STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERIC MARDER	:	DETERMINATION DTA NO. 812258
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, Eric Marder, 45 West 67th Street, New York, New York 10023, 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 May 20, 1994 at 1:15 P.M., with all briefs due by September 30, 1994. Petitioner filed a letter in lieu of a brief on June 6, 1994. The Division of Taxation filed its brief on September 6, 1994. Petitioner filed his reply letter on September 15, 1994. Petitioner appeared by Howard Koff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Laura J. Witkowski, Esq., of counsel).

ISSUES

I. Whether petitioner has established that the only correlation between the three contiguous and adjacent condominium units in issue is their contiguity or adjacency and that the units were not used for a common or related purpose.

II. In the alternative, whether the sale of petitioner's interest in three condominium units at one location constituted a transfer of shares bya single investor which should be aggregated for purposes of applying the $1,000,000.00 exemption.

FINDINGS OF FACT

The three properties involved in the transfer at issue are the contiguous and adjacent

condominium units 16A, 16B and 16F, located at 45 West 67th Street, New York, New York.

On January 3, 1984, Eric Marder Associates, Inc. ("EM, Inc.") acquired two-bedroom unit 16A from the condominium plan sponsor, 45 West 67th Street Corporation, for $340,511.00. EM, Inc. was a subchapter S marketing research corporation located at 122 East 42nd Street and wholly owned by petitioner, Eric Marder. Petitioner also served as the chairman and chief executive officer of the corporation. EM, Inc.'s clients were generally major corporations for which EM, Inc. did large scale surveys.

After acquiring unit 16A, petitioner furnished the apartment using corporate funds. The corporation subsequently claimed depreciation expenses for such furniture on its tax returns, along with all other expenses associated with the apartment. In addition, although petitioner could not quantify the benefit received by the corporation from the apartment in specific dollar amounts, petitioner did acknowledge that the apartment made a difference in some vital business transactions, and that it served a good business purpose.

Petitioner lived in Westchester County but conducted most of his business and business entertaining in New York City. He would sometimes take clients out to dinner and instead of having them stay at a hotel, he would offer them accommodations at unit 16A. This provided Mr. Marder and the client with an opportunity to discuss business in a more relaxed setting. In addition, on those nights when petitioner worked late, he would stay over in unit 16A rather than make the trip back home. Finally, petitioner and his wife would stay over in unit 16A after going to the theater in New York City. Unit 16A was never rented out by EM, Inc.

On December 17, 1986, petitioner acquired one-bedroom unit 16F from Mr. Charles Read for $260,000.00. Two weeks later, on December 31, 1986, petitioner acquired two-bedroom unit 16B from Mr. Peter Brentnall for $470,000.00. The floor plan of unit 16B was a mirror image of the floor plan of unit 16A. At all times following the purchases of units 16B and 16F, the units were leased to other individuals and acted as a source of rental income for petitioner. Units 16B and 16F were not used by petitioner or the corporation. The three units, although located on the same floor, did not have a common entrance.

Petitioner subsequently placed all three units (16A, 16B and 16F) on the market at the same time with the same real estate agent. According to petitioner, units 16B and 16F were offered for sale because he felt that the real estate market was soon to fall due to what he considered to be the overbuilding in New York City. Petitioner stated that unit 16A was placed on the market because he and his wife decided to move to New York City. As they would have their own apartment to entertain and house clients, the corporate apartment was no longer needed. The only ensuing offer received by the real estate agent was submitted by one purchaser, Mr. David Roth, for the purchase of all three units. After a period of negotiations, Mr. Roth ultimately agreed upon the purchase prices set by petitioner.

Two identical contracts of sale, one for units 16B and 16F and one for unit 16A, were executed by petitioner and Mr. Roth on March 15, 1989 for a total consideration of $1,340,000.00. Both petitioner and EM, Inc. were represented by the same attorney, Robert M. Pellegrino, during this transaction.

Following the signing of the contracts, Mr. Roth assigned his interest in unit 16B to Cut & Sold Pension Trust for $0.00. Mr. Roth, president of Cut & Sold Pension Trust, executed the assignment agreement on behalf of both himself and the company.

On March 20, 1989, the Division of Taxation ("Division") received the following documents regarding the transfers of units 16B and 16F:

(a) Transferor Questionnaire for unit 16F, dated March 10, 1989, whereby petitioner transferred 100% of his interest to Mr. Roth for $790,000.00;

(b) Transferee Questionnaire for unit 16F, dated March 10, 1989;

(c) A March 1989 contract of sale for units 16B and 16F, signed by David Roth and petitioner;

(d) Transferor Questionnaire, dated March 17, 1989, for the assignment of the contract of sale for unit 16B from David Roth to Cut & Sold Pension Trust for $0.00;

(e) Transferee Questionnaire, dated March 17, 1989, for the

assignment of the contract of sale for unit 16B signed by David Roth on behalf of Cut & Sold Pension Trust; and

(f) A copy of the March 1989 assignment of the right to purchase unit 16B from David Roth to Cut & Sold Pension Trust for $0.00.

On the same date, under separate cover, the Division received the following documents regarding the transfer of unit 16A:

(a) Transferor Questionnaire for unit 16A, dated March 10, 1989, signed by petitioner on behalf of Eric Marder Associates, Inc. whereby petitioner transferred 100% of his interest to Mr. Roth for $550,000.00;

(b) Transferee Questionnaire for unit 16A, dated March 10, 1989; and

(c) A March 1989 contract of sale signed by David Roth and petitioner, on behalf of EM, Inc.

All of the aforementioned documents were prepared by petitioner's attorney upon his request.

On April 20, 1989, the Division received a supplemental Transferor Questionnaire, wherein petitioner aggregated the sales of the three units for purposes of determining the anticipated tax due. Although petitioner maintained that the sales of the three units should not be aggregated, this supplemental form was submitted for reference should the Division reasonably determine that tax was due.

Attached to the Supplemental Transferor Questionnaire was an affidavit signed by petitioner, individually and as chairman of EM, Inc., dated April 18, 1989. In this affidavit, petitioner claimed that the three units should not be aggregated because they had been used for separate and distinct purposes. Petitioner alleged that unit 16A was used solely for the conduct of corporate business (meeting and resting place) and had never been offered for rental. In contrast, petitioner alleged that units 16B and 16F were purchased as investment properties and had been utilized solely for rental purposes and never for the benefit of the corporation.

The three units were subsequently transferred on May 8, 1989 pursuant to three separate deeds.

On March 16, 1992, the Division issued a Notice of Determination for assessment L-005382112-7, indicating that petitioner owed $16,568.80 in tax, plus interest, for the transfer of the three properties to one transferee for consideration in excess of $1,000,000.00. The explanation of gains tax due was as follows:

Unit	Consideration	
16A	$ 550,000.00	
16B	495,000.00	
16F	295,000.00	
	$1,340,000.00	
Total Consideration		$1,340,000.00
Less: Brokerage		53,600.00
		$1,286,400.00
Less: Original Purchase Price		
Original Acquisition	$1,070,511.00	
Acquisition Costs	8,671.00	
Capital Improvements	37,030.00	
Selling Expenses	4,500.00	
Gain Subject to Tax		$ 165,688.00
Gains Tax - 10%		$ 16,568.80

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a 10% tax on the gains derived from the sale of real property located within New York State where the consideration received for such transfer is $1,000,000.00 or more (Tax Law §§ 1441, 1443[1]). The "transfer of real property" is defined, in pertinent part, to include "the transfer of any interest in real property by any method" (Tax Law § 1440[7][a]).

B. The regulation at 20 NYCRR 590.42 codifies the Division's interpretation of this first sentence of Tax Law § 1440(7) (Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003). This regulation states that:

> "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.
>
> "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.)"

The third paragraph of 20 NYCRR 590.42 has been recognized as requiring two distinct showings by the taxpayer to prevent the Division from treating multiple transfers as one transfer for purposes of the gains tax (Matter of Von Mar Realty Co., Tax Appeals Tribunal, December 19, 1991, confirmed 191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803; Matter of Sanjaylyn Co., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55; Matter of Ertegun, Tax Appeals Tribunal, March 18, 1993; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988): (1) that the only correlation between the properties is the contiguity or adjacency itself and, (2) that the properties were not used for a common or related purpose.

C. Petitioner concedes that the properties involved in this matter are contiguous and adjacent, and that the transfer of the three condominium units by separate deeds was by one transferor to one transferee. It has been recognized as an established principle of the gains tax that beneficial ownership of real property may be determined by looking through entities (see, Matter of Howes v. Tax Appeals Tribunal, 159 AD2d 813, 552 NYS2d 972; Matter of 307 McKibbon St. Realty Corp., supra). The principle of focusing on the economic realty of the transaction has also been adopted by the courts and applied to corporate entities (see, Matter of Bredero Vast Goed, N.V. v. Tax Commn., 138 Misc 2d 27, 523 NYS2d 754, affd 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). In the present matter, petitioner transferred units 16B and 16F, while unit 16A was sold by the corporation. The transferee in each transaction was the same. However, as petitioner is the 100% shareholder of

the corporation, he is determined to be the beneficial owner of unit 16A and its transferor as well.

D. The first requirement outlined in the regulation, that "the only correlation between the properties is their contiguity or adjacency itself," presents petitioner with a significant burden in light of its broad language, as discussed by the Tax Appeals Tribunal:

> "The use of such language is consistent with the expansive definition of 'transfer of real property' which was designed to maximize revenues (Tax Law § 1440[7]; Matter of Bombart v. Tax Commn. of the State of New York, [132 AD2d 745, 516 NYS2d 989]; Matter of Iveli v. Tax Appeals Tribunal, supra). We read this requirement in a manner consistent with this legislative intent -- to comprehensively tax real property transfers -- to allow separate gains tax treatment of contiguous properties only in the rare instance that the nature of the properties at issue had no kinship whatsoever, except their physical proximity" (Matter of Von Mar Realty Co., supra).

In Von Mar Realty Co., both of the parcels involved had been improved with industrial buildings, were acquired from one grantor at the same time and were transferred to one purchaser at the same time. The Tax Appeals Tribunal held that these factors did not establish that the only correlation was the contiguity itself. In the present matter, the three condominium units were transferred by petitioner at the same time to the same purchaser using identical contracts of sale, the same attorney and the same real estate broker. Although petitioner stated a different reason for placing unit 16A on the market than for placing units 16B and 16F, his instructions to the real estate broker were to sell all three units. Units 16A and 16B were identical two-bedroom apartments while unit 16F was a one-bedroom apartment on the same floor of the building. Furthermore, it is noted that the only offer received by petitioner involved the transfer of the three units. Based on these facts, it is clear that there existed a correlation between these three units beyond their mere contiguity (see, Matter of Ertegun, supra).

The other requirement outlined in the regulation, that "the properties were not used for a common or related purpose", also creates a significant hurdle to petitioner in light of its broad language. Petitioner originally purchased units 16B and 16F for investment and rental income purposes. All income, deductions and expenses benefitted petitioner. Unit 16A was used by petitioner to help generate income for the corporation. The corporation claimed all deductions

and expenses for the use and operation of this unit on its corporate income tax returns. As the corporation was a subchapter S corporation, all benefits derived from unit 16A, including the deductions and expenses taken, were received by petitioner. As a result, petitioner derived a financial benefit from his interest in each of the three units; they were all, in essence, business investments. Based on the above, it is clear that they were used for a common or related purpose (see, Matter of Albany Public Markets, Tax Appeals Tribunal, August 27, 1992).

E. Tax Law § 1440(7)(a) defines the transfer of real property as the transfer or transfers of any interest in real property by any method, including sale. Section 1440(former [7]) further provided that a transfer of real property shall also include partial or successive transfers 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 (the tax on gains derived from certain real property transfers).

Among the partial or successive transfers which are specifically included in the coverage of Article 31-B are transfers which occur pursuant to a cooperative plan (Tax Law § 1440[former (7)]). The Division argues that transfers pursuant to a cooperative plan include all transfers of stock in a cooperative corporation which owns real property, and any partial or successive transfers of such interests are deemed a single transfer. This position of the Division, that the transfers of the condominium shares by petitioner, as a single investor, are to be aggregated for purposes of applying the $1,000,000.00 exemption, provides the second rationale for aggregating the transfers at issue.

While Tax Law § 1440(7) makes reference only to cooperative plans and transfers of stock in a cooperative corporation, it should be noted that it was the intention of the Legislature that condominium plans and the sale of apartments pursuant to such plans be treated in the same manner as cooperative plans and the transfers of stock in such cooperative plans (Matter of 1230 Park Associates, Tax Appeals Tribunal, July 27, 1989, confirmed 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Matter of Ziegelman, Tax Appeals Tribunal, August 18, 1994; Matter of 61 East 86th St. Equities Group, Tax Appeals Tribunal,

January 21, 1993). Thus, section 1440(7) applies to the present case.

The language in Tax Law § 1440(7) makes no distinction between transfers made by the original sponsor of the plan and subsequent sales of interests by purchasers/investors. As a result, it is apparent that partial or successive transfers of condominium interests by any individual owning such interests are deemed a single transfer pursuant to a condominium plan and are automatically aggregated for purposes of determining the $1,000,000.00 exemption.

Such a conclusion is further supported by the fact that the ownership interests in the condominium units could not even have been created, but for the existence of the original plan of the sponsor. It follows, therefore, that all subsequent transfers of unit interests by one transferor should also be deemed as being pursuant to a condominium plan. Of course, in order to be subject to tax, such transfers must still exceed the $1,000,000.00 threshold of Tax Law § 1443(1).

Accordingly, transfers pursuant to a condominium plan encompass all transfers of apartments in a condominium, including all transfers (sales and resales) made subsequent to the initial offering plan by individuals unrelated to the sponsor. Therefore, the transfers made by petitioner in this case were made pursuant to a condominium plan and should be treated as a single transfer for purposes of applying Tax Law § 1443.

20 NYCRR 590.40(b) provides further support for the aforementioned conclusion. This regulation states, in pertinent part, that "All transfers of shares by a single investor are aggregated for purposes of applying the $1 million exemption."

Petitioner claims that this regulation applies only to the initial transfers made by the sponsor of the condominium plan. Although this issue has not been directly addressed by the Tax Appeals Tribunal, it has consistently been the position of the Division that 20 NYCRR 590.40(b) applies to both the initial sale by the sponsor to investors and resales by investors to subsequent investors (see, Private Letter Ruling, 1988 WL 247480 [NY Dept Tax Fin], May 6, 1988; Private Letter Ruling, 1986 WL 79854 [NY Dept Tax Fin], November 14, 1986; Private Letter Ruling, 1985 WL 68841 [NY Dept Tax Fin], December 2, 1985; Private Letter Ruling,

1985 WL 68777 [NY Dept Tax Fin], February 13, 1985).

It is undisputed that petitioner purchased units 16B and 16F solely for investment purposes. In addition, the purchase of unit 16A was clearly an investment made by petitioner on behalf of the corporation. Petitioner deducted all expenses associated with the operation of the apartment, and petitioner derived a significant financial benefit from its purchase. Furthermore, because the corporation already had a main office, unit 16A was purchased to assist the corporation in generating profits. Therefore, as none of the units was ever used by petitioner as his official residence, they were clearly purchased by petitioner for income and investment purposes within the meaning of 20 NYCRR 590.40(b).

Accordingly, petitioner's sale of his interest in the three condominium units constituted a transfer by a single investor, which was effected pursuant to a condominium plan within the meaning of Tax Law § 1440(7), and the transfers are automatically aggregated for purposes of applying the $1,000,000.00 exemption.

F. The petition of Eric Marder is denied and the Notice of Determination dated March 16, 1992 is sustained.

DATED: Troy, New York
March 9, 1995

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE