STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RONALD FATOULLAH	:	DETERMINATION DTA NO. 811707
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, Ronald Fatoullah, 445 Northern Boulevard, Great Neck, New York 11021, 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 Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 29, 1993 at 1:15 P.M. with all briefs to be submitted by April 29, 1994. Petitioner filed briefs on February 22, 1994 and April 28, 1994. The Division of Taxation filed a brief on April 8, 1994. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUES

I. Whether the sale of contiguous properties to separate transferees should be treated as a single transfer under the aggregation clause of Tax Law § 1440(7).

II. Whether petitioner has established that the penalties which were imposed by the Division of Taxation for failure to remit tax when due should be abated.

FINDINGS OF FACT

In June 1965 petitioner's father, Khanbaba Fatoullah, and petitioner's uncle, Nedjat Lazar, acquired certain real property located in the Tottenville section of Staten Island. The deed conveying the property described the property by tax lot. Neither petitioner's father nor petitioner's uncle subdivided the property.

The property was considered special inasmuch as it was a rural area a few blocks from the water located within the limits of Staten Island. The property was purchased to be kept as vacant land in the Fatoullah family. At the time of the purchase, petitioner's family was living in Queens.

Upon the death of petitioner's father, the Staten Island property was transferred in a series of two steps to petitioner and his siblings, Ellice and Elliot Fatoullah. In a deed dated December 6, 1983, the trustees of a trust under the last will and testament of Khanbaba Fatoullah transferred to petitioner, petitioner's brother and petitioner's sister the interest of petitioner's father in the Staten Island property. The purchase price was $159,000.00. In a deed dated January 30, 1984, the interest of petitioner's uncle in the Staten Island property was also transferred to petitioner, petitioner's brother and petitioner's sister. The purchase price for this interest was $180,000.00.

When the land was first acquired by petitioner and his family, the price was determined by an appraisal. Petitioner and his siblings represented themselves in the purchase and petitioner participated in the drafting of the legal documents used to effectuate the transfer. This was the first time petitioner was involved in the transfer of undeveloped land.

At or about the time of the respective transfers, petitioner and his siblings executed a mortgage to trustees of a trust under the will of petitioner's father. Petitioner and his siblings also executed a mortgage to their uncle. The eighteenth paragraph of the mortgage to petitioner's uncle stated:

> "This mortgage is subject and subordinate to a first mortgage that mortgagors, their successor and/or assigns, may place on the premises, not to exceed $100,000.00."

At the hearing, petitioner could not recall why the foregoing paragraph was added. However, he assumed it was included in the event there was a need to raise capital.

Each of the foregoing mortgages contained a rider which stated, in part:

> "Provided that none of the substantial terms and conditions of the mortgage are in default, a release from the lien of this mortgage will be granted upon fifteen (15) days written application or notice in accordance with the following terms and conditions:

"a) The propery [sic] to be released must be in whole building plots, and must be contiguous to property previously released if possible.

"b) All installments of interest due under the terms of the mortgage and all outstanding real estate taxes, sewer rents, water rates or assessment charges on the entire property must be paid before the time of the delivery of the said release.

"c) The owner of the property shall cause to be prepared the release in recordable form and deliver same to the attorney for the holders of the mortgage, for examination and computation of the amount(s) due thereon. The attorneys for the holder of the mortgage shall in addition to the above arrange for the execution, acknowledge and delivery of the release.

"d) Payment of principal for the portion released shall be in accordance with the following formula, with interest thereon to the date payment is received:

$$\frac{\text{AREA TO BE RELEASED}}{\text{TOTAL AREA MORTGAGED}} \times \text{AMOUNT OF MORTGAGE}$$

"At the mortgage holder's option the total area mortgaged may refer instead to the total number of houses to be constructed on the property mortgaged, with the numerator of the above fraction being the number of houses to be released on that particular release.

"e) Releases shall include without additional charge the roadway in front of the premises or whatever area is necessary for access and may reserve access to the remaining parcels not released.

"f) The mortgagor shall not remove from the premises any topsoil or fill, except as may reasonably be required to commence or complete construction or to obtain permits, and the like. This shall not, however, prohibit or in any way limit the mortgagor in his right to excavate, stockpile or transfer such topsoil or fill from any portion of the mortgaged premises to any other part thereof."

Contrary to the inference which could be drawn from the foregoing paragraph of the rider, petitioner did not contemplate a partial release of the mortgage to facilitate sales of lots. In order to prepare the mortgage, petitioner merely copied a form which was provided by an attorney who was a friend of petitioner's uncle. Petitioner did not think that the provisions of the rider would cause any difficulty.

Petitioner and his siblings purchased the property because they wanted to keep the property in the family. There was no plan to develop it at a future date or to subdivide the property with a goal of future sales. Accordingly, nothing was done by petitioner or his siblings with respect to the property when it was acquired.

In 1986, petitioner, his brother and his sister began receiving unsolicited offers to sell

the property. One of the offers was made by S.L. Homes, Inc. ("Homes"). Thereafter, petitioner conferred with several real estate brokers in order to determine an appropriate price. Subsequently they decided to sell some of the tax lots.

In a deed dated December 24, 1986, petitioner and his siblings conveyed a portion of the property located near a street to Homes, a builder, for $969,000.00. Most of the property on the block was retained. As before, the deed described the property in terms of tax lots. At the hearing, petitioner explained that the term "tax lots" is just descriptive as many of the lots were not large enough to be built upon.

The contract of sale, dated December 9, 1986, with Homes listed the seller as "Ronald Fatoullah, Ellice Fatoullah and Elliot Fatoullah" and the purchaser as "S.L. Homes, a New York corporation having an office at 87 Pouch Terrace, Staten Island, New York". The contract had originally listed the purchaser as "SAVINO SAVO, residing at 87 Pouch Terrace, Staten Island, New York", but "SAVINO SAVO, residing" was crossed out and replaced with "S.L. Homes, Inc., a New York corporation having an office . . . ."

When the sale was made in 1986, it was petitioner's intention to hold on to the remainder of the property. Neither petitioner nor his siblings did anything to the property to accommodate the sale such as subdividing the property.

Gains tax forms were filed on the foregoing transaction and, in response, petitioner received a tentative assessment and return stating that no tax was due. The Division did not assert that tax was due because the consideration was under $1,000,000.00.

Starting in 1988, petitioner's family became involved in litigation involving an unrelated piece of property. As a result, they incurred significant legal bills. During the years 1988 through 1990, the legal fees were in excess of $500,000.00. During the year 1991, the legal fees were approximately $150,000.00. Further, the litigation resulted in other expenses in addition to the legal fees.

In addition to the lawsuit, petitioner began experiencing another problem which involved his practice of law. Until approximately 1989 petitioner was able to earn a satisfactory

income representing clients at house closings. During the years 1989 through 1991, the real estate market plummeted and petitioner received only about five percent of the business he received in prior years. Matters became so difficult that it caused a separation between himself and his partner in the practice of law.

The foregoing financial pressures caused petitioner and his family to try to sell the remainder of the property. As a result, petitioner and his family spoke to real estate brokers and tried to market the property directly.

The real estate brokers advised petitioner that the market was weak and that most of the potential buyers would be developers. In order to make the land attractive to buyers and to maximize what they could earn from selling the property, petitioner and his family were advised to prepare the land for construction. Thereafter, they obtained permits to build on the property.

In January 1991, petitioner and his family found willing buyers of one lot who sought to build a home for their own use. At this time they conveyed Lot 23 to Anthony and Katherine Accardo. The consideration for the transfer was $105,000.00. The purchasers of Lot 23 were not related to Homes.

A Transferor Questionnaire and a Transferee Questionnaire were filed on the foregoing transfer. Petitioner also submitted an affidavit in an attempt to establish that the transaction was exempt from tax on the basis it was not made pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be subject to gains tax. The affidavit noted that Homes and its principal, Mr. Savino Savo, are unrelated to Mr. and Mrs. Accardo.

Petitioner and his siblings received a Tentative Assessment and Return dated March 28, 1991 which asserted that tax was due on the sale to Anthony and Katherine Accardo. The document stated that tax was due in the amount of $9,542.84, plus penalty of $1,336.00 and interest of $217.84, for a total amount due of $11,096.68. Petitioner's attorney advised petitioner that no tax was due and that he should pay the tax under protest. This advice was followed.

The Division of Taxation ("Division") issued a Statement of Proposed Audit Adjustment, dated April 15, 1991, with respect to the transfer to Homes stating that tax was due in the amount of $80,381.00, plus interest of $2,582.00 and penalty of $12,860.00, for a total amount due of $95,823.00.

Petitioner and his family protested the foregoing Statement of Proposed Audit Adjustment. In response, the Division issued a Notice of Determination, dated July 8, 1991, which explained that tax was due in the amount of $80,381.00, plus interest of $3,818.35 and penalty of $16,075.24, for a current balance due of $100,274.59. The notice was based on the Division's position that the consideration from the sale to Homes should be aggregated with the consideration from the sale to Mr. and Mrs. Accardo.

On May 7, 1993, petitioner and his family transferred the remainder of the property in issue to Savo Bros., Inc., 625 Annadale Road, Staten Island, New York 10312 for consideration in the amount of $1,632,672.00. Real property gains tax of $133,048.52 was paid on the sale.

Petitioner's law practice was almost exclusively residential real estate transactions. He was involved in only a few large transactions. In his practice, petitioner had occasion to draft and review contracts of sale, deeds and mortgages.

Petitioner's real estate experience included involvement with a partnership that owned a building in Manhattan. He was also involved with three limited partnerships that engaged in cooperative conversions of small apartment buildings.

At the time of the hearing, petitioner's practice concentrated on law for the elderly since the real estate market was weak.

Petitioner's sister is an attorney who practices law for the elderly and his brother is a psychologist.

In accordance with State Administrative Procedure Act § 307(1), the Division's requested findings of fact have been accepted and substantially incorporated herein.

SUMMARY OF THE PARTIES' POSITIONS

It is petitioner's position that the 1986 sale to Homes and the 1991 sale to Mr. and

Mrs. Accardo were not made pursuant to a plan or agreement and therefore the sale to Homes and Mr. and Mrs. Accardo should not be aggregated. Petitioner also argues that there is reasonable cause to cancel penalties.

The Division submits that petitioner and his family engaged in the sale of unimproved subdivided lots and that such sales should be aggregated. The Division contends that petitioner's testimony on the question of the transferor's intent is not credible because it conflicts with the clauses in the rider. The Division also argues that the clause reserving the right to place a $100,000.00 mortgage on the property has not been adequately explained. The Division points out that the fact that the contract for the sale to Homes originally listed "SAVINO SAVO" shows that there is some affiliation between the transferees in 1986 and 1993. Lastly, the Division submits that petitioner has not shown reasonable cause for the abatement of penalty.

In an answering brief, petitioner submits that there is no basis in the record for the claim that petitioner subdivided the property. The balance of the brief is directed to the point that there was no agreement or plan to dispose of the entire parcel of property.

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. However, if the consideration for the transfer is less than $1,000,000.00, the transaction is exempt from gains tax (Tax Law § 1443[1]).

B. In recognition of the possibility that a property owner could avoid the imposition of the gains tax by subdividing and selling off portions of the property in separate sales of less than $1,000,000.00, the Gains Tax Law includes a provision for the aggregation of the consideration received from such multiple transfers (Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, 356; appeal dismissed 75 NYS2d 946, 555 NYS2d 692; see also, Matter of Benaquista, Polsinelli & Serafini Management Corp. v. Commr. of Taxation & Fin., 191 AD2d 80, 598 NYS2d 829). This provision, known as the "aggregation clause", provides at Tax Law § 1440.7, 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 . . . ."

C. The Commissioner's regulations distinguish between transfers of contiguous parcels by one transferor to one transferee (20 NYCRR 590.42) and the situation herein where there is a transfer by one transferor of contiguous parcels to more than one transferee (20 NYCRR 590.43).

Under the latter circumstances, the Commissioner's regulations provide, in part:

"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."

D. It has been noted that the existence of a plan or agreement within the meaning of Tax Law § 1440.7 cannot be presumed merely because adjacent parcels are sold (Matter of General Builders Corp., Tax Appeals Tribunal, December 24, 1992; see, Matter of DiMasi, Tax Appeals Tribunal, March 4, 1993).

E. As set forth in the briefs, the crux of this case is whether the sale to Homes and the sale to Mr. and Mrs. Accardo were pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer that would otherwise be subject to real property gains tax. On the evidence presented, it is concluded that petitioner has established that such an agreement or plan did not exist. The factors supporting this conclusion are: (1) the 1986 sale was based on an unsolicited offer whereas the 1991 sale resulted from unforeseen financial difficulties; (2) there

was a substantial period of time between the respective sales; (3) the 1986 and 1991 sales were made to unrelated parties; and (4) petitioner did not pursue a purchaser prior to the sale to Homes whereas the sale to Mr. and Mrs. Accardo was actively sought through the obtaining of building permits.

F. The arguments raised by the Division do not warrant a different result. Petitioner has adequately explained that the provision for the $100,000.00 mortgage was placed in the contract in anticipation of a need to raise funds. Further, petitioner has credibly explained that the Rider, which is relied upon by the Division, was simply copied without forethought from another contract and that petitioner and his family intended to keep the rest of the property at the time of the sale to Homes. It is noted that the Division's reliance upon Emery Air Freight Corp. v. New York State Tax Appeals Tribunal (188 AD2d 772, 591 NYS2d 264) is misplaced inasmuch as the testimony herein does not unambiguously conflict with the documentary evidence.

G. The Division's argument with respect to the crossing out of the Savo name on the 1986 contract is also without merit. The fact that the transferee in 1986 is related to the transferee in 1993 does not establish the existence of an agreement or plan in 1986 which is necessary to aggregate the consideration for the transfer of the parcels at issue herein (see, Matter of General Builders Corp., supra).

H. Since it is concluded that the transfers were improperly aggregated, the penalties should similarly be cancelled.

I. The petition of Ronald Fatoullah is granted and the Notice of Determination dated July 8, 1991 is cancelled.

DATED: Troy, New York
October 31, 1994

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE