STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DOMINICK AND CAROL S. VITUCCI	:	DETERMINATION DTA NO. 817736
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1992.	:	

Petitioners, Dominick and Carol S. Vitucci, 163-59 84th Street, Howard Beach, New York 11414, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 3, 2000 at 11:30 A.M., with all briefs to be submitted by March 13, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Sondra I. Harris and Associates, P.C. (Gary B. Port, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUE

Whether the long-term gain realized from the condemnation of Dominick Vitucci's property should have been recognized by petitioners in 1992.

FINDINGS OF FACT

Pursuant to section 3000.15(d)(6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal and section 3071 of the State Administrative Procedure Act, the Division of Taxation (the "Division") submitted proposed findings of fact. The proposed findings of fact have been substantially incorporated into this determination with the exceptions noted in the final finding of fact.

1. Petitioners, Dominick and Carol Vitucci, using the name Dom's Truck Sales, are engaged in the used truck sales business. They sell used large heavy duty trucks and construction equipment as well as truck parts, mostly for export.

2. In May 1980, Mr. Vitucci purchased a two-acre unimproved parcel of land, located at 3269 Atlantic Avenue in Brooklyn, New York (the "Atlantic Avenue property") for $100,000.00 from the City of New York. The Atlantic Avenue property, zoned M-1, heavy duty industrial use, was used by Mr. Vitucci to store the business's inventory of large trucks used for parts, truck parts and construction equipment, such as bulldozers and other large pieces of machinery. Trucks may be parked on property zoned M-1. Garages that can be used to repair trucks also require an M-1 zoning. In addition to the Atlantic Avenue property, petitioners used other locations in Brooklyn to conduct their business.

3. On November 8, 1990, the New York City School Construction Authority informed Mr. Vitucci that it had identified the Atlantic Avenue property as a possible site for the construction of a public school. Sometime after receiving the November 8, 1990 letter, Mr. Vitucci hired the law firms of Jaul and Strong and Port & Port to assist him in the potential condemnation process.

4. In early 1992, the New York City Board of Education selected the Atlantic Avenue property as the site for an intermediate school to be used by Community School District 19. A Notice of Condemnation was published and a Petition was made by the New York City School Construction Authority to acquire the Atlantic Avenue property pursuant to the Eminent Domain Procedure Law. On March 13, 1992, the New York City School Construction Authority filed a Notice of Pendency of Condemnation Proceeding. On May 4, 1992, an Order of Condemnation for the Atlantic Avenue property for the construction of an intermediate school was entered.

5. As his business thrived, Mr. Vitucci decided to consolidate all business operations associated with the used truck sales business at the Atlantic Avenue property. Shortly before the condemnation proceeding was initiated, construction of a building began. Only the steel frame of the building was up by the time the condemnation proceeding commenced. At that point, all construction ceased at the Atlantic Avenue property.

6. After attending a public hearing concerning the proposed intermediate school conducted at Public School IS-171, the school being replaced, and seeing the overcrowded conditions that existed at that facility, petitioners decided not to contest the condemnation proceeding and agreed to negotiate the amount of the condemnation award.

7. As the condemnation process went forward, Mr. Vitucci came to an understanding with the City of New York. The City orally agreed to assist Mr. Vitucci in finding a piece of property, like the Atlantic Avenue property, which was suitable for relocation of his business, that he could purchase from the City. On August 27, 1992, Mr. Vitucci agreed to remove all inventory and personal property from the Atlantic Avenue property and relinquish possession of same by November 16, 1992.

8. On September 22, 1992, Mr. Vitucci purchased a parcel consisting of a garage, formerly used to store ambulances and other vehicles, and vacant land, located at 895 Liberty Avenue, Brooklyn, New York (the "ambulance garage property") from individuals. The cost of this piece of property was $200,000.00. Mr. Vitucci used the garage to store items removed from the Atlantic Avenue property.

9. In 1992,[1] Mr. Vitucci received a condemnation award in the amount of $1,104,987.00, less brokerage fees of $50,708.00, for a total consideration of $1,054,279.00 for his claim concerning his fee interest in the Atlantic Avenue property. New York State Real Property Transfer Gains Tax Transferor and Transferee questionnaires were filed and gains tax was paid on the condemnation of the Atlantic Avenue property.

10. Petitioners did not report the gain from the condemnation award or their election to defer the gain from the condemnation award on either their 1992 New York State Resident Income Tax Return or their 1992 Federal Income Tax Return. Petitioners filed their 1992 New York State return on October 15, 1993.

11. Petitioners did report their election to defer the gain from the condemnation award on both their 1993 Federal Income Tax Return and 1993 New York State Resident Income Tax Return.

12. On March 26, 1993, Mr. Vitucci purchased property located at 457 Blake Avenue, Brooklyn, New York (the "Blake Avenue property") for $110,000.00 from an individual. Although this property was not very large, it was zoned M-1 and Mr. Vitucci was able to store trucks there.

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[1] The exact date of the payment of the award is not part of the record.

13. After the Atlantic Avenue property was taken, petitioners met numerous times with representatives of the New York City Economic Development Corporation who gave them lists of available properties. Petitioners looked each parcel over and found many to be very small lots that were not suitable for their needs.

14. In November 1995, after a year of negotiations, the City offered Mr. Vitucci property known as Block 3736, lots 1 and 18, containing approximately 80,000 square feet, located within the East New York Industrial Park. On January 2, 1996, the New York City Economic Development Corporation submitted a Contract of Sale for that property in the amount of $280,000.00 to Mr. Vitucci which he executed and returned. A few months later, Mr. Vitucci was notified that the City would not be conveying the property to him because that area's City Councilperson objected to the sale due to the nature of his business.

15. In addition to working with various representatives of the City of New York, petitioners also worked with numerous commercial real estate agents. Those agents submitted information about various available properties located in the Brooklyn area to petitioners for their consideration. Petitioners rejected the properties for, among other reasons, prohibitively high asking prices.

16. The New York City Economic Development Corporation continued to supply petitioners with lists of available properties which they viewed and rejected. Eventually, the City offered one-half of Block 2813, lot 1 located on Cherry Street in Brooklyn to Mr. Vitucci. That parcel was being used by the City of New York Department of Sanitation for the storage of rock salt. On March 20, 1997, Mr. Vitucci submitted a contract of sale for the property along with two checks as directed by the City. As part of the conditions for the sale of the property to him, Mr. Vitucci agreed to remove debris, provide paved ingress and egress to the other half of the

parcel as well as perform other services. In anticipation of closing on the property, Mr. Vitucci expended about $30,000.00 in performance of the agreed upon tasks. Mr. Vitucci never received the executed contract of sale for the Cherry Street property from the City and the checks remained uncashed one year later.

17. In April 1997, the New York City School Construction Authority announced that it no longer intended to build a school on the Atlantic Avenue property. Mr. Vitucci immediately advised the New York City School Construction Authority that he wished to repurchase the property at the fair market value to be determined by the City. On November 19, 1997, Mr. Vitucci formally notified the law firm representing the New York City School Construction Authority that he was demanding the opportunity to repurchase the Atlantic Avenue property pursuant to section 406 of the Eminent Domain Procedure Law. The City refused to make arrangements to sell the Atlantic Avenue property back to Mr. Vitucci.

18. On April 1, 1998, Mr. Vitucci commenced an action in Kings County Supreme Court against the New York City School Construction Authority, the New York City Economic Development Corporation, the New York City Board of Education and the City of New York which includes, among other things, his claim of right of first refusal with respect to the sale of the Atlantic Avenue property by the City. As of the date of the November 3, 2000 hearing in the instant matter, that action was still pending.

19. In 1998, Mr. Vitucci purchased 970 - 1000 Stanley Avenue, Brooklyn, New York, for $400,000.00.

20. There is no evidence that petitioners applied to the Internal Revenue Service ("IRS") for an extension of time to purchase like kind property to replace the Atlantic Avenue property.

21. In March 1997, the Division commenced an audit of petitioners' income tax returns for the years 1993 through 1995. The audit focused on Mr. Vitucci's used truck sales business reported by petitioners on a Schedule C. As a result of information supplied by petitioners' accountant, Marvin Goldberg, the auditor became aware of the City of New York's condemnation of the Atlantic Avenue property in 1992. The auditor reviewed the documentation pertaining to the condemnation that was supplied by Leon Port, petitioners' former attorney, and requested evidence that either replacement property of a like kind was acquired within the time period allowed under Internal Revenue Code ("IRC") § 1033 or an extension of time to purchase replacement property was granted by the IRS. Petitioners did not supply any of the requested proof. The auditor determined that a gain was realized from the conversion in 1992 that should have been recognized.

22. The auditor's computation of the long-term capital gain from the condemnation of the Atlantic Avenue property follows:

Gross consideration paid by transferee		$1,104,987.00
Less: Brokerage fees	$50,708.00	
Allowable selling expenses	50,900.00	
NYS Gains Tax	88,491.00	($190,099.00)
NET PROCEEDS FROM DISPOSITION		$ 914,888.00
LESS: ADJUSTED BASIS		
PURCHASE PRICE	$106,666.00	
OTHER ACQUISITION COSTS	11,800.00	($118,466.00)
LONG-TERM CAPITAL GAIN		$ 796,422.00

Based on his computation of the long-term capital gain, the auditor determined that because petitioners' income was understated by more than 25% of New York State adjusted gross income, a tax deficiency could be assessed within six years after the 1992 return was filed under Tax Law § 683(d)(1).

23. The Division issued a Statement of Personal Income Tax Audit Changes to petitioners, dated July 22, 1998, which increased petitioners' New York State income in the amount of $796,422.00, based on the unreported long-term capital gain from the condemnation award. Based on the audit change, the Division computed petitioners' New York State taxable income as $933,329.00 and computed additional New York State and New York City personal income taxes due in the amounts of $63,152.66 and $41,168.67, respectively. The statement, in addition to interest calculated due on the corrected tax liability, also asserted two types of penalties against petitioners for (i) deficiency due to negligence under Tax Law § 685(b) and (ii) substantial understatement of liability under Tax Law § 685(p).

24. On November 2, 1998, the Division issued to petitioners a Notice of Deficiency (Notice number L-015742367-5) setting forth additional New York State and New York City income taxes due for 1992 of $104,321.33, plus $44,287.67 in penalties and $53,063.46 in interest for a current balance due of $201,672.46.

25. Petitioners filed a request for a conciliation conference and by Conciliation Order (CMS No. 171616) dated February 25, 2000, the conferee sustained the tax plus interest and canceled the penalties.

26. Petitioners then filed a petition with the Division of Tax Appeals challenging the assessment of the additional New York State and New York City personal income taxes for 1992. In their petition, petitioners asserted, among other things, that replacement properties were purchased with a portion of the condemnation award and therefore the amount of the long-term capital gain recognized in 1992 should be reduced.

27. On June 29, 2000, the Division served its answer to Petitioners. On June 30, 2000, the Division served a Demand for Bill of Particulars on petitioners. In the demand, the Division

requested, among other things, the exact address of the property claimed to have been purchased as replacement property with a portion of the condemnation award and the exact date and purchase price of that replacement property.

28. In response to the Division's Demand for a Bill of Particulars, petitioners served a Bill of Particulars dated July 14, 2000. The Bill of Particulars included copies of the deed for 457 Blake Avenue, Brooklyn, New York dated March 26, 1993, and the contract for sale for 970-1000 Stanley Avenue, Brooklyn, New York, dated April 1998.

29. Based on information received regarding the purchase of 457 Blake Avenue, the Division issued a Statement of Personal Income Tax Audit Changes, dated October 24, 2000, which deducted the $110,000.00 purchase price for Blake Avenue from the amount of long-term capital gain computed at audit. Based on the recalculation, the Division determined the amount of the long-term capital gain to be recognized in 1992 to be $686,422.00 and determined New York State and New York City income taxes to be due in the amount of $54,672.94 and $30,432.00, respectively, for a total amount due in the amount of $85,607.13.

30. During the hearing, petitioners presented testimony concerning the purchase of another replacement property within the three-year time frame allowed under IRC § 1033(g)(4), 895 Liberty Avenue (the ambulance garage property). After receiving permission to do so, petitioners submitted the deed for 895 Liberty Avenue dated September 22, 1992 which was received into evidence.

31. After reviewing the deed for 895 Liberty Avenue and verifying that the purchase price was $200,000.00, the Division accepted the purchase of that property as replacement property to partially offset petitioners' gain, and again recalculated petitioners' long-term gain and the amount of tax due. Based on the recalculation, the Division has determined that petitioners'

adjusted long-term capital gain (after deducting the costs for both the Blake Avenue and the Liberty Avenue properties) is $486,422.00. Based on the adjusted long-term capital gain, the New York State and New York City income taxes due are $38,922.94 and $22,014.19, respectively, for a total amount due of $60,937.00, plus interest.

32. The Division submitted proposed findings of fact numbered "1" through "14". Of these, the following proposed findings of fact are, in substance, accepted and have been incorporated into the record herein: "1" through "6", "8" through "12" and "14". Proposed finding of fact "7" (***see,*** Finding of Fact "23") has been modified to reflect the correct date of the Division's issuance of a Statement of Personal Income Tax Audit Changes to petitioners. Proposed finding of fact "13" (***see***, Finding of Fact "28") has been modified to more accurately identify the documents that were included with the Bill of Particulars.

CONCLUSIONS OF LAW

A. IRC § 1033 provides generally for the recognition of gain as a result of the involuntary conversion of property. Pursuant to IRC § 1033(a)(2)(A), a taxpayer who is subject to an involuntary conversion of property, such as a condemnation, may elect to postpone the recognition of gain realized from the conversion, if the taxpayer reinvests the amount realized from the conversion into replacement property "similar or related in service or use" to the converted property, within the time period specified by statute. IRC § 1033(a)(2)(B) specifies:

> (B) PERIOD WITHIN WHICH PROPERTY MUST BE REPLACED. — The period referred to in subparagraph (A) beginning with the date of the disposition of the converted property, . . . and ending —
>
> (i) 2 years after the close of the first taxable year in which any part of the gain upon the conversion is realized, or
>
> (ii) subject to such terms and conditions as may be specified by the Secretary, at the close of such later date as the Secretary may designate on

> application by the taxpayer. Such application shall be made at such time and in such manner as the Secretary may by regulations prescribe.

In the case of real property used in a trade or business, the taxpayer must replace the involuntarily converted property with property of a like kind to be used in a trade or business no later than three years after the close of the taxable year in which the taxpayer realized any part of the gain from the conversion (IRC § 1033[g][1], [4]). In the case of the conversion of real property held for productive use in trade or business, the application for an extension of time to purchase replacement property must be made to the IRS prior to the expiration of three years from the close of the first taxable year in which any part of the gain is realized, unless the taxpayer can show to the satisfaction of the district director of the IRS reasonable cause for not having filed the application within the required period of time, and that the filing of such application was made within a reasonable time after the expiration of the required period of time (Treas Reg § 1.1033[a]-2[c][3]). If only a portion of the gain realized from the involuntarily converted property is used to purchase replacement property within the allowed time period, the remainder of the realized gain is recognized in the year in which the gain was realized (IRC § 1033[a][2][A]).

B. The courts have consistently held that in order for a taxpayer to qualify for the nonrecognition provisions of IRC § 1033, the taxpayer must purchase replacement property within the time period set by the statute unless the IRS has granted an extension of time (***see, e.g., Marco S. Marinello Associates, Inc. v. Commissioner of Internal Revenue***, 34 TCM 392, ***affd*** 535 F2d 147, 76-1 US Tax Cas ¶ 9415; ***Fort Hamilton Manor, Inc. v. Commissioner of Internal Revenue,*** 445 F2d 879, 71-2 US Tax Cas ¶ 9531; ***R.A. Stewart & Co. v. Commissioner of Internal Revenue***, 57 TC 12; ***see also, Scolari v. Commissioner of Internal Revenue***, 497

F2d 962, 74-2 US Tax Cas ¶ 9500; ***Matter of Civetta,*** State Tax Commission, April 11, 1980; ***Matter of Colin***, State Tax Commission, February 8, 1979; ***Matter of Sia***, State Tax Commission, August 31, 1979).

In the instant matter, petitioners received the condemnation award in 1992. Since the involuntarily converted property was used in a trade or business, petitioners had three years, or until December 31, 1995, to reinvest the proceeds in compliance with the statute, or seek an extension of time under the regulations. Given that there is no evidence that petitioners applied for an extension of time to purchase replacement property, petitioners were required to reinvest the proceeds by December 31, 1995. The record establishes that petitioners purchased two properties within the three-year time period allowed by IRC § 1033(g)(4), the Blake Avenue property and the ambulance garage property (***see,*** Findings of Fact "8" and "12"). However, the amount of the gain realized from the condemnation of the Atlantic Avenue property exceeds the cost of both the Blake Avenue and the ambulance garage properties. Therefore, the gain from the condemnation award must be recognized to the extent that it exceeds the cost of the replacement property (IRC § 1033[a][2][A]).

As noted in Findings of Fact "29" and "31", the Division has recalculated the amount of the gain subject to tax, after deducting the purchase prices for the Blake Avenue property and the ambulance garage property, to be $486,422.00. Based on the adjusted long-term gain of $486,422.00, the total amount of New York State and New York City income taxes due for the year 1992 is $60,937.00.

C. Petitioners assert that the gain from the condemnation of the Atlantic Avenue property should not be taxable because they attempted to purchase additional replacement property, but were unable to do so through no fault of their own. They point out that they executed two

contracts of sale for the purchase of replacement properties owned by the City of New York; however, the City failed to sell either property to them. Petitioners' argument is without merit. In order to defer the recognition of the gain realized on the converted property, IRC § 1033 requires a taxpayer to purchase replacement property similar to the converted property within the statutory time period. Petitioners purchased two replacement properties, the Blake Avenue property and the ambulance garage property; however, the cost of those properties is less than the amount realized from the condemnation of the Atlantic Avenue property. At the hearing, Mrs. Vitucci explained that those two properties were purchased only to afford petitioners with locations on which to store some of the items that had to be removed from the Atlantic Avenue property, while they continued to look for a suitable piece of replacement property. The record clearly establishes that during the three-year statutory replacement period, 1993 through 1995, petitioners were presented with information about numerous available pieces of M-1 zoned property by representatives of the New York City Economic Development Corporation and commercial real estate agents, which properties petitioners rejected for a variety of reasons including size and cost. Petitioners chose to focus their search towards finding a single piece of property located in the Brooklyn area that was large enough to allow Mr. Vitucci to conduct his entire used truck sales business there. After a year of negotiations, the first contract of sale for City-owned land was submitted to Mr. Vitucci for execution on January 2, 1996 (***see,*** Finding of Fact "14"). However, that date is after the three-year time period within which petitioners could have reinvested the condemnation award. Moreover, even if the first contract of sale for City-owned land had been executed in 1995, it would not have satisfied the conditions of IRC § 1033 which requires the actual purchase of replacement property (***see, Fort Hamilton Manor, Inc. v. Commissioner, supra).*** The second contract of sale was not submitted by Mr. Vitucci to the City

until March 20, 1997, which date is long after the statutory time period allowed for the purchase of replacement property had expired (***see***, Finding of Fact "16"). While I can appreciate petitioners' desire to acquire a two-acre parcel like the Atlantic Avenue property and the great deal of effort that they expended in trying to achieve that goal, petitioners were required to be cognizant of the statutory time period allowed for replacement of the converted property and, if necessary, to apply for an extension of time to purchase the replacement property with the IRS. Petitioners failed to either purchase additional replacement property or apply for an extension of time to purchase such replacement property. Therefore, since petitioners failed to reinvest the full amount of the gain realized on the condemnation of the Atlantic Avenue property within the statutory time period, that realized gain must be recognized and subject to tax in 1992 to the extent that it exceeds the cost of the two replacement properties, Blake Avenue and the ambulance garage properties, discussed above (***see, Conclusion of Law "B"; see also,*** IRC § 1033[a][2][A]).

D. Petitioners argue that fairness dictates that the three-year replacement provision of IRC § 1033(a) should be tolled and that the Division should be equitably estopped from enforcing such provision. They are not relying on any act or misrepresentation by the Division to support their estoppel claim. Rather, they contend that, because of the actions of the City of New York in failing to assist them in purchasing replacement property, the Division should be estopped from strictly enforcing the three-year period to acquire replacement property. Petitioners assert that the City of New York induced them to rely on its promise to assist them to either find replacement property for the condemned property or to sell them City-owned replacement property. They argue that not only has the City of New York failed to live up to its promises, but, by inducing Mr. Vitucci to sign contracts of sale for City-owned property on two separate

occasions, neither of which were consummated, it has caused petitioners to wrongfully delay acquiring replacement property within the three-year period. Petitioners contend that their detrimental reasonable reliance on the City of New York is the sole cause of the delay and that they should not be punished for the negligent and wrongful acts of the City of New York. They claim that all elements of estoppel are met and the doctrine should be applied to toll the statute.

E. As a general rule, the doctrine of estoppel cannot be invoked against the State or its governmental units unless such exceptional facts exist as would require its application in order to avoid "manifest injustice" (***see, Matter of Wolfram v. Abbey***, 55 AD2d 700, 388 NYS2d 952, 954; ***Matter of Sheppard-Pollack, Inc. v. Tully***, 64 AD2d 296, 409 NYS2d 847, 849; ***see also, Matter of Moog, Inc. v. Tully***, 105 AD2d 982, 482 NYS2d 138, 139). This general rule is particularly applicable with respect to a taxing authority since sound public policy favors full and uninhibited enforcement of the tax laws (***Matter of Turner Construction Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78, 80). The doctrine as it applies to tax matters was concisely stated in ***Schuster v. Commissioner*** (312 F2d 311, 62-2 US Tax Cas ¶ 12,121). There, the Court, after recognizing that estoppel should be applied against the government with utmost caution and restraint, stated:

> It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context (***Schuster v. Commissioner, supra***, at 317).

The doctrine applies to positive acts as well as omissions when there was a demonstrated duty to act (***Boeckmann & Assocs. v. Board of Educ., Hempstead***, 207 AD2d 773, 616 NYS2d 395).

In ***Matter of Consolidated Rail Corp***. (Tax Appeals Tribunal, August 24, 1991, ***confirmed*** ***Matter of Consolidated Rail Corp. v. Tax Appeals Tribunal***, 231 AD2d 140, 660 NYS2d 459, ***appeal dismissed*** 91 NY2d 848, 667 NYS2d 683), the Tribunal, discussing the doctrine of estoppel, stated as follows:

> This Tribunal has embraced a three-part test to determine applicability of the doctrine to specific cases. We ask if petitioner had the right to rely on the Division's representation; whether, in fact, there was such a reliance; and whether such reliance was to the detriment of petitioner (***Matter of AGL Welding Supply Co.***, Tax Appeals Tribunal, May 11, 1995; ***Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988).

F. I do not conclude that petitioners will suffer a manifest injustice if the Division is allowed to enforce the statutory mandates of IRC § 1033 and require petitioners to recognize the gain from the involuntary conversion in 1992. There is no evidence that the Division made any representations to petitioners. Nor is there any evidence that the Division neglected to do an act which it was under a duty to perform. Petitioners assert that estoppel should apply to the Division for the alleged actions of the City of New York in allegedly failing to assist petitioners in purchasing replacement property. The Division of Tax Appeals does not have jurisdiction to determine whether the City's actions were inappropriate. Rather, that matter must be decided in a separate action in the appropriate court. The Division cannot be estopped from enforcing the statutory mandate of IRC § 1033 based on the alleged actions of the City of New York. Petitioners claim that, but for the actions of the City, they would not have to pay the tax. This claim is incorrect because the nonrecognition of gain permitted under IRC § 1033 merely defers current recognition. It is not a release of the tax liability, but merely a deferral. Recognition of the gain is merely deferred until the sale of the replacement property, the basis of which must be decreased to the extent that the gain is not recognized initially (***see, Feinberg v. Commissioner***,

377 F2d 21, 67-1 US Tax Cas ¶ 9413). Because petitioners did purchase two replacement properties, recognition of a portion of the gain realized on the condemnation of the Atlantic Avenue property has been deferred.

There being no facts to support a finding of "manifest injustice" (***Matter of Moog, Inc. v. Tully, supra***, at 139; ***see***, ***Matter of Rashbaum v. Tax Appeals Tribunal,*** 229 AD2d 723, 725, 645 NYS2d 175, 176) the doctrine of estoppel may not be applied against the Division (***Matter of AGL Welding Supply Company, Inc. v. Commissioner of Taxation and Finance***, 238 AD2d 734, 656 NYS2d 502, 504, ***lv denied*** 90 NY2d 808, 664 NYS2d 270).

G. Since petitioners failed to purchase replacement property for the full extent of the gain realized on the condemnation of the Atlantic Avenue property by December 31, 1995, the nonrecognition provisions of IRC § 1033 are unavailable to them, and the realized gain, to the extent that it exceeds the cost of the replacement properties, is taxable in the year 1992.

H. The petition of Dominick and Carol Vitucci is granted to the extent indicated in Conclusion of Law "B"; the Division of Taxation is directed to modify the Notice of Deficiency accordingly; but in all other respects the petition is denied.

DATED: Troy, New York
August 23, 2001

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE