

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VINCENT MELOMO, ANTHONY MELOMO, MARY PACE, PETER MELOMO, JOSEPH MELOMO, MARY ANN ANDERSON, MARGARET BUSSIGEL, ANNE MARIE GINKEL AND MARY NOBERINI	:	DETERMINATION DTA NO. 809365
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, Vincent Melomo, Anthony Melomo, Mary Pace, Peter Melomo, Joseph Melomo, Mary Ann Anderson, Margaret Bussigel, Anne Marie Ginkel and Mary Noberini, 8007 Colonial Road, Brooklyn, New York 11209, 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.

On or about September 4, 1991 petitioners, by their representative, Stanley Zuckerman, Esq., moved for a summary determination. On October 30, 1991 the Division of Taxation, by its representative, William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel), filed an affirmation in opposition to petitioners' motion for summary determination and, in the alternative, cross-moved for summary determination in its favor. Upon review of the affidavits, affirmations and proofs submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the so-called residential exemption provided by Tax Law § 1443(2) exempts from gains tax in its entirety a transfer wherein only onetransferor out of a number of transferors actually occupied and used the transferred premises as his residence.

II. Whether, assuming exemption as sought above is denied, petitioners are nonetheless

entitled to exemption under Tax Law § 1443(1), upon the theory that only the consideration apportioned to petitioners' ownership interests in the premises should be counted in determining whether the gains tax million dollar threshold has been met.

FINDINGS OF FACT

During the period May 31, 1987 until August 30, 1988, title to premises located at 1437 67th Street, Brooklyn, New York (the "premises") was held by Carlo S. Corsuti (as executor of the Estate of Francis P. Melomo), Vincent Melomo, Anthony Melomo, Mary Pace, Peter Melomo, Joseph Melomo, Mary Ann Anderson, Margaret Bussigel, Anne Marie Ginkel and Mary Noberini. The premises consist of a one-family house together with four lots known as lots 54, 57, 58 and 60 of Block 57-62 in Brooklyn, New York.

Prior to his death on May 31, 1987, Francis P. Melomo, a physician, had occupied the premises as his home. He utilized the premises exclusively as a residence and never practiced medicine thereat. Dr. Melomo had lived at the premises for many years and paid no rent to the other owners of the premises. Dr. Melomo held a 1/6th ownership interest in the premises, with the remaining 5/6ths ownership in the premises held by petitioners herein, being nine other members of Dr. Melomo's family. Dr. Melomo and petitioners herein had inherited title to the premises from Peter Melomo and Giuseppe Melomo who, in turn, had acquired title by purchases under deeds made in the years 1907, 1913, 1914 and 1919.

On August 30, 1988, title to the premises was conveyed by petitioners herein together with Carlo S. Corsuti, as executor of the estate of Francis P. Melomo, to Albert Ingravallo (or his nominee). The selling price for the premises was \$1,100,000.00. The contract of sale for the premises covered the entire premises (the lots together with the one-family house situated thereon).

With respect to the subject transfer, transferor and transferee questionnaires required under Tax Law Article 31-B ("gains tax") were filed. Each questionnaire indicated gross consideration of \$1,100,000.00 to be paid by the transferee. The transferors, on their questionnaire, claimed exemption under Tax Law § 1443(2) (sale of a personal residence).

Hence, no tax was indicated as due on such questionnaires.

In response to the noted questionnaires, the Division of Taxation completed and returned a Tentative Assessment and Return indicating thereon tax due in the amount of \$91,305.61. The Division of Taxation calculated such tax due as follows:

Consideration	\$1,100,000.00
Less: Original purchase price based on information supplied	<u>(4,332.70)</u>
Gain	1,095,667.30
Less: Estate of Francis P. Melomo's 16-2/3% interest	<u>(182,611.22)</u>
Taxable gain	913,056.08
Tax	<u>91,305.61</u>

The Division's Tentative Assessment and Return was accompanied by an explanation of the calculation of tax as follows:

"Section 590.43(d) refers to several transferors owning one parcel of land either as joint tenants, tenants in common or as tenants by the entirety selling to one transferee. The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is \$1 million or more. Once the million dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives less his original purchase price for the property. Section 590.7 states that a transferor will be granted a full or partial exemption if he sells his personal residence. In this case, Francis P. Melomo's estate will be granted an exemption for its 16-2/3% ownership interest in the property. The remaining 83-1/3% in ownership interests are taxable."

In effect, the Division of Taxation recognized a residential exemption to the extent of Francis P. Melomo's interest in the premises, and reduced the amount of taxable gain to the extent thereof, but denied residential exemption for the rest of the transferors.

Petitioners paid the amount of tax determined by the Division and thereafter filed a claim for refund of such amount paid. By letter dated December 5, 1990, the Division of Taxation denied petitioners' claim for refund. The Division's denial was upon the same basis as that set forth in the explanation to the Tentative Assessment and Return indicated above.

Petitioners admit that only Dr. Melomo occupied and used the premises as his residence, and that none of the other nine owners of the premises occupied or used the premises as a residence.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners allege that full exemption should be afforded under Tax Law § 1443(2) since the transfer herein was of premises actually used and occupied by one of the transferors as his residence. Petitioners argue that the property itself was residential property which was actually occupied and used as a residence, and that the transfer, although by more than one transferor, constituted a single transfer pursuant to Tax Law § 1440(7). Thus, notwithstanding that the other nine owner/transferors of the premises did not occupy or utilize the premises as their residence, petitioners allege exemption should be afforded under Tax Law § 1443(2). In the alternative, petitioners note that the Division allowed exemption and reduced the amount of gain subject to tax to the extent of Francis P. Melomo's interest in the premises, based on the fact that he actually occupied and used the premises as his residence. Petitioners maintain that such reduction should have been made against gross consideration, thereby reducing the same to an amount less than \$1,000,000.00 and exempting the entire transfer from gains tax pursuant to Tax Law § 1443(1).

The Division of Taxation argues, in response, two grounds. First, the Division alleges that summary determination is not appropriate in this matter in that a material issue of fact remains in question thereby precluding summary determination as a matter of law. More specifically, the Division cites as material the fact that petitioners "have not documented and explained whether they treated the premises as residential property or rather as investment property on their personal income tax returns."

The Division also argues, in the alternative and assuming it is found that no material issue of fact remains, for summary determination in its favor. The Division maintains that allowance of a residential exemption under Tax Law § 1443(2) is appropriate only to the extent of the percentage of ownership interest held by the person (or persons) who actually occupy and use premises as a residence. Therefore, in this case only Dr. Melomo but none of the other transferors can claim the residential exemption. The Division also argues that the total consideration received by all transferors on a transfer of premises must be calculated first in

determining whether the \$1,000,000.00 gains tax threshold has been met. Here, since the gross consideration received for the transfer at issue was \$1,100,000.00, the Division maintains that exemption pursuant to Tax Law § 1443(1) is not available.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. Certain exemptions from the tax are provided for in Tax Law § 1443. Two of such exemptions are pertinent here. More specifically, no tax shall be imposed (1) if the consideration is less than \$1,000,000.00 (Tax Law § 1443.1) or (2) if the real property consists of premises occupied by the transferor as his residence (Tax Law § 1443.2). As is generally the case, "statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision proves his entitlement to the exemption" (Matter of Bredero Vast Goed N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105).

B. As to Tax Law § 1443(2), exemption is allowed "[i]f 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)" (emphasis added). In this case, exemption was allowed to the extent of the percentage of ownership interest in the premises held by the one transferor (Dr. Melomo) who actually occupied the premises as his residence. There is no argument that any of the other transferors (petitioners herein) ever occupied such premises as their residence. In fact, petitioners specifically admit that they did not do so, arguing that such occupancy would have been in violation of the Municipal Dwelling Law. While it is not disputed that petitioners herein were titled owners of premises occupied and used for residential purposes, it is clear that their relationship to the premises was not as residents. The statute specifically allows exemption when the premises are occupied by as opposed to simply owned by a transferor. Hence, petitioners should not be afforded exemption as residents of the premises transferred.

As petitioners point out, for purposes of Tax Law § 1440(7) it is appropriate to treat the

subject transfer of the premises by multiple owner/transferees as one transfer. However, such treatment does not require granting a blanket residential exemption to all such owner/transferees simply because one owner/transferee occupied and used the premises as his residence. The Division's position of limiting the residential exemption to the transferee (or transferees) who in fact occupied and utilized the premises at some point as a residence is consistent with the well-established principle that the focus of the gains tax is based upon a "look through" to see the beneficial ownership interests in property (Matter of 307 McKibbin Street Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Robert Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972). In fact, carrying petitioners' position to its extreme could vitiate the tax by allowing multiple non-residing owners of premises to use a non-rent-paying nominee occupying the premises and holding a tiny percentage of ownership to "qualify" the premises for the residential exemption for all owner/transferees, even though the true parties in interest never occupied the premises as their residence (theoretically, such a situation could serve to "convert", after some period of time, previously used commercial property to residential property subject to exemption upon transfer). In sum, there is nothing unreasonable or irrational in concluding, as a matter of law, that each owner/transferee seeking the residential exemption must, at some point, have occupied the premises in question as their residence.

C. Petitioners next argue that even if the residential exemption is not available to them, the allowance of such exemption with respect to Francis P. Melomo's ownership interest should reduce consideration received by the balance of the transferees (petitioners herein) to an amount less than \$1,000,000.00. Hence, petitioners claim exemption pursuant to Tax Law § 1443(1).

D. Petitioners' position is rejected. 20 NYCRR 590.43(d) provides that where several transferees own one parcel of land either as joint tenants, tenants in common or tenants by the entirety and transfer such premises to one transferee, the consideration paid to each such transferee is aggregated for purposes of determining whether the total consideration is \$1,000,000.00 or more. Thereafter, once the \$1,000,000.00 threshold is met, each such

transferor is liable for payment of the tax based on the consideration he receives less his original purchase price for the property. There is no mention, either in Tax Law § 1443(1) or in 20 NYCRR 590.43(d), of reducing consideration to the extent of any transferors who may be subject to the residential exemption. Similarly, 20 NYCRR 590.25(a), dealing specifically with the \$1,000,000.00 exemption as interacting with the residential exemption in instances of mixed-use premises (i.e., part residential and part business use), provides that the \$1,000,000.00 exemption is applied to the total consideration received for the transfer for purposes of determining whether the tax is due. In turn, where consideration is determined to equal or exceed \$1,000,000.00, the gain (and resulting tax) is thereafter reduced to allow residential exemption to the extent of the personal use of the premises (see, Matter of Howes, supra). These regulations, as well as those found at 20 NYCRR 590.7, 590.55 and 590.57, are all consistent with and support the conclusion that total consideration received for the transfer is calculated first and without reduction for any residential exemption for purposes of determining whether the transfer itself is exempt as being for a consideration of less than \$1,000,000.00. In this case, total consideration was \$1,100,000.00 and thus exemption under Tax Law § 1443(1) is not available.

E. This matter has proceeded as a motion for summary determination in favor of petitioners, responded to by an affirmation in opposition and an alternative cross-motion for summary determination in favor of the Division. Section 3000.5(c)(1) of the Tax Appeals Tribunal's regulations provides:

"The motion [for summary determination] shall be granted if, upon all the papers and proofs submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party."

The issue of summary judgment in a court of law is viewed as a drastic remedy, and should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223, 231, 413 NYS2d 141). Upon motion for summary judgment, it is the duty of the court to determine if any question of fact exists and, if so, to deny the motion

(Crowley's Milk Co. v. Klein, 24 AD2d 920, 264 NYS2d 680).

In this case, the Division does raise the argument that a material issue of fact exists.

Specifically, the Division argues that:

"petitioners have not documented and explained whether they treated the property as residential or investment property on their personal income tax returns."

It is observed initially that this fact (petitioners' treatment of the premises for income tax purposes) would only have potential relevance with regard to the residential exemption issue, and has no apparent bearing on the issue of the million dollar threshold. Further, as set forth above, the residential exemption issue may be resolved as a matter of law (i.e., that each transferor seeking such exemption must have himself occupied the premises as his residence). Thus, the income tax treatment of the premises by petitioners herein is irrelevant to the subject determination. Even if the questioned fact was found most strongly in petitioners' favor (i.e., that the premises were treated as residential property [and not as depreciable commercial property] on each petitioner's personal income tax return), the Division of Taxation's position still obtains. That is, no actual use and occupancy of the premises as a residence was made by any of the petitioners thus leaving the residential exemption, as a matter of law, unavailable. In contrast, assuming such fact was found most favorably to the Division (i.e., that petitioners treated the premises as commercial or investment property on their personal income tax returns), the same provides only one additional factor in favor of the Division's position. In either case, the issue can be determined as a matter of law based upon the parties' submissions, and thus the fact claimed by the Division to be material and triable is of no ultimate consequence. Accordingly, summary determination in this matter is appropriate (compare, Matter of Lion Brewery of New York City, Tax Appeals Tribunal, May 2, 1991 [wherein the Tribunal held summary determination should not have been granted where the law itself called into question the validity of a material fact initially assumed to be undisputed]).

F. Petitioners' motion for summary determination in their favor is hereby denied and the Division of Taxation's cross-motion for summary determination denying petitioners' claim for refund is granted.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE