STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
B. V. BROOKS, BROOKS, TORREY & SCOTT, INC. RAINBOW CAPITAL, INC. WESTBROOK, INC., AND WESTFAIR, INC.	:	DECISION DTA Nos. 808653, 808654, 808655, 808657 and 808658
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners B. V. Brooks, Brooks, Torrey & Scott, Inc., Rainbow Capital, Inc., Westbrook, Inc. and Westfair, Inc., c/o Michael D. Blaymore, Esq., 97 Powerhouse Road, Suite 102, Roslyn Heights, New York 11577 filed an exception to the determination of the Administrative Law Judge issued on January 23, 1992 with respect to their petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law. Petitioners appeared by Howard M. Koff, P.C. (Howard M. Koff, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief in response. Oral argument, requested by petitioners, was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners' transfers of 77 unimproved residential lots in a residential subdivision were properly aggregated by the Division of Taxation and subjected to gains tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "8," "9" and "11" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner Brooks, Torrey & Scott, Inc. ("BT & S") was incorporated on January 16, 1943, under the name Brooks, Inc., in the State of Connecticut. The name of the corporation was later changed to its present name. This corporation is engaged in business as a real estate broker, owner and manager. For several years prior to 1981, all of the stock in this corporation was owned by petitioner B. V. Brooks. However, in or about 1981, B. V. Brooks changed the stock ownership of BT & S such that he owned 28 of the 100 issued and outstanding shares of stock, with the balance of such stock owned in equal amounts (24 shares each) by each of petitioner B. V. Brooks' children, Torrey Brooks, Scott Brooks and Wendy Brooks.

Petitioner Westfair, Inc. ("Westfair") was incorporated on May 12, 1942 under the laws of the State of Connecticut. This corporation is engaged in the business of owning and operating commercial real estate. For several years prior to 1981, its stock was owned entirely by petitioner B. V. Brooks. In or about 1981, the stock ownership of this corporation was changed such that B. V. Brooks owned 9 shares of the 30 issued and outstanding shares of Westfair, with the balance of such stock owned in equal amounts (seven shares each) by each of petitioner B. V. Brooks' three above-named children.

Petitioner Westbrook, Inc. ("Westbrook") was incorporated on January 18, 1952, under the name of Weitbrook, Inc., in the State of Connecticut. The corporation's name was changed to Westbrook, Inc. on March 5, 1984. This corporation is engaged primarily in owning and operating real estate and in operating a travel agency. Prior to 1981, the stock of Westbrook was owned entirely by petitioner B. V. Brooks. However, in or about 1981, the stock ownership was changed such that petitioner B. V. Brooks retained ownership of 27.5% of the issued and outstanding shares of stock, with the balance of such stock owned equally (24.17%

of such stock) by each of petitioner B. V. Brooks' three above-named children.

Petitioner Rainbow Capital, Inc. ("Rainbow") was incorporated on November 27, 1968, under the name of Rainbow Operating Corp., in the State of New York. The name of the corporation was changed to Rainbow Capital, Inc. on June 13, 1984. This corporation was described as being maintained as an available corporation for future use. At all times, petitioner B. V. Brooks has owned 100% of the stock of this corporation.

Petitioner B. V. Brooks has been involved in the real estate business, in one respect or another, since approximately 1949. He has, in addition, pursued other ventures, including investment counselling and business consulting. Petitioner B. V. Brooks' father was a real estate developer, and petitioner B. V. Brooks was involved in the real estate business with his father. All of the corporations involved in this matter were, at one time, owned by petitioner B. V. Brooks' father. As part of his estate plan, petitioner B. V. Brooks has arranged for the stock he owns in each of the corporations to be transferred upon his death to his three children Torrey, Scott, and Wendy.

At all times relevant hereto, petitioner B. V. Brooks has held the office of president of each of the corporate petitioners. He was not, however, the only person authorized to sign checks or execute leases or other documents on behalf of the corporations.

The property whose transfer is at issue in this proceeding consisted of all of the lots in a subdivision known as Stuyvesant Manor Park, located in South Setauket, Suffolk County, New York. This subdivision consisted of a total of 92 individual lots, each of which was residentially zoned. At the time of transfer, none of these lots was improved with residences.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> Eighty-three of the lots in the subdivision were initially acquired by a corporation known as Mardex Homes, Ltd. on December 19, 1967, with the remaining nine lots in the subdivision acquired by petitioner B. V. Brooks (individually) on April 30, 1968. Thereafter, in June 1971, certain lots were transferred to Audrey Brooks, as well as to Rainbow and to Westfair. The purpose of these

> conveyances was to "checkerboard" the lots in the subdivision; that is to place any contiguous lots in single and separate ownership (leaving no adjoining lots in common ownership) thereby preserving rights to develop the lots under then-existing zoning rules and avoiding any subsequent up-zoning which might reduce the number of homes which could be built. After such checkerboarding, none (or at least very few) of the lots having common boundaries were owned by the same person or entity. Petitioner B. V. Brooks testified that such checkerboarding was undertaken upon the advice of petitioners' attorney.
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> Mardex also sold 33 lots to BT & S for $428,610.00 and 13 lots to Westbrook for $167,428.00 on or about November 15, 1976. The stated purpose of these transactions was to raise capital.[1]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> Upon the liquidation of Mardex Homes in 1981, its remaining 36 lots were transferred to B. V. Brooks. Prior to the transfer at issue herein, Mr. Brooks made charitable contributions of several lots in the subdivision to Dartmouth College and to Deerfield Academy. In December 1986, several lots were exchanged between B. V. Brooks, BT & S and Westbrook, allegedly for the purpose of taking advantage of favorable income
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> tax rates for 1986. These transfers occurred approximately one month after petitioners had contracted to sell all the parcels in the subdivision (see, infra). Income tax returns were not submitted, nor was it otherwise indicated which person or entity(s) benefited from the favorable income tax rates. One additional lot was transferred, on September 19, 1980, from Westbrook to one Roy A. Foulke, Jr., a long-time family friend of petitioner B. V. Brooks.[2]

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[1] Finding of fact "8" was modified by the addition of the last paragraph describing the 1976 sales by Mardex.

[2] Finding of fact "9" of the Administrative Law Judge's determination originally stated:

> "Upon the liquidation of Mardex Homes in 1981, its remaining 36 lots were transferred to B. V. Brooks, its sole shareholder. Prior to the transfer at issue herein, Mr. Brooks made charitable contributions of several lots in the subdivision to Dartmouth College and to Deerfield Academy. In December 1986, several lots were exchanged between B. V. Brooks, BT & S and Westbrook, allegedly for the purpose of taking advantage of favorable income tax rates for 1986. Income tax returns were not submitted nor was it otherwise indicated which person or entity(s) benefited from the favorable income tax rates. One additional lot was transferred, on September 19, 1980, from Westbrook to one Roy A. Foulke, Jr., a long-time family friend of petitioner B. V. Brooks.

This fact was modified because the record does not contain a detailed description of the relationship between B. V. Brooks and Mardex. This fact was further modified to show that the December 1986 transfers of lots occurred subsequent to the contract to sell all the parcels.

With respect to the 1986 transfers between B. V. Brooks, BT & S and Westbrook, transferor and transferee questionnaires were submitted to the Division of Taxation (hereinafter the "Division") as required under Tax Law Article 31-B ("gains tax"). In connection with these questionnaires, a Statement of No Tax Due was requested (and was apparently issued) upon the position that "consideration was under $1 million" and that "the transfers represent a mere change of identity". An affidavit accompanying these questionnaires, made by petitioner B. V. Brooks and dated December 17, 1986, provides as follows:

> "These are not taxable transfers in that this is a mere change of ownership although the parties in interest are the same, namely, sole stockholder of a corporation changing lots with himself individually."

When this affidavit was presented to Mr. Brooks at hearing, he testified that he had never been the sole stockholder of BT & S, and that statements to that effect on the December 17, 1986 affidavit apparently were made in error.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> On or about November 5, 1986, a contract was entered into between B. V. Brooks, Westbrook, BT & S, Westfair, Rainbow, Torrey Brooks, Audrey Brooks, Dartmouth College, Deerfield Academy, Torrey Brooks c/o California Footwear, Inc. and Roy A. Foulke, Jr., as transferors (sellers), and John and Salvatore Chiarelli, as transferees (purchasers). This contract was for the sale of all 92 lots in the Stuyvesant Manor Park subdivision from the described transferors to the Chiarellis. This contract was executed by B. V. Brooks for himself and for all of the corporations, and also by B. V. Brooks for Torrey Brooks as attorney in fact. The contract was executed for each of the other transferors by one Leonard E. Nedlin, attorney in fact. It is noted that one real estate broker was utilized to find a buyer for all of the lots sold, and that one contract was used for the transaction. The brokerage agreement was signed on behalf of all of the corporations by petitioner B. V. Brooks.[3]

On or about November 5, 1987, the transaction closed and the 92 lots were transferred. The transferors' ownership interests were listed as follows:

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[3] Finding of fact "11" was modified to add Torrey Brooks c/o California Footwear, Inc. to the list of transferors in the contract.

Number of Lots	Owner
29	B. V. Brooks
20	Brooks, Torrey & Scott, Inc.
4	Westfair, Inc.
5	Torrey Brooks
13	Westbrook, Inc.
6	Rainbow Capital, Inc.
77 Lots	

The balance of lots were owned by Roy Foulke, Dartmouth College and Deerfield Academy.

While the contract of sale originally provided for payment to be made in part by a purchase money mortgage, the transaction actually closed with full payment made in cash. The $3,000,000.00 purchase price paid by the Chiarellis was apportioned to each transferor based upon dividing $3,000,000.00 by the number of lots sold. B. V. Brooks was the sales proceeds disbursing agent on behalf of each of the transferors. Mr. Brooks noted in testimony that the reason he signed the contract on behalf of all of the corporations was because "we had a requirement that an officer of the corporation sign this document and I was an officer. It was a convenient way to do it." Mr. Brooks added this same explanation for the use of one contract of sale and one broker (i.e., that it was "strictly a matter of convenience"). All of the subject corporations have a common address, to wit, 136 Main Street, Westport, Connecticut.

Initially, the Division treated the transfer of all 92 lots as properly subject to aggregation and gains tax was imposed on such basis. Thereafter, upon submission of proof to the Division of Taxation that Deerfield Academy and Dartmouth College were exempt organizations and that Roy Foulke was an unrelated party, the Division excised the lots sold by these persons from the aggregated total. Furthermore, as the result of information provided at a prehearing conciliation conference, the Division eliminated from inclusion the lots transferred by Torrey Brooks. Finally, petitioners provided additional substantiation for certain costs claimed as part of the original purchase price for the premises, resulting ultimately in partial refunds authorized for all petitioners except Westfair. A reallocation of original purchase price among the transferors resulted in a deficiency of $2,577.38 being assessed against Westfair. Petitioners herein seek cancellation of such deficiency against Westfair, and a refund of gains tax with

respect to the other petitioners.

Petitioner B. V. Brooks explained the decision-making process within the various corporations as involving joint decisions made after discussion among the four shareholders, noting that he was not the sole decision maker for any of the corporations. In the same fashion, Torrey Brooks testified that he was an officer of the corporate petitioners and was involved with their operation. He testified that "when an investment opportunity would come up it would be discussed, the pros and cons would be evaluated, and a decision would be made." With respect to the transfers in question, Torrey Brooks testified that:

> "these lots had been sitting around in Long Island for many years, and the market picked up, and the opportunity came to sell them, and I added my opinion that it was a good idea to sell them to raise the money to put into projects closer to home."

Regarding the involvement of petitioner B. V. Brooks' other children (Scott and Wendy), their participation in decision making was described by petitioner B. V. Brooks as essentially talking with them on the phone about the major things proposed to be done.

Petitioners offered in evidence leases, extensions thereto and other documents signed by, among others, Carolyn Fletcher, Rita Hopsicker, Scott Brooks and Torrey Brooks. These documents were offered for the stated purpose of showing that persons other than B. V. Brooks executed documents on behalf of the corporations. It is noted that many of such signatures were affixed after the date of the subject transfer.

On January 14, 1982, a restrictive agreement of stockholders was executed relative to each of the three corporations BT & S, Westfair and Westbrook. The stockholders in each corporation were petitioner B. V. Brooks, Torrey Brooks, Scott Brooks and Wendy Brooks. The purpose of the restrictive agreements, as expressed on the second page of each of such agreements, was as follows:

> "Whereas the stockholders and corporation believe it to be in the best interest of all parties hereto [i.e., B. V. Brooks, Torrey Brooks, Scott Brooks and Wendy Brooks] that the stock of the corporation which has, since its organization, been owned and controlled by one or more members of the Brooks family, remain under such ownership and control; and desire hereby to make provisions, in furtherance of such status..." (emphasis added).

On each such agreement, petitioner B. V. Brooks is listed as a resident of Riverside,

Connecticut, Torrey Brooks is listed as a resident of Willowby Hills, Ohio, and Scott Brooks and Wendy Brooks are listed as residents of San Francisco, California. Petitioner B. V. Brooks and Torrey Brooks testified at hearing to being residents of Connecticut as of the date of the transfers at issue herein. The specific whereabouts of Scott Brooks and Wendy Brooks as of the date of the subject transfers was not indicated at hearing.

OPINION

The Administrative Law Judge determined that the transferors, though separate entities, could not be considered separate and independent with respect to the transfers at issue. This decision was based upon the facts, which indicated a common purpose. The Administrative Law Judge found that the facts did not establish any independence between the entities nor any separation between petitioners.

On exception, petitioners assert that a plain reading of 20 NYCRR 590.43(b) dictates that petitioners are entitled to a refund. Alternatively, petitioners state that, pursuant to the "look through" principle, Torrey, Scott, and Wendy Brooks' interests in the entities at issue should be aggregated at the shareholder level, rather than at the entity level. This would result in each of their interests in the subject entities being less than $1,000,000.00 and, therefore, exempt.

In response, the Division relies on the determination of the Administrative Law Judge and its post-hearing brief. Further, the Division states that aggregation is proper at either the shareholder or entity level, and that petitioners have misinterpreted the holding in Matter of Howes (Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 552 NYS2d 972) in their attempt to support their assertion that aggregation at the shareholder level should result in an exemption.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1441 imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. Tax Law § 1443(1) provides that a partial or total exemption shall be allowed if the consideration is less than $1,000,000.00. As a general rule,

statutes which provide for exemptions from tax must be strictly construed, and the taxpayer must clearly demonstrate that it is entitled to the exemption (see, Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158).

The term "transfer of real property" is defined in Tax Law § 1440(7) which provides, in part, as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale . . ." (emphasis added).

The third sentence of Tax Law § 1440(7), the "aggregation clause," provides:

> "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).

The aggregation clause affects the application of the $1,000,000.00 exemption because the proceeds from the transfers that are treated as a single transfer are aggregated to determine the applicability of the exemption.

However, the aggregation clause is not applied in certain situations (see, 20 NYCRR 590.42 and 590.43). Petitioners assert that the facts of this case warrant a granting of their refund request based upon a literal reading of 20 NYCRR 590.43(b). This regulation provides, in relevant part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
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> * * *
>
> "(b) Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?
>
> "Answer: The consideration is not aggregated, even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors."

Petitioners argue that since one individual and four separate corporations are the transferors, the transaction is within the regulations and is not subject to aggregation. Petitioners' application of the regulation fails to take into account a major feature of the gains tax: that the focus of the gains tax is to look through entities to determine the beneficial ownership of real property (see, Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Howes, supra). The principle of focusing on the economic reality of the transaction has also been accepted 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 our view, the purpose behind 20 NYCRR 590.43(b) is to clarify that aggregation of contiguous or adjacent lots owned by separate and distinct transferors is not warranted merely because such lots were sold to a single transferee. However, where contiguous properties are beneficially owned by the same individual through wholly owned corporations (see, Matter of 307 McKibbon St. Realty Corp., supra), or where one transferor is controlling the acts of another transferor, such transferors are not separate transferors and are not intended to be treated as such by the regulations. To interpret the regulations as petitioners urge would provide a loophole which would effectively nullify the gains tax law. Petitioners' literal reading of 20 NYCRR 590.43(b) would allow a taxpayer to avoid the gains tax by transferring parcels of property to a corporation or corporations he controls, and then have these entities transfer the property to the intended transferee. Each transfer could be designed to fall below the $1,000,000.00 threshold, and would be insulated from aggregation by 20 NYCRR 590.43(b). Obviously, this was not the intent behind the gains tax law or the regulations.

Based on this analysis, we reject petitioners' interpretation of 20 NYCRR 590.43(b) and conclude that aggregation is not avoided here simply because four entities and one individual made the transfers. Instead, we believe that the question is properly resolved based on the relations among the beneficial owners of the property.

Looking first at the relationship between B. V. Brooks and Rainbow, it is clear that the transfers by these transferors should be aggregated because B. V. Brooks owned 100% of Rainbow (Tr., p. 46; see, Matter of 307 McKibbon St. Realty Corp., supra).

With respect to the relationship of B. V. Brooks to the other transferors, the facts presented in this record lead us to conclude that B. V. Brooks was also the controlling force behind them. Several factors support this conclusion. First, B. V. Brooks and his children Torrey, Scott, and Wendy are the shareholders of Westfair (Tr., pp. 21-22), BT & S (Tr., p. 30), and Westbrook (Tr., p. 39). Although a family relationship between transferors may not necessarily, by itself, be grounds for aggregation, it does suggest that one party may be controlling the others. In addition, B. V. Brooks owned a larger share of each of the corporations than did any one of the children.

Second, we note the lack of documentation concerning the ownership of Mardex Homes, Inc. (hereinafter "Mardex"), the original party to own the parcels in this subdivision (see, Tr., p. 61; Exhibit "25," request for refund). Unlike the other corporations relevant to the transaction, we do not know who the shareholders and officers of Mardex were or how the corporate decisions of Mardex were made. What we do know about Mardex is that it purchased 83 lots in the subdivision in 1967; that it conveyed several of the lots to Rainbow and Westfair in 1971 to checkerboard the subdivision; that it made additional transfers in 1976; and that it was liquidated in 1981. At the time of liquidation, Mardex's remaining 36 lots were transferred to B. V. Brooks (Exhibit "25").[4]

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[4] The affidavit accompanying petitioners' request for refund contains the following statements regarding Mardex:

> "B. V. Brooks, being duly sworn, deposes and says:
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> "Concerning the various lots in Stuyvesant Manor Park Section I and II (which lots were owned by different individuals and entities):
>
> "1. Approximately 83 of the lots were purchased on or about December 19, 1967 by Mardex Homes Inc. ("Mardex"). . . .
>
> "2. On or about 1969/1970 Mardex sold 4 lots in arm's length sales to four unrelated parties.

Absent contradictory evidence, we consider it reasonable to interpret the transfer of 36 parcels to B. V. Brooks at the time of Mardex's liquidation as demonstrating that B. V. Brooks had a controlling, if not complete, interest in Mardex. Further, there is no evidence, nor even an allegation, that the 1971 "checkerboard" transfers made by Mardex, which was apparently under the control of B. V. Brooks, were supported by consideration. The stated purpose of the checkerboarding was to prevent upzoning. There has been no assertion that the transfer of ownership to the corporate petitioners was also a relinquishment of control by B. V. Brooks; rather, it was simply to protect the subdivision from a potential change in the zoning laws.

Third, concerning the December 1986 transfers immediately preceding the sales at issue, there are significant discrepancies between the affidavit accompanying petitioners' request for refund (Exhibit "25") and the affidavits accompanying transferor/transferee questionnaires filed by petitioners (Exhibits "23" and "24"). These discrepancies make it impossible to determine what parcels were transferred and when. The affidavit accompanying the request for refund states:

> "B. V. Brooks, being duly sworn, deposes and says:
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> * * *
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> "8. On or about December 12, 1986 B. V. Brooks and Brooks Torrey & Scott, Inc. exchanged various lots for $1,033,333 (less a brokerage commission of $68,889). On the same day, in an arm's length transaction, Brooks Torrey & Scott, Inc. sold two lots to Westbrook, Inc. for $56,000. Also on the same day, in an arm's length

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> "3. On or about June of 1971 Mardex conveyed title to certain lots to Audrey S. Brooks, Rainbow Operating Corp. and Westfair Inc. . . .
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> "4. Thereafter, on or about November 15, 1976, in an arm's length transaction 33 lots were sold by Mardex to Brooks Torrey and Scott Inc. for $428,610 and an additional 13 lots were sold to Westbrook Inc. for $167,428. . . .
>
> "5. On or about February 1981 Mardex Homes Inc. was liquidated and its remaining 36 lots were transferred to B. V. Brooks" (Exhibit "25").

This affidavit is flawed on its face. The transfers made in paragraphs 2, 4, and 5 result in a total of 86 parcels transferred, not including the unknown number of lots transferred in paragraph 3. This number exceeds the 83 lots that were purchased by Mardex, as stated in paragraph 1.

> transaction, Westbrook, Inc. exchanged 12 lots for 12 other lots (seven with Brooks Torrey & Scott, Inc. and five with B. V. Brooks) for a selling price of $400,000 . . ." (Exhibit "25").

In contrast, the four affidavits accompanying the transferee/transferor questionnaires describe the December 1986 transfers in the following manner:

> "B. V. Brooks, being duly sworn deposes and says:
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> "I am selling to a corporation [BT & S] of which I am sole stockholder the attached referred to lots for a consideration of $33,333.33 per lot or a total of $633,333.27 for the sale of 19 lots. In addition, I am transferring 1 lot to Westfair, Inc., of which I am the sole stockholder" (Exhibit "24," affidavit dated December 17, 1986 attached to BT & S's transferee questionnaire).
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> and
>
> "B. V. Brooks, being duly sworn deposes and says:
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> "I am the president and sole stockholder of Brooks, Torrey & Scott Inc., the corporation which is selling to me the attached referred to lots for a consideration of $33,333.33 per lot or a total of $833,333.25 for the sale of 25 lots. In addition, I am transferring 1 lot to Westfair, Inc., of which I am the sole stockholder" (Exhibit "24," affidavit dated December 17, 1986 attached to B. V. Brooks' transferee questionnaire).

Each transferee/transferor affidavit contained the following closing paragraph:

> "These are not taxable transfers in that this is a mere change in ownership although the parties in interest are the same, namely, sole stockholder of a corporation changing lots with himself individually" (Exhibits "23" and "24").

At the hearing, B. V. Brooks denied being the sole shareholder of either BT & S or Westfair (Tr., pp. 70-71), and this denial is supported by the evidence offered by petitioners (see, Exhibits "3," "4," "8," and "9"). However, even if factually incorrect, the statement that he was the sole shareholder, made contemporaneous to the transfers, is relevant as to what B. V. Brooks' view of the situation was at the time the transfers were made.

Finally, the events surrounding the sale of the parcels offer further support that B. V. Brooks was the motivating and controlling force behind the deal. Specifically: one contract was

used to effectuate the sale of 92 parcels owned by 11 transferors[5] to one transferee (Exhibit "19," Tr., p. 48); B. V. Brooks signed the sales contract on behalf of himself, BT & S, Westbrook, Rainbow, Westfair, and Torrey Brooks (Exhibit "19," Tr., pp. 48-49); one check was written as payment by the transferees (Tr., p. 51); and B. V. Brooks acted as disbursing agent for all the transferors (Tr., pp. 50-51). B. V. Brooks dismisses these items as shortcuts taken for "convenience" (Tr., pp. 49-51). However, we consider them relevant when making a determination as to whether he was the controlling factor in the transferors' sales.

In sum, based upon the affidavits and the actions surrounding the transfers, it appears that the transfers of the parcels were under the guidance and control of B. V. Brooks: (1) he was the apparent sole or controlling shareholder of Mardex, which at one point owned almost all of the parcels in question (at that time the remaining subdivision parcels were owned by Mr. Brooks, individually); (2) he held 100% interest in Rainbow; (3) he and his three children were the only shareholders of the other corporate petitioners, his interest in each corporate petitioner was greater than any one of his children's interests, and the affidavits filed contemporaneous to the December 1986 transfers contain statements by B. V. Brooks that he is the sole shareholder of BT & S and Westfair; (4) the checkerboarding of the parcels was solely to avoid upzoning, and there is no evidence suggesting that B. V. Brooks intended to relinquish control of the parcels; (5) the affidavits describing the various transfers of parcels between the parties contain inaccuracies and inconsistencies which demonstrate a lack of independence among the parties; and (6) one contract was executed for the sales by all the corporate petitioners, with B. V. Brooks signing for all the corporations and acting as the disbursing agent for the proceeds from the sale, which were paid by the transferees to the transferors with one check.

As an alternative argument, petitioners assert that under the "look through" principle, aggregation should be applied at the shareholder level rather than at the entity level. Specifically, petitioners state that Torrey, Scott, and Wendy Brooks' percentage interests in the

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[5]The 11 transferors listed on the contract are: (1) B. V. Brooks, individually; (2) Westbrook; (3) BT & S; (4) Rainbow; (5) Trustees of Dartmouth College; (6) Audrey Brooks; (7) Torrey Brooks, individually; (8) Westfair; (9) Roy A. Foulke, Jr.; (10) Deerfield Academy; and (11) Torrey Brooks c/o California Footwear, Inc. (Exhibit "19").

corporate petitioners reflect their percentage interests in the proceeds received by the corporate petitioners in conjunction with the sale, and that since their respective interests in the proceeds received by the entities is less than $1,000,000.00, no liability should be imposed. In support of their position, petitioners cite to Matter of Howes (supra).

We disagree. Our decision that the transfers should be aggregated rests on the conclusion that the transferors are not separate because B. V. Brooks was the controlling force in all of them. In effect, we have concluded that B. V. Brooks held the beneficial interest in all of the property owned by petitioners. To exempt the transfers based on the apparent ownership of the children would be inconsistent with this conclusion. In Matter of Howes (supra), the issue of the taxpayer's control over the other transferors was not raised; therefore, we believe that that decision is not dispositive of this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of B. V. Brooks, Brooks, Torrey & Scott, Inc., Rainbow Capital, Inc., Westbrook, Inc. and Westfair, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of B. V. Brooks, Brooks, Torrey & Scott, Inc., Rainbow Capital, Inc., Westbrook, Inc. and Westfair, Inc. is denied and the Division of Taxation's denial of petitioners' refund claim is sustained.

DATED: Troy, New York
September 24, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner