy, New York
September 17, 1992

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE