

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANDREA RICH	:	DECISION
AS TRUSTEE FOR HOWARD RICH TRUST	:	DTA No. 808977
	:	
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.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on April 1, 1993 with respect to the petition of Andrea Rich, as Trustee for Howard Rich Trust, 73 Spring Street, Suite 507, New York, New York 10012. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel). Petitioner appeared by Hutton & Solomon, Esqs. (Kenneth I. Moore, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a brief in opposition. Oral argument was heard on December 2, 1993 which began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether the sales of two contiguous parcels of real property to two separate transferees each involving a sales price under \$1,000,000.00 were "partial or successive transfers" pursuant to a "plan or agreement" and should be treated as a single transfer under the aggregation clause of Tax Law § 1440(7).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Howard Rich, petitioner's husband, acquired the two contiguous parcels of property known as 932 Amsterdam Avenue ("932 Amsterdam") and 934 Amsterdam Avenue ("934 Amsterdam", also known as 200 West 106th Street), the sales of which are the subject of this controversy, in November 1970. Both properties were improved by apartment buildings containing rental units. 932 Amsterdam was comprised of units in a "railroad layout", which was described as an apartment layout where a person must go from one room into another and into a third as opposed to entering rooms from a hallway. 934 Amsterdam, however, was described as a walk-up apartment building with a standard box layout, i.e., the rooms of the apartment were entered from a hallway. The properties shared a common boundary line and, originally, had one boiler servicing both buildings. As part of the subsequent sale of 932 Amsterdam, a separate boiler was installed. The buildings had separate entrances and no passageways. There was a separate electric service in each building and the properties were taxed separately. The properties were acquired from the same seller in 1970 and one superintendent managed both. 932 Amsterdam had commercial space in which a laundromat was operated on a ground floor. 934 Amsterdam had two commercial store units operating in that building. The remaining units in each of the two buildings were residential apartments.

The two properties described herein, as well as five other unrelated parcels, were transferred to a trust established by Mr. Rich in 1978. Mr. Rich had created an irrevocable trust for the benefit of his two sons, with his wife Andrea Rich designated as trustee. Both Howard and Andrea Rich managed the properties on behalf of the trust.

In 1986, with the Tax Reform Act of 1986 playing a major role, Howard and Andrea Rich determined that numerous properties owned by the trust should be sold and took appropriate steps to do so. Of the nine properties then held by the trust, seven of such properties were sold

between August and December 1986. Among those was 934 Amsterdam (also known as 200 West 106th Street). All of the properties sold were placed on the market during the summer of 1986, including 934 Amsterdam. 932 Amsterdam was not listed with brokers at that time.

On August 28, 1986, Andrea Rich on behalf of the trust contracted to sell 934 Amsterdam to 22nd Floor Purchasing Corp. for \$832,000.00. 22nd Floor Purchasing Corp. assigned the contract of sale to Mendel-Borg Group, Inc., who had already assigned its right, title and interest as purchaser under the contract to 200 West Associates, a New York limited partnership. Pursuant to such assignments, title was ultimately conveyed from petitioner to 200 West Associates on December 18, 1986 with Friedman Roth Realty acting as broker of the sale.

Petitioner filed a New York State Real Property Transfer Gains Tax Transferor Questionnaire reporting gross consideration for the transfer of 934 Amsterdam at \$832,000.00 and claimed an exemption from real property gains tax under Tax Law § 1443(1) since the consideration was less than \$1,000,000.00. The Division of Taxation ("Division") issued Form TP-585, a Statement of No Tax Due dated November 25, 1986, acknowledging receipt of real property gains tax questionnaires from the transferor and transferee and indicating no real property transfer gains tax due.

Both Andrea and Howard Rich provided testimony in this matter. They established the fact that 932 Amsterdam was in the nature of "railroad flats" and considerably less marketable than a building with conventional box-type apartment units. They described the location of the units in what is now referred to as Manhattan Valley, an area whose properties were increasing in value. Mr. Rich had indicated that he gave serious consideration to renovating 932 Amsterdam in order to generate higher rents in an area where the demand was growing at a rapid pace. His intention during the summer of 1986 was to retain 932 Amsterdam, and he and Mrs. Rich testified to numerous steps taken to support such intention. Petitioner and Mr. Rich visited other buildings in the area that had been similarly renovated on at least two occasions. Mr. Rich testified that the renovation he viewed at 951 and 953 Amsterdam provided him with a great deal of information and was identical to a plan that he had in mind to effectuate his renovation

project. Subsequently, Mr. Rich retained architects who evaluated the renovation with a slightly different set of plans. Introduced into evidence were the preliminary drawings and an estimate of construction costs that would be incurred in renovating the building located at 932 Amsterdam prepared by Knafo & Associates, a firm of architects, builders and designers, on October 17, 1986. Mr. Rich testified as to having paid Knafo & Associates several hundred dollars for such services. The cover letter correspondence dated October 17, 1986, which sets forth information regarding the renovation proposal and cost structure, states the following in its closing: "Let me know your decision so that we can proceed with preparing a set of plans." This correspondence was directed to the attention of Marion Williams.

During their period of ownership of numerous properties, Mr. and Mrs. Rich employed a managing agent, Marion Williams, for assistance in the management of the properties. Marion Williams owned her own management company during these years and for some period of time it was referred to as H. R. Management and during another period of time it was called Westside Management. Her role was to collect rents, schedule repairs and handle the expenditures for the property, ensuring petitioner that the property was operating smoothly. For her role in managing all of the trust properties, she was paid a management fee.

On November 6, 1986, petitioner received a detailed analysis of the proposed renovation of 932 Amsterdam by Marion Williams. Introduced into evidence was a four-page document which was identified as the informal correspondence submitted to Mr. Rich by Marion Williams which provided her analysis of the plans for renovation and her ideas on the project. Petitioner introduced an affidavit of Marion Williams and it reiterated many of the facts that have been established thus far, i.e., that she was the managing agent for 932 Amsterdam until the building was later sold in June 1987, and that she also managed 934 Amsterdam until its sale at the end of 1986. She established by her affidavit that there was a plan in place to "rehab" 932 Amsterdam floor by floor as apartments became vacant, and that unlike 934 Amsterdam, which was in excellent condition, 932 Amsterdam was in very poor condition. She confirmed the fact that preliminary drawings and an estimate were prepared by Knafo & Associates and that she

thereafter prepared an analysis of the rehab. She stated that in late December 1986 Mr. Rich told her that his intentions on the rehab concept had become negative and that, in January 1987, she received an offer for 932 Amsterdam and prepared a complete real estate listing, having received the offer.

Mr. Rich testified that after analyzing the cost estimates and reviewing Marion Williams' report he and Mrs. Rich realized that the risk in renovating the property was too great and could not be economically justified. It was only at that time that Mr. and Mrs. Rich considered selling the property. Prior thereto it was not listed with a broker or "on the market". Mr. Rich testified that petitioner had received inquiries about selling 932 Amsterdam previously from brokers and from the purchasers of 934 Amsterdam. All were advised that the property was not for sale and that it was their intention to retain the building for renovation. Selwyn Roth, president of Friedman Roth Realty, was the broker in the sale of 934 Amsterdam. An affidavit of Mr. Roth indicating that he inquired whether 932 Amsterdam would also be placed on the market for sale at the time he listed 934 Amsterdam was introduced into evidence. Mr. Roth indicated that Mr. Rich clearly expressed an intention that the trust was planning to renovate the building and would therefore not be selling it. Mr. Roth indicated by his affidavit that he was not given a listing on 932 Amsterdam until he had a substantial offer which he brought to the trust, unsolicited by it. He also testified upon information and belief that the parties to these transactions (Mendel-Borg, Friedland-Weinberg and Dr. Henry Lieberman) are unrelated to each other.

In January 1987, an offer to buy 932 Amsterdam was made to petitioner and a contract of sale dated February 5, 1987 was entered into between petitioner and 932 Realty Associates. A copy of the contract for the sale of 932 Amsterdam at a price of \$575,000.00 was introduced into evidence. The contract was thereafter assigned by 932 Realty Associates to Harr Realty Corp.

Two additional affidavits were provided by parties involved in the two transactions in issue. Abe Mendel of Mendel-Borg Group, Inc. issued an affidavit swearing to the fact that he is a partner in 200 West Associates and did not then own or ever own an interest in the property

known as 932 Amsterdam; nor was he a party to a contract for the purchase of the same. He indicated that he had no business relationship regarding 932 Amsterdam with Joseph Friedland, Joel Weinberg or 932 Realty Associates. He stated that at the time he negotiated the purchase of 934 Amsterdam through Friedman Roth Realty, he inquired about the availability of 932 Amsterdam and was told that the building was not for sale as there were plans to renovate it. In a conversation directly with Mr. Rich, he also inquired about the availability of 932 Amsterdam and was informed likewise. He stated he is not in any way related to Dr. Henry Lieberman or Harr Realty Corp.

The second affidavit provided was that of Henry Lieberman, president of Harr Realty Corp. Mr. Lieberman indicated that Harr Realty Corp. purchased the contract for 932 Amsterdam in June 1987 from Joseph Friedland and Joel Weinberg. He stated that he was not in any way connected to the principals of 934 Amsterdam, does not now own or nor did he ever own any part of 934 Amsterdam, and he never had a contract to purchase such property.

Petitioner filed the New York State Real Property Transfer Gains Tax Transferor Questionnaire reporting gross consideration for the transfer of 932 Amsterdam at \$575,000.00 and claimed an exemption pursuant to Tax Law § 1443(1) since the consideration was less than \$1,000,000.00. Questionnaires related to the subsequent assignment were thereafter filed accompanied by the assignment agreement. The Division issued a Tentative Assessment and Return in this matter dated April 7, 1987 showing no tax due on the transfer of 932 Amsterdam.

The Division issued a Statement of Proposed Audit Adjustment dated June 12, 1989 which indicated that the Division had reviewed the real property transfer gains tax questionnaires received for the sale of properties located at 932 and 934 Amsterdam. The Division determined that such sales constituted the transfer of contiguous parcels and was a taxable transaction. The computation of gains tax due, plus penalty and interest, was as follows:

Consideration	\$1,407,000.00	
Less: Brokerage	-0-	
O.P.P. (no documentation)	-0-	
	<u>\$1,407,000.00</u> x 10% =	\$140,700.00
Penalty & Interest Penalty 5/5/87-7/31/89 = 35% x \$140,700.00 =		49,245.00
Interest 299 @ 7.5		<u>29,980.98</u>
365 @ 8.9		
<u>153</u> @ 10.2		
817		
		\$219,925.98

A more detailed explanation was provided in correspondence attached to the Statement of Proposed Audit Adjustment and is reproduced below:

"On April 2, 1987 and November 12, 1986, questionnaire forms and supporting documentation were filed with our office to report the transfer of the above properties to 932 Realty Associates & 200 West Associates pursuant to Article 31-B of the Tax Law, Real Property Transfer Gains Tax.

"On the questionnaire forms filed, an exemption was claimed under Section 1443.1 of the Tax Law; consideration is less than a million dollars.

"Section 1440.7 of the Tax Law provides in part that the transfer of real property will include partial or successive transfers. Sections 590.42 and 590.43 of the Gains Tax Regulations provide that the separate deed transfers of contiguous or adjacent properties is, for the purposes of the Gains Tax, a single transfer of real property. To determine the application of the one million dollar exemption, the consideration for each transfer is to be aggregated. However, if the transferor can establish 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 would not be aggregated.

"A review of our records has revealed that the above properties are contiguous or adjacent to each other. The parcels were sold by you for \$575,000.00 and \$832,000.00. When the consideration received from each transfer is aggregated the total consideration exceeds one million dollars, and therefore, the gain derived from each transfer is subject to Gains Tax.

"The exemption claimed on the transfer of both properties has to be denied. We have enclosed Statements of Proposed Audit Adjustment, which show how we computed your Real Property Transfer Gains Tax liability, which was based on information available in your file at that time."

The Division thereafter issued a Notice of Determination dated August 1, 1989 assessing tax due in the amount of \$140,700.00, plus penalty and interest of \$49,245.00 and \$29,505.61, respectively, for a total amount due of \$219,450.61.¹

Mrs. Rich, as trustee and transferor of the properties in question, provided an affidavit confirming many of the facts established herein and, in addition, stated:

"[T]he transfer of 934 Amsterdam Avenue in December, 1986, and the transfer of 932 Amsterdam Avenue in June, 1987, were not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be subject to the tax imposed by Article 31-B of the Tax Law."

The Division introduced into evidence a subpoena duces tecum which it had issued to Friedman Roth Realty Corp., dated January 22, 1992, requesting that the company produce:

"all listing agreements, correspondence and any other written documentation or records [of] any kind or nature, including computer records, relating to property now or formerly owned by the Howard Rich Trust(s), including, but not limited to, the premises known as 200 West 106th Street (a/k/a 934 Amsterdam Avenue) and 932 Amsterdam Avenue, City, County and State of New York."

The result of the subpoena duces tecum was the production of three folder files and numerous documents contained therein. A sworn statement contained in correspondence which accompanied the folders dated January 31, 1992 by Selwyn Roth of Friedman Roth Realty Corp. to the Division's attorneys stated, in pertinent part:

"In the regular course of business it is our practice to stamp the upper left corner of each folder (normally in red) to indicate the salesperson and date that the information is received. The initials you see in all of them is J.W. (Joyce Warshauer)."

The first folder file was that pertaining to 932 Amsterdam. On the inside of the folder file in the upper left corner was a red stamp indicating places to initial and date portions of the transaction. Under the owner's name it states "Howie". In the address section beneath the name is a number

¹The only difference between the Notice of Determination and the Statement of Proposed Audit Adjustment is reflected in the calculation of interest.

which appears to be a telephone number, "9258992". Under two sections which indicate "terms if any" and "listed by" the initials "J.W." appear. Across from "terms if any", where there is no indication that a date is to be provided, the date January 12, 1987 appears. Across from the initials where "listed by" appears is the date "10-8-86". Throughout the folder file are numerous dates, numbers, names, telephone numbers and notes for which no explanation was provided. Contained in the folder file were five documents which are described below.

(1) The first document was on the letterhead of H. R. Management. It was essentially a fact sheet of 932 Amsterdam indicating a brief description of the building and its layout, a price of \$675,000.00 and a listing of rent and operating expenses, among other items. The document was not dated.

(2) The second document is handwritten indicating much of the same information as listed on the management company's statement. However, this appears on the letterhead of Friedman Roth Realty Corp. and was not dated.

(3) The third document was also on the letterhead of Friedman Roth Realty Corp. It is dated January 30, 1987, refers to the premises of 932 Amsterdam, gives seller and purchaser information and states a price of \$575,000.00. It also provides some mortgage information, a contract appointment and what appears to be a proposed closing date.

(4) The fourth document is a brokerage agreement which refers to Andrea Rich as trustee and the premises located at 932 Amsterdam. The brokerage agreement is dated February 5, 1987 and indicates that Andrea Rich, as trustee and seller, is acknowledging the agreement with respect to the brokerage commission to be paid to Friedman Roth Realty Corp. in the sum of \$14,375.00. In pertinent part, by her signature, petitioner:

"acknowledges that no agreement of purchase and sale has been entered into as of the execution of this brokerage agreement, and that you have requested that this brokerage agreement be entered into before negotiations continue which may result in the execution of a formal agreement of purchase and sale."

(5) The fifth document in the file is a handwritten page of notes from a notepad. It bears a date of February 5, 1987, although it is unclear that the same was the date of preparation. No explanation was provided for any of the notes or the figures contained thereon.

The second folder file provided as the result of the subpoena duces tecum was one referring to 200 West 106th Street (also known as 934 Amsterdam). On the inside of the folder it contained the same red stamp in which the following information was provided: the owner was listed as "Howie Rich"; in the address section beneath the name is a number which appears to be a telephone number, "9258992"; beneath such information, in the section which refers to "listed by", the initials "J.W." appear; across from such initials is "7-17-86". Contained in the file are two documents.

(1) The first is a two-page document on the letterhead of H. R. Management indicating a location, description, rent expenses, etc. of 934 Amsterdam. The price is stated at \$1,250,000.00. This document bears no date.

(2) The second document, dated December 10, 1986, is addressed to Andrea Rich, as trustee, and references 934 Amsterdam. It is a bill for services rendered in the amount of \$9,000.00 from Friedman Roth Realty Corp.

Also within this folder are numerous dates, dollar amounts, messages, names, and other notes which, without further explanation, are indecipherable.

The third folder provided by Friedman Roth Realty Corp. pursuant to the subpoena duces tecum is unmarked; however, the five pieces of correspondence contained therein all refer in some way to 2330 Crotona Avenue, Bronx, New York. In the left-hand side of the folder there is a red stamped box and it indicates that the owner is Howie Rich with a telephone number. Under the "listed by" section, the name "P. Fogel" appears. Across from such name is a date of "12/24/62". Underneath such information is a column "checked by" under which the initials "J.W." appear. Across from her initials is the date "8-1-86". Contained within the file are numerous documents referring to 2330 Crotona Avenue in the Bronx, all of which speak to a

potential closing during 1986 of this property. Since the sale of this property is not in issue, additional information on the documents contained therein will not be provided. Additionally, this folder contains handwritten notes and references to names and dollar amounts for which no further explanation has been provided.

The Division questioned Mr. Rich on one of the documents in the folder for 932 Amsterdam. The Division's attorney referred to a document as the "listing agreement" and asked Mr. Rich if he was familiar with the agreement. Mr. Rich indicated that he was fairly certain Marion Williams had prepared it and that it was probably the information that had been sent to the broker for the purpose of placing the building on the market. Mr. Rich was questioned as to whether he remembered when the information was provided to the real estate broker. Mr. Rich provided the following testimony:

"My guess is, and I'm pretty sure of this, that this information was given to him early on. See, this building [932 Amsterdam], plus 204-10 West 108th were buildings that I decided to test waters in the market as part of the decision making process on this [932] building. So I know it wasn't in the summer and I know it wasn't in December, so it was somewhere in between."

Mr. Rich had also indicated in previous testimony that he often used properties to "test the market" for the purpose of determining what properties are worth, having no actual intention of selling them.

Ultimately, 932 Amsterdam was reacquired by the Howard Rich Trust. Mr. Rich testified that the trust had taken back a second mortgage on the property from the purchasers and subsequently they were unable to meet the mortgage obligation. Rather than going through foreclosure proceedings, a deed in lieu of foreclosure was executed. The transaction took place during 1990 and the documents supporting the reacquisition were submitted into evidence by petitioner.

OPINION

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

The term "transfer of real property" is defined broadly to include the "transfer or transfers of any interest in real property by any method, including but not limited to sale" (Tax Law § 1440[7]).

The third sentence of section 1440(7), the "aggregation clause," provides:

"[t]ransfer 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 . . ."
(Tax Law § 1440[7]).

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, as the statute indicates, the aggregation clause is not applied in certain instances. The Division's regulations, thus, provide that consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee is, as a general matter, added together for purposes of applying the \$1,000,000.00 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 (20 NYCRR 590.42). With regard to transfers by one transferor to more than one transferee, the Division's regulation, 20 NYCRR 590.43, provides, in part, as follows:

"Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:

"(a) One transferor, more than one transferee, contiguous or adjacent parcels of land?

"Answer: When the sales are pursuant to a plan or agreement, the consideration for each parcel is to be aggregated in determining whether the consideration is \$1 million or more.

"A transferor may furnish, along with his questionnaire, a sworn statement that the sales are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of article 31-B.

"Whether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated" (20 NYCRR 590.43).

The Administrative Law Judge determined that all the facts and circumstances surrounding the transfers show that there was no plan or agreement to effectuate by partial or successive transfers, a transfer of property which would otherwise be included in the coverage of the gains tax. Specifically, the Administrative Law Judge found that:

"[p]etitioner and her husband provided credible, unequivocal testimony that, at the time the contract of sale for 934 Amsterdam was signed, petitioner did not intend or have a plan to dispose of both properties. The statement of their intent with regard to the properties in issue was further supported with documentary evidence which, though spanning a brief number of months, clearly establishes their primary and initial intent to renovate the property. The fact that 932 Amsterdam was ultimately sold seven months later is not a determinative factor. The testimony by Mr. and Mrs. Rich established that the parcels were different in layout and design and their values were obviously very different as was established by testimony and is evidenced by their sales prices. The investigation done by Mr. and Mrs. Rich with regard to the renovation of similar properties located near their units, in addition to architectural drawings and financial analysis, could only lead to the conclusion that petitioner did not initially anticipate disposing of 932 Amsterdam. While 934 Amsterdam was being marketed by a broker, inquiries and unsolicited offers for the purchase of 932 Amsterdam were being made. Numerous individuals were informed that the plan for 932 Amsterdam was renovation and not sale, and affidavits attesting to such facts were provided" (Determination, conclusion of law D," emphasis added).

The Administrative Law Judge rejected the Division's assertion that intent is determined at the time of the transfer of the property. Referring to Matter of General Builders Corp. (Tax

Appeals Tribunal, December 24, 1992), she stated that "the Tribunal clearly held that the determination of whether petitioner had a plan to dispose of parcels must be made at the time of the signing of the contract" (Determination, conclusion of law "E").

On exception, the Division asserts that: 1) the burden of proof is on petitioner to show that aggregation is not proper; 2) petitioner has failed to demonstrate that the transfers of 932 and 934 Amsterdam Avenue were not pursuant to an agreement or plan to effectuate by partial or successive transfers, a transfer of real property which would otherwise be subject to the tax; and 3) the Administrative Law Judge misconstrues General Builders and that the literal language of the Division's regulations indicates clearly that intent is to be determined at the time of each transfer.

The Division asserts that the proof offered by petitioner with regard to the renovation plans is insufficient to buttress her statement of intent because she received

"a handwritten analysis from their property manager (Exh. 1) for which they paid nothing (T 70) and they received some plans from an architect (Pet. 5) for which they paid less than one thousand dollars (T 71). No permits were obtained which would be required before renovation work could be started (T 71). These actions do not establish that the Petitioner had a renovation plan to the exclusion of a plan to sell the property along with several other properties sold. Mr. Rich even testified that he did not have all his 'duc[k]s in place' to do the renovation (T 72)" (Division's brief, p. 7).

The Division also asserts that the Broker's folder established that: "information necessary to list the property was sent to the Broker on October 8, 1986 . . . [and that] certain notations in the Broker's folder show that negotiations were taking place in 1986 and that there were efforts to close the transaction by the end of 1986, before the effective date of the Tax Reform Act of 1986" (Division's brief, p. 8). The Division also asserts that:

"[t]here is no proof in the record other than the self-serving testimony of the witnesses at the hearing that the listing of the property was done only to 'test the market.' What makes the 'testing the market' argument all the more difficult to accept is the fact that if all the Petitioner wanted to do was determine the fair market value of the property, all it needed to do was procure an

appraisal. There would be no need to list the property with a broker" (Division's brief, p. 9).

Finally, the Division asserts that:

"[s]ince the overriding plan here was the maximization and preservation of the trust assets, notwithstanding any of Petitioner's arguments to the contrary, the transfer of 932 Amsterdam Avenue was made pursuant to a plan or agreement. The plan or agreement is the Trust itself" (Division's brief, p. 9).

On exception, petitioner asserts that the determination of the Administrative Law Judge is correct in all respects.

The Administrative Law Judge concluded, in essence, that the "credible, unequivocal testimony" of petitioner and her husband, coupled with their documentary evidence, was sufficient to show that there was no plan or agreement to effectuate by partial or successive transfers, a transfer which would otherwise be included in the coverage of the gains tax. We find no reason to modify or alter the determination of the Administrative Law Judge and we affirm for the reasons stated therein. However, we find it necessary to specifically reject the Division's assertion that the transferor's intent is determined at the time of the actual transfer of the property. Carried to its logical end, the Division's argument would result in all transfers of contiguous or adjacent properties being aggregated solely because they were transferred. As we stated in Matter of General Builders (*supra*):

"[this] argument that this is enough to constitute a plan under the gains tax results in the consideration from these two parcels being aggregated only because they happened to be adjacent to each other, and because they were both sold. This interpretation would irrefutably presume the existence of a plan whenever contiguous or adjacent properties are sold. If this is what the Legislature intended, the exception to aggregation for transfers not pursuant to an agreement or plan need not have been included in the statute."

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Andrea Rich as Trustee for Howard Rich Trust is granted; and

4. The Notice of Determination dated August 1, 1989 is cancelled.

DATED: Troy, New York
May 12, 1994

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

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