STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
REINSTEIN FAMILY TRUST	:	DETERMINATION DTA NO. 810873
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, Reinstein Family Trust, 1105 Liberty Building, Buffalo, New York 14202, 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 Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 23, 1993 at 11:30 A.M. Petitioner filed a brief on July 30, 1993. The Division of Taxation did not file a brief but submitted a letter stating its position on September 8, 1993. Petitioner filed a response on September 15, 1993. Petitioner appeared by Duke, Holzman, Yaeger & Photiadis (Michael J. Lombardo, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether Tax Law § 1440(7) requires that petitioner's transfer of two adjacent parcels of land to two unrelated transferees be treated as a single transfer.

FINDINGS OF FACT

On or about October 27, 1989, the Division of Taxation ("Division") issued to petitioner, Reinstein Family Trust, a Notice ofDetermination of real property transfer gains tax due in the amount of $133,200.00 plus interest. Following a conciliation conference, the Division issued a Conciliation Order dated March 13, 1992, reducing the amount of tax due to $109,490.77. Petitioner paid the tax so determined plus interest in the amount of $38,315.04 to

the Division on or about March 23, 1992. By its petition to the Division of Tax Appeals, petitioner seeks a refund of tax and interest paid, together with interest on the total amount.

Petitioner is a charitable remainder trust (hereinafter "petitioner" or the "charitable remainder trust") created by Item VII of the Last Will and Testament of Dr. Victor P. Reinstein.

Dr. Reinstein was a practicing physician in the Town of Cheektowaga for many years and was active in the affairs of the town. He purchased many parcels of land in the Town of Cheektowaga, although he was not a land developer.

In 1949, Dr. Reinstein purchased a single parcel of land in the Town of Cheektowaga consisting of about 7.6 acres. Approximately 4 acres of that land was leased in 1964 to Bedie J.M, Inc., a corporation which operated a miniature golf course on the leased land. Petitioner refers to this as the "Putt-Putt" parcel. The remainder of the real property was left vacant until its sale to Mobil Oil Corporation in 1988. It is referred to by petitioner as the "Mobil" parcel. Both parcels fronted on and had access to Union Road. They were bordered on the west by several parcels of land also owned by Dr. Reinstein (the dates of acquisition of these other parcels are not in the record). The parcels to the west of the Putt Putt and Mobil parcels were not accessible by public road. In 1980, Dr. Reinstein installed the road commonly known as Postal Drive in order to provide access from Union Road to those parcels of land lying to the west. Postal Drive effectively divided the single parcel of land fronting on Union Road into two separate parcels. Postal Drive was formally dedicated to the Town of Cheektowaga in 1981.

The Putt-Putt parcel was improved with a miniature golf course and a refreshment stand constructed by the tenant. The initial lease ran for a term of five years with an option to renew for five years. The tenant was responsible for all expenses, including real property taxes. From 1974 through 1983, the tenant continued to occupy the premises under the terms of the original lease. In 1983 a new lease was executed for a term of 20 years beginning January 1, 1984, with four five-year options to renew. The rental amount was $35,000.00 per year with a cost of living increase at the time of the first renewal. All expenses were to be the responsibility of the tenant. Bedie J.M., Inc. assigned the lease to Putt Putt Golf and Games of Cheektowaga, Inc.

("Putt-Putt, Inc.") in December 1983. The assignment was approved by the executors of the Reinstein estate on August 30, 1984.

Although the Mobil parcel was left vacant, Dr. Reinstein allowed a nearby restaurant to use a small portion of the property as a parking lot. This strip of land, approximately 50 by 350 feet, was blacktopped. No rent was charged for the restaurant's use of the land during Dr. Reinstein's lifetime.

Dr. Reinstein was approached on several occasions by the tenants of the Putt-Putt parcel who expressed a desire to purchase the property. Dr. Reinstein rejected these offers, since he had no intention of selling either the Putt-Putt or the Mobil parcel and was generally loath to sell the real property he acquired over his lifetime.

Dr. Reinstein died on May 27, 1984, leaving a substantial estate. For estate tax purposes, the estate was valued at $13,000,000.00, consisting of liquid assets valued at $3,500,000.00 and real property. It was Dr. Reinstein's intention to provide for his wife and children during their lifetimes but to leave the greater part of his estate to the Town of Cheektowaga for the construction of a public library. To accomplish this purpose, Dr. Reinstein's Last Will and Testament established a one-third marital deduction trust for his wife under Item VI of the will and a charitable remainder trust (petitioner) under Item VII of the will. The purpose of the Item VII trust was to create a charitable deduction for a substantial portion of the Reinstein estate. The income from the charitable remainder trust was to be paid to Dr. Reinstein's wife and children during their lifetimes, with the remainderman being the Town of Cheektowaga. The executors and trustees under the will were the same persons (the "Fiduciaries").

Dr. Reinstein placed a number of provisions in his will which reflect his lifetime intention of retaining the real property he had acquired. Item XI, paragraph 4, of the will contains the following provision:

> "I hereby expressly direct that any real property fronting on Union Road, Dick Road, or Walden Avenue in the Town of Cheektowaga, New York, which is part of my estate, shall not be sold or conveyed in fee simple for a period of twenty-one (21) years from the date of my death."

Thus, the will restricted the sale of the Putt-Putt and Mobil parcels.

After Dr. Reinstein's death, it was discovered that the charitable remainder interest in the trust created under Item VII did not qualify for the charitable estate tax deduction provided in section 2055(e)(2) of the Internal Revenue Code. As a consequence of this failure to qualify, the additional estate tax liability for the entire estate would have been substantial. The Fiduciaries determined that in order to carry out Dr. Reinstein's intention of preserving the greatest portion of his estate for the Town of Cheektowaga and to decrease the estate's tax liability, it would be necessary to reform the will.

The Fiduciaries sought a decree of reformation of the will from Surrogate's Court by petition dated August 1985. A decree was issued on September 15, 1987, reforming the will as requested. Among other things, the reformation increased the amount of income to be paid to the income beneficiaries of the charitable remainder trust and removed the restrictions on the sale of real property contained in Item XI, paragraph 4, of the will.

After Dr. Reinstein's death, the Fiduciaries continued the same uses of the Putt-Putt parcel and the Mobil parcel as had existed prior to Dr. Reinstein's death. In short, rent was collected from the Putt-Putt tenants and the Mobil parcel was left vacant. The Fiduciaries continued to allow the nearby restaurant to use a strip of the Mobil parcel as a parking lot; however, because of their fiduciary duty to the estate and to the charitable remainderman, they began charging a monthly rent of $416.00 as of May 1, 1987.

After receiving the reformation decree, the Fiduciaries allocated the assets of the Reinstein estate to the marital deduction trust (Item VI) and the charitable remainder trust (Item VII). Based upon the recommendation of a firm specializing in trust administration, the Putt-Putt parcel and the Mobil parcel were each allocated to the charitable remainder trust.

The Fiduciaries were advised that in order to qualify for the desired charitable deduction, the Item VII trust would be required to have an annual payout rate equal to 7.4 percent of the initial net fair market value of the trust property. As reformed, Item VII, paragraph 1, of the will required a 7.4 percent payout. Moreover, the Fiduciaries understood

that petitioner would lose its classification as a charitable trust if it retained property which produced no income. Based on these considerations, the Fiduciaries made a decision to sell a number of parcels of real property which had been a part of the Reinstein estate, among them the Mobil parcel.

A realtor, Gurney, Becker & Bourne, Inc., was engaged as the exclusive listing agent for 40-50 Reinstein parcels. Through their offices a buyer was found for the Mobil parcel, Mobil Oil Corporation, and the sale was consummated on May 18, 1989. The sale price was $782,000.00.

For estate tax purposes, the Putt-Putt parcel was valued at $295,000.00. At the time of Dr. Reinstein's death, it was encumbered with a 20-year lease with 4 5-year options to renew. The annual return for the charitable remainder trust was $35,000.00; thus, it was a profitable investment and the Fiduciaries intended to retain the property. They received several inquiries from the tenants of the Putt-Putt parcel about a possible sale, but they refused to entertain an offer. However, in or about September 1987 the principals of Putt-Putt, Inc. (through their attorney) offered to purchase the property for $500,000.00. They later increased their offer to $550,000.00. The Fiduciaries believed that refusing an offer of that magnitude would be inadvisable, due to the increased annual investment income which would be generated from an increase in the trust principal, and would subject them to criticism and a possible penalty. Consequently, they agreed to sell the Putt-Putt parcel to principals of Putt-Putt, Inc. The Putt-Putt parcel was sold on January 21, 1988.

Either before or shortly after the Putt-Putt parcel was sold, the Fiduciaries learned that the buyers were purchasing the parcel with the intention of selling it to Citibank. In fact, a portion of the property was later sold to Citibank.

The Putt-Putt parcel was erroneously listed with Gurney, Becker & Bourne as one of those the Fiduciaries were seeking to sell. However, the real estate agent and the Fiduciaries understood that the Putt-Putt property was not for sale. The real estate agent made no effort to sell the Putt-Putt property. When the deed of sale was being prepared, the Fiduciaries learned

of the erroneous listing. Because they had an exclusive listing agreement with Gurney, Becker & Bourne, the Fiduciaries agreed to pay the real estate agent its commission.

James P. Fallon, vice-president of Gurney, Becker & Bourne, executed a sworn affidavit stating, in pertinent part:

> "[T]he premises at the northwest corner of Postal Drive and Union Road in the Town of Cheektowaga, New York . . . was not on the open market for sale for the reason that it was burdened by a leasehold agreement, . . . making a sale on the open market to a third party, other than the existing tenant, highly improbable.
>
> "[T]he premises although appearing on the listing agreement with GURNEY, BECKER & BOURNE, was not advertised, marketed or offered for sale for the reasons above stated, and the ultimate sale on April 25, 1988, to the tenant came about through no actions or marketing of GURNEY, BECKER & BOURNE."

The purchase agreements or contracts for purchase of the Putt-Putt and Mobil parcels are substantially different in form and content.

Petitioner timely filed real property transfer gains tax questionnaires reporting the transfer of the Mobil and Putt-Putt parcels as separate transfers. They claimed that each property was exempt from gains tax because it qualified for the $1,000,000.00 exemption of Tax Law § 1443(1).

By its answer, the Division asserted that the transfers of the Mobil parcel and the Putt-Putt parcel "were 'partial or successive transfers pursuant to an agreement or plan' within the meaning of Tax Law § 1440.7 and were therefore properly aggregated." At hearing, the Division's attorney asserted an additional ground for the assessment, stating: "the transfers of the Putt-Putt and Mobil parcels are subject to aggregation as transfers of subdivided parcels."

Petitioner objected to the Division's assertion of an additional ground for the assessment at the beginning of the hearing. The Administrative Law Judge ruled that the Division would be allowed to raise the issue and petitioner would have an opportunity to address it either by the submission of additional documentation or by continuation of the hearing, if necessary.

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 transfer or acquisition of a controlling interest in any entity with an interest in real property." (Emphasis added.)

Since a property owner could avoid the gains tax by subdividing and selling off portions of the property for less than $1,000,000.00 each, article 31-B includes a provision for the aggregation of the consideration received on such multiple transfers, commonly referred to as the "aggregation clause" (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, 356, appeal dismissed 75 NY2d 946, 555 NYS2d 692). Tax Law § 1440(7), states, as pertinent here:

> "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 . . ." (emphasis added).

In interpreting section 1440(7), the Division distinguishes between transfers of adjacent or contiguous parcels by one transferor to one transferee (20 NYCRR 590.42) and transfers of such parcels to more than one transferee (20 NYCRR 590.43), the situation under discussion here. Where the transfer is from one transferor to more than one transferee, 20 NYCRR 590.42 directs attention to 20 NYCRR 590.43, stating:

> "When the transfer is to more than one transferee, whether the amount paid for each deed transfer is added together depends on whether the transferor is subject to the aggregation clause for partial or successive transfers. (See section 590.43 of this Part.)"

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."

B. The first issue to be addressed here is whether the transfers of the Putt-Putt and Mobil parcels were "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]" (Tax Law § 1440[7]).

Apparently, the Division takes the position that the the parcels were transferred pursuant to a plan to liquidate the real property held by the Reinstein estate. The evidence at hearing does not establish that the two parcels were transferred pursuant to such a plan. The evidence shows that the Fiduciaries of the charitable remainder trust intended to sell the Mobil parcel as part of a plan to sell off 40 to 50 properties which were not producing sufficient income. These were the properties listed with Gurney, Becker & Bourne. The evidence does not show that there was a plan to liquidate the Reinstein estate. Moreover, through credible testimony, petitioner established that the Fiduciaries had no intention of selling the Putt-Putt parcel as a part of the plan to dispose of nonproductive properties. The affidavit of James Fallon, vice-president of Gurney, Becker & Bourne, further confirms that the Putt-Putt parcel was never offered for sale on the open market. The Putt-Putt parcel was sold when the Fiduciaries received an unsolicited offer which was deemed too lucrative to refuse. In conclusion, the record does not support a finding that the Mobil and Putt-Putt parcels were transferred pursuant to a plan to liquidate the Reinstein estate or to dispose of nonproductive properties.[1]

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[1]The Division placed in evidence a map which shows that other properties adjacent to the Mobil and Putt-Putt properties were owned and sold either by Dr. Reinstein or the Fiduciaries. There is no evidence in the record that these other properties were sold pursuant to a plan to liquidate the Reinstein estate, that they were among the 40 to 50 properties listed with Gurney,

The evidence establishes that the Putt-Putt and Mobil parcels were sold independently. The contracts for sale were separately negotiated with two separate purchasers. The selling prices of the properties were substantially different (the Mobil parcel was sold for approximately $217,000.00 per acre, and the Putt-Putt parcel was sold for approximately $137,500.00 per acre). The Fiduciaries actively solicited buyers for the Mobil parcel, while the Putt-Putt parcel was sold as the result of an unsolicited purchase offer. The contracts for sale of each parcel differ in form and content. The sales had no relationship to each other. The purchasers were motivated by different concerns and had different intentions with regard to the use of each parcel. Where, as here, it is established that the transfers of contiguous or adjacent properties were, in fact, independent transfers and not pursuant to a plan, the consideration from the transfers is not subject to aggregation (see, Matter of DiMasi, Tax Appeals Tribunal, March 4, 1993; Matter of General Builders Corp., Tax Appeals Tribunal, December 24, 1992).

C. The second issue to be addressed is whether the parcels are subject to aggregation as "subdivided parcels". In its letter of September 8, 1993, the Division states its position on this issue as follows:

> "It is our position that the record developed at hearing establishes that the parcels sold by the Petitioner were originally part of the same parcel. The two parcels in question were created when a road was constructed through the original parcel. The Petitioner's sales of the subdivided parcels were therefore properly aggregated by the Division of Taxation."

The Division offers no legal authority to support its position. Apparently, it is contending that the transfer of subdivided parcels must always be treated as a single transfer. This interpretation of Tax Law § 1440(7) was explicitly rejected by the Tax Appeals Tribunal in

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Becker & Bourne or that the properties were sold pursuant to a subdivision plan. The Division never fully explained what it intended to prove by placing the map in evidence. Although the map was admitted in evidence over petitioner's objection, it was found to have no probative value except to show that Dr. Reinstein, and later his estate, owned and sold some parcels of land bordering the Putt-Putt and Mobil parcels.

Matter of Six Stars Realty (Tax Appeals Tribunal, October 7, 1993) where the Tribunal held that the sale of subdivided parcels is properly treated as a single transfer only "if it is determined that the transferor had a plan or agreement to dispose of the entire parcel." The Tribunal also stated that to treat all subdivided parcels as a single transfer would be contrary to the Court's decision in Matter of Cove Hollow Farm v. State of New York Tax Commn. (146 AD2d 49, 539 NYS2d 127) where the court stated:

> "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" (id. at 129, see also, Matter of Armel, Tax Appeals Tribunal, July 23, 1992 [where the Tribunal upheld an Administrative Law Judge determination that certain lots of a subdivided parcel were not to be aggregated with the other sales in the subdivided parcel because petitioners had established that they did not have a plan to dispose of all of the property in the subdivision].)

The record establishes that there was not a plan to transfer the Putt-Putt and Mobil parcels by subdivision. The original property was subdivided by the construction of Postal Drive. The purpose of the construction was to provide other properties owned by Dr. Reinstein with access to Union Road. Since the original property fronted on Union Road, the road construction was not necessary to benefit the original property or the two subdivided parcels that resulted. The record contains no evidence that the road was constructed with the intention of subdividing the original parcel or "to effectuate by partial . . . transfers a transfer which would otherwise" be subject to the gains tax. There is no evidence that a subdivision plan existed which included these properties.

D. The petition of Reinstein Family Trust is granted, and the Division is directed to refund taxes and interest paid pursuant to the Notice of Determination issued on October 27, 1989.

DATED: Troy, New York
March 10, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE