STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **FULTON ASSOCIATES** 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.	:	DECISION DTA Nos. 809679 and 809680
In the Matter of the Petition of **JOSEPH M. MATTONE AND THE ESTATE OF JAMES J. MANNIX** 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 and petitioners Fulton Associates, Joseph M. Mattone and the Estate of James J. Mannix, c/o Mattone, Megna and Todd, Suite 240, 2171 Jericho Turnpike, Commack, New York 11725, each filed an exception to the determination of the Administrative Law Judge issued on December 30, 1993. Petitioners appeared by Mattone, Megna and Todd (Philip W. Megna, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Each party filed a brief in support of their exception and in opposition to the other party's exception. Petitioners filed a reply brief. Oral argument was heard on November 17, 1994 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation properly denied five refund applications filed by

petitioners for gains tax paid by petitioners on five separate real property transfers, where petitioners contended they were entitled to an exemption pursuant to Tax Law § 1443(6), the grandfather exemption.

II. Whether the Division of Taxation agreed at the hearing that the issue of independent evidence confirming the claimed grandfather contracts was no longer in issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

Petitioner Fulton Associates was a joint venture between an entity known as FSB Properties, Inc., Joseph M. Mattone ("Mattone") and the Estate of James J. Mannix ("Mannix") which owned the real property known as 451 Lexington Avenue, New York, New York, 202 West 23rd Street, New York, New York, and 427 Fulton Street, Brooklyn, New York. Mannix and Mattone owned real property at 1557 Broadway, New York, New York and 50 West 33rd Street, New York, New York as tenants in common.[1]

On December 28, 1989,[2] Fulton Associates, Mattone and Mannix (collectively, the "claimants") sold all five of the properties to five separate Nevada corporations which were affiliated with the Horn and Hardart Company, 730 Fifth Avenue, New York. The properties and their sales prices were as follows:

Property	Sale Price	Transferor
202 West 23rd Street New York, New York	$1,784,500.00	Fulton Associates
427 Fulton Street Brooklyn, New York	4,305,500.00	Fulton Associates

[1]The Mannix and Mattone properties were governed by leases which recited "Man-Hard Realty Corp." as the landlord. Although there was no explanation of the change in title, no issue was raised regarding identity of ownership. Therefore, it is assumed that a proper assignment or transfer occurred.

[2]The actual closing date is uncertain. The evidence contains conflicting dates. However, the parties both aver that the closing date was December 28, 1989 and, for purposes of this determination, that is determined to have been the date of transfer.

451 Lexington Avenue New York, New York	4,422,000.00	Fulton Associates
50 West 33rd Street New York, New York	2,327,500.00	Mannix/Mattone
1557 Broadway New York, New York	7,525,500.00	Mannix/Mattone

Prior to the transfers of property, the claimants filed transferor questionnaires stating that the subject transfers of real property were exempt from tax pursuant to Tax Law § 1443(6), since they were pursuant to contracts entered into prior to March 28, 1983.

In response to these filings, the Division of Taxation ("Division") issued to the claimants schedules of adjustments which stated that the exemption from tax which had been claimed by the claimants pursuant to Tax Law § 1443(6) was denied. The Division issued five tentative assessments and returns, dated December 27, 1989, which set forth the amount of tax due for each transfer. The tentative assessments and returns included the following information:

Transferor	Property	Tax Due	Assessment Number
Fulton Associates	202 West 23rd Street	$116,880.98	A25340-1
Fulton Associates	427 Fulton Street	328,960.81	A25340-2
Fulton Associates	451 Lexington Avenue	331,231.85	A25340-5
Joseph M. Mattone/ Estate of James J. Mannix	1557 Broadway	611,346.29	A25340-4
Joseph M. Mattone/ Estate of James J. Mannix	50 West 33rd Street	163,019.77	A25340-3

Petitioners paid the real property gains tax as determined by the Division.

On February 6, 1990, claimants filed five claims for refund of real property transfer gains tax for each of the five transfers referred to above. The basis for the refund claims was that each of the transfers was made pursuant to an option agreement contained in each of the leases covering each of the five properties in issue which was entered into prior to the enactment of the gains tax on March 28, 1983. The refund claim numbers assigned by the Division, the amounts

claimed for each property, the property covered by each refund claim and the date of the lease containing the option agreement pursuant to which the exemption was claimed were as follows:

Refund Claim Number	Amount Claimed	By Whom	Property	Lease Date
R-1423	$116,880.98	Fulton Associates	202 West 23rd Street New York, New York	June 30, 1978
R-1424	328,960.81	Fulton Associates	427 Fulton Street Brooklyn, New York	March 11, 1977
R-1427	331,231.85	Fulton Associates	451 Lexington Avenue New York, New York	November 18, 1977
R-1425	163,019.77	Mannix/Mattone	50 West 33rd Street New York, New York	July 1, 1976
R-1426	611,346.29	Mannix/Mattone	1557 Broadway New York, New York	January 22, 1976

With each claim for refund of real property transfer gains tax, petitioners filed a copy of the lease covering the respective property being transferred.

(a) With regard to refund claim number R-1423 which covered the premises at 202 West 23rd Street, New York, New York, the option to purchase was contained in a lease between Fulton Associates, a joint venture consisting of FSB Properties, Inc. and James J. Mannix and Joseph M. Mattone, as landlord, and the Horn and Hardart Company, as tenant. This lease, dated June 30, 1978, included a section entitled "Tenant's Option to Purchase Premises", Section 29. Said section stated as follows:

> "The Tenant is given the option to purchase the property described herein any time after the expiration of the fifth year of the lease term on the following conditions:
>
> "(a) That such option to purchase shall be conditioned on the Tenant having theretofore exercised all options to renew the lease term which it could have exercised before exercising any option to purchase the premises.
>
> "(b) The possession by the Tenant of the premises shall, at no times, create any condition other than the possession of the property by the Tenant as tenant only, without any claim that the Tenant has become a vendee or purchaser in possession, even though Tenant may claim that Landlord is in default with respect to the option given to Tenant to purchase.
>
> "(c) The form of contract of sale shall be substantially as set forth in the form which is attached hereto, excepting that there will be no apportionment of any charges which are payable by Tenant under the terms of this lease other than prepaid rent and taxes.
>
> "(d) The price for the sale of the premises shall be the fair value of the

premises based on its then current use therefor, as of the date of title closing, and together with the notice to be sent to the owners of the premises exercising the option to purchase, there shall be sent to the owner of the premises the sum of $50,000.00 to be applied on account of the sales price thereof, to be held in escrow by the attorney for Landlord.

"(e) The sale of the premises shall be subject to the lease which may then affect the property, and the Tenant or Tenant's assignee or designee acquiring title shall take title subject to the unpaid balances of the principal of any mortgage or mortgages which may then affect the premises (interest on such mortgage on the fee title is to be apportioned to the date of title closing); to the fact that the lease was assigned to mortgagees as collateral security for the payment of any mortgage indebtedness; to U.C.C. certificates executed by any owner as debtor in favor of any mortgagee as secured party; to any conditions which the Tenant under the lease is obligated to perform; to any state of facts that an accurate survey may show; to covenants, restrictions and easements of record which may affect the premises; to zoning regulations and ordinances (including but not limited to landmark designations, if any) of the City or State; to the possible rights of tenants and occupants of said premises; to party walls or party wall agreements; to utility company easements of record; to taxes and charges imposed by any government authority in connection with the sale of the premises, other than income and franchise taxes; all such taxes (other than income and franchise taxes) shall be paid by purchaser at the time of title closing; the balance of the purchase price shall be paid by a good solvent bank or by good certified check drawn on a business bank transacting business in the City of New York, to the order of the seller or to the order of any other party or parties designated by seller in writing, such bank to be a member of the Clearing House.

"(f) The notice of election to exercise the option to purchase above referred to shall fix a closing date at the office of the Landlord, between the hours of 9 A.M. and 2 P.M. on a business day, and at least one hundred twenty (120) days notice of such closing date shall be given to Landlord, such notice or notices to be sent by registered or certified mail, return receipt requested.

"(g) If the parties cannot agree as to the fair value of the premises based on the then current use thereof, current as of the date of closing, same shall be determined by arbitration as provided in Section '31' hereof.

"(h) It is agreed, however, that if the option to purchase shall be exercised by Tenant anytime after the expiration of the fifth year of the lease term and the arbitrators shall determine that the fair value of the premises shall be less than $650,000.00 the sales price of the premises shall be $650,000.00 plus an increase equal to 10% of $650,000.00 for the sixth year of the lease term, irrespective of the determination of the arbitrators and after the sixth year of the lease term the following schedule shall apply:

"During the 7th year of the lease $650,000.00 plus 12%
During the 8th year of the lease $650,000.00 plus 14%
During the 9th year of the lease $650,000.00 plus 16%
During the 10th year of the lease $650,000.00 plus 18%
During the 11th year of the lease $650,000.00 plus 20%
During the 12th year of the lease $650,000.00 plus 22%
During the 13th year of the lease $650,000.00 plus 24%
During the 14th year of the lease $650,000.00 plus 26%

During the 15th year of the lease $650,000.00 plus 28%
During the 16th year of the lease term and thereafter
(including any renewal period) $650,000.00 plus 30%."

(b) With regard to refund claim number R-1427, which covered the premises at 451 Lexington Avenue, New York, New York, the option to purchase was contained in a lease between Fulton Associates, a joint venture consisting of FSB Properties, Inc. and James J. Mannix and Joseph M. Mattone, as landlord, and the Horn and Hardart Company, as tenant. The lease for said premises was dated November 18, 1977 and contained virtually identical language as the lease covering the premises at 202 West 23rd Street detailed in "(a)" above.

(c) With regard to refund claim number R-1424, which covered the premises at 427 Fulton Street, Brooklyn, New York, the option to purchase was contained in a lease between Fulton Associates, a joint venture consisting of FSB Properties, Inc. and 427 Fulton Street Realty Corp., as landlord, and the Horn and Hardart Company, as tenant. The lease for said premises was dated March 11, 1977 and contained virtually identical language as the lease covering the premises at 202 West 23rd Street detailed in "(a)" above, with the exception that the option was exercisable anytime after the first year of the lease term.

(d) With regard to refund claim number R-1426, which covered the premises at 1557 Broadway, New York, New York, the option to purchase was contained in a lease between Man-Hard Realty Corp., as landlord, and the Horn and Hardart Company, as tenant. The lease, dated January 22, 1976, included a section entitled "Tenant's Option to Purchase Premises", Section 29. Said section stated as follows:

"The Tenant is given the option to purchase the property described herein during the fifteenth (15th) year of the lease term and during the tenth (10th) year of each succeeding ten (10) year period of the lease term on the following conditions:

"(a) That such option to purchase shall be conditioned on the Tenant having theretofore exercised all options to renew the lease term which it could have exercised before exercising any option to purchase the premises.

"(b) The possession by the Tenant of the premises shall, at no times, create any condition other than the possession of the property by the Tenant as tenant

only, without any claim that the Tenant has become a vendee or purchaser in possession, even though Tenant may claim that for some reason or other Landlord is in default with respect to the option given to Tenant to purchase.

"(c) The form of contract of sale shall be substantially as set forth in the form which is attached hereto, excepting that there will be no apportionment of any charges which are payable by Tenant under the terms of this lease other than prepaid rent and taxes.

"(d) The price for the sale of the premises shall be the fair value of the premises based on its then current use therefor, as of the date of title closing, and together with the notice to be sent to the owners of the premises exercising the option to purchase, there shall be sent to the owner of the premises the sum of $50,000.00 to be applied on account of the sales price thereof, to be held in escrow by the attorney for Landlord.

"(c) [sic] The sale of the premises shall be subject to the lease which may then affect the property, and the Tenant or Tenant's assignee or designee acquiring title shall take title subject to the unpaid balances of the principal of any mortgage or mortgages which may then affect the premises (interest on such mortgage on the fee title is to be apportioned to the date of title closing), to the fact that the lease was assigned to mortgagees as collateral security for the payment of any mortgage indebtedness; to U.C.C. certificates executed by any owner as debtor in favor of any mortgagee as secured party; to any conditions which the Tenant under the lease is obligated to perform; to any state of facts that an accurate survey may show; to covenants, restrictions and easements of record which may affect the premises; to zoning regulations and ordinances (including but not limited to landmark designations, if any) of the City or State; to the possible rights of tenants and occupants of said premises; to party walls or party wall agreements, to utility company easements of record, to taxes and charges imposed by any government authority in connection with the sale of the premises, other than income and franchise taxes; all such taxes (other than income and franchise taxes) shall be paid by purchaser at the time of title closing; the balance of the purchase price shall be paid by a good solvent bank or by good certified check drawn on a business bank transacting business in the City of New York, to the order of the seller or to the order of any other party or parties designated by seller in writing, such bank to be a member of the Clearing House.

"(f) The notice of election to exercise the option to purchase above referred to shall fix a closing date at the office of the Landlord, between the hours of 9 A.M. and 2 P.M. on a business day, and at least sixty (60) days' notice of such closing date shall be given to then landlord of the premises, such notice or notices to be sent by registered or certified mail, return receipt requested.

"(f) [sic] If the parties cannot agree as to the fair value of the premises based on the then current use thereof, current as of the date of closing, same shall be determined by arbitration as provided in Section '31' hereof.

"(g) [sic] It is agreed, however, that if the option to purchase shall be exercised by Tenant during the first renewal term of this lease and the arbitrators shall determine that the fair value of the premises shall be less than $2,080,000.00, the sales price of the premises shall be $2,080,000.00, irrespective of the determination of the arbitrators, and if during each succeeding renewal term of this lease when the option to purchase may be exercised by Tenant the arbitrators shall

> determine that the fair value of the premises shall be less than $2,080,000.00 plus a ten (10%) per cent increase during each succeeding renewal term of this lease in effect when such option to purchase shall be exercised (each such increase of 10% dating from the sum stated during the preceding renewal term of this lease), then the sales price shall be $2,080,000.00 plus the 10% increases as stated in this subdivision, irrespective of the determination of the arbitrators."

(e) With regard to refund claim number R-1425, which covered the premises at 50 West 33rd Street, New York, New York, the option to purchase was contained in a lease between Man-Hard Realty Corp., as landlord, and the Horn and Hardart Company, as tenant. The lease for said premises was dated July 1, 1976[3] and contained virtually identical language as the lease covering the premises at 1557 Broadway detailed in "(d)" above.

Neither party contested the validity or enforceability of the lease agreements and there was no evidence that either party was in default thereunder.

On August 14, 1989, each of the lessees exercised its option to purchase its respective property at 202 West 23rd Street, New York, New York, 427 Fulton Street, Brooklyn, New York, 50 West 33rd Street, New York, New York, 1557 Broadway, New York, New York, and 451 Lexington Avenue, New York, New York. Each of the five letters was accompanied by a check in the sum of $50,000.00 issued by the Horn and Hardart Company for the benefit of its affiliates, which technically exercised the options.[4]

The tentative assessments issued by the Division rejected the claimants' contention that the transfers were exempt from gains tax due to the fact that the transfers were pursuant to options which were executed prior to the enactment of the gains tax. On the date all of the properties closed, the claimants paid the taxes set forth on the tentative assessments, as

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[3]It is noted that the recorded memorandum of lease and the recorded lease covering the premises at 50 West 33rd Street, New York, New York was dated July 1, 1976, while a copy of a lease contained in Exhibit "FF," the refund application, contains a lease for said premises which was dated September 4, 1975. It is noted that the provisions of Section 29, regarding when the option was to be exercisable, are the same in both leases.

[4]The affiliates mentioned were 1557 Broadway Leasing Corp., 451 Leasing Corp., HHBK, Inc., 427 Fulton Leasing Corp., all listing addresses in care of the Horn and Hardart Company of 730 Fifth Avenue, New York, New York. A letter included in Petitioners' Exhibit "1," from Kenneth Lee Raisch, Esq., to the Division, dated December 11, 1989, recited assignments from Horn and Hardart to "H.H.B.K." and second assignments to the entities mentioned above, the ultimate tenants that entered into the contracts for sale.

modified slightly by supplemental returns.

On November 2, 1989, Horn and Hardart Company sent a letter to Mr. Joseph M. Mattone which concerned the sale of all five properties and set forth the following:

> "This letter will constitute written confirmation of the agreement between us for the sale of the above properties to us ('Horn & Hardart') or our designees, consequent upon the exercise of the options to purchase contained in each of the leases therefor by each of the tenants thereunder (such tenants being our wholly owned subsidiaries). This letter shall supersede all prior agreements among us with respect to the sale of the above properties, other than the leases between you and us of such properties.
>
> "We understand that ownership of the above properties is as follows: 1557 Broadway and 50 West 33rd are owned equally by Joseph M. Mattone and the Estate of James J. Mannix as tenants in common. The remaining three are owned by Fulton Associates, a joint venture in which FSB Properties, Inc. has a 50% interest and Joseph Mattone and the Estate of James J. Mannix each has a 25% interest.
>
> "Five separate contracts will be executed for the acquisition of these properties between the respective sellers and us, the closing of each of which shall be conditioned on the closing of all contemporaneously. We have agreed that the fair market value to be paid for each property consequent upon our exercise of the options to purchase is as follows:

451 Lexington Avenue	$ 4,442,000.00
1557 Broadway	7,525,500.00
202 West 23rd Street	1,784,500.00
50 West 33rd Street	2,327,500.00
427 Fulton Street	4,305,500.00
Total	$20,365,000.00

> "At the option of some or all of the sellers, to be spelled out in the contracts, one or more of the transactions may take the form of a tax free exchange under Section 1031 of the Internal Revenue Code. We will cooperate to accomplish this, if practicable, provided that the closings will not be delayed and we will not be subject to any additional expense or liabilities. If a substitute exchange property or properties cannot be designated at the time the contracts are executed, the contracts will provide for a non-simultaneous exchange of properties to be designated at a later date.
>
> "The closing of title to all the properties will occur on or before December 31, 1989.
>
> "Each of us represents and the contracts will provide that no brokers are involved in the transaction and the contracts will contain cross-indemnifications to such effect.
>
> "All real property transfer taxes will be paid by the purchasers and gains taxes, if any, will be paid by the sellers.

"Our obligations to purchase the properties shall be subject to the review and approval of the status of title to each property by our counsel. The contracts will contain such other provisions as are customarily contained in contracts for sale and purchase of properties in the City of New York similar to these properties.

"The parties to this letter will instruct their attorneys to negotiate the contracts in accordance with the provisions hereof.

"If the foregoing sets forth your understanding, please sign and return a signed copy of this letter."

On December 8, 1989, Fulton Associates entered into three agreements to sell its properties at 202 West 23rd Street, New York, New York, 427 Fulton Street, Brooklyn, New York, and 451 Lexington Avenue, New York to 202 West 23rd Leasing Corp., 427 Fulton Leasing Corp., and 451 Leasing Corp., respectively. Also on December 8, 1989, Joseph M. Mattone and the Estate of James J. Mannix entered into agreements with 1557 Broadway Leasing Corp. and 50 West 33rd Leasing Corp. for the sale of the premises at 1557 Broadway, New York, New York, and 50 West 33rd Street, New York, New York, respectively. Pursuant to the terms of these agreements, they were executed pursuant to the options contained in the leases as set forth above. Further, each of the agreements referred to the $50,000.00 paid on the exercise of the option to purchase the premises, as provided for in the lease as part of the purchase price.

In fact, several sections of the purchase agreements recited language directly from the lease agreements, specifically that the sale of the premises would be subject to the lease which might then affect the property, and other encumbrances which might affect the title or value of the premises.

Paragraph 8(c) of each of the agreements stated that the contract was executed pursuant to the option contained in the lease and that gains tax was not expected to apply due to the provisions of Tax Law § 1443(6).

In May of 1988, the firm of Cushman & Wakefield, at the request of Horn and Hardart Company, prepared appraisals of the five properties in issue. The appraisals in issue take the form of five separate letters written between May 10 and May 24, 1988. Each of the letters had the same introductory paragraph which set forth the following:

"At your request, we have completed an appraisal of the real property named above. The appraisal states our opinion of Market Value of the Fee Simple Interest in the property, subject to the various Assumptions and Limiting Conditions described in the accompanying report. This appraisal assumes: (1) that the projected sale of the Leased Fee Interest to Horn and Hardart Properties Corp. is completed, and; (2) that the properties are appraised as if free and clear and leased at market as of July 1, 1988 to a multiple fast food operation. The physical inspection and analysis that formed the basis of this report have been conducted by John D. Busi under the supervision of Brian R. Corcoran, MAI, CRE."

The appraised values as of May 1988 for each of the properties was as follows:

Property	Appraised Value
202 West 23rd Street	$10,900,000.00
427 Fulton Street	18,000,000.00
451 Lexington Avenue	22,700,000.00
50 West 33rd Street	6,500,000.00
1557 Broadway	24,900,000.00

By five letters dated April 6, 1990, the Division denied each of the five claims for refund filed by claimants with regard to refund numbers R-1423, R-1424, R-1427, R-1425 and R-1426. Each of the five letters contain the same language regarding the basis for said denials. The letters stated, in part, as follows:

"The basis of the claim is that the transfer of the above real property was made pursuant to an option agreement entered into prior to March 28, 1983, and therefore, was exempt from gains tax under section 1443.6 of the Tax Law.

"Section 590.23 of the Gains Tax Regulations provide, in part, that the transfer of real property after March 28, 1983, when made pursuant to the exercise of a written option granted prior to March 29, 1983, is grandfathered and exempt from gains tax by reason of section 1443.6 of the Tax Law, providing that the option is in writing, is supported by consideration, includes all substantiated [sic] terms of the sale, and is evidenced by independent evidence as described for contracts in general.

"In New York State, the Statute of Frauds is applicable to options to purchase real property (Tobias v. Steinberg, 115 NYS2d 164). The Statute of Frauds provides that a contract for the sale of any real property or an interest therein is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing and subscribed, i.e., signed by the party to be charged or his lawful agent (General Obligations Law § 5-703). In order to satisfy the Statute of Frauds, the contract or memorandum must designate the parties, identify and describe the property and state all of the essential terms of a complete agreement (Sheehan v. Culotta, 99 AD2d 544). The Statute of Frauds requirements are the requirements included in the Gains Tax Regulations concerning the grandfathering of options.

"The option in question provides that the purchase price for the real property would be its fair value based on its then current use as agreed to by the parties or if they cannot agree, then as determined by finding [sic] arbitration.

> "The general rule under the Statute of Frauds is that a memorandum or writing which expressly refers to an essential term of the contract as one to be agreed on subsequently does not meet the requirements of the Statute of Frauds (Read v. Henzel, 67 AD2d 186). The purchase price to be paid for the real property is a material element of any contract of sale, and an agreement to agree on the purchase price at a future date is too indefinite to make the contract enforceable under the Statute of Frauds (In Re McVoy's Estate, 94 NYS2d 396).
>
> "Therefore, we have determined that the option agreement does not include all substantial terms of the sale and that the transfer of the real property on December 28, 1989, was not entitled to an exemption under section 1443.6 of the Tax Law. The refund claim . . . has to be denied in its entirety."

On May 3, 1990, claimants filed requests for conciliation conferences with the Bureau of Conciliation and Mediation Services ("BCMS"). Following a conciliation conference held on December 17, 1990, a Conciliation Order was issued sustaining the Division's denial of all five claims for refund.

On June 19, 1991, claimants filed two petitions with the Division of Tax Appeals appealing the decisions of the BCMS conferee with regard to the five denials of refund. The Division filed an answer to each of the two petitions 104 days later on October 1, 1991, wherein it stated that petitioners' refund claims had been denied because they did not qualify for the grandfather exemptions and that petitioners had not proven that they were entitled to said claimed exemptions.

In addition to the facts found by the Administrative Law Judge, we find the following:

At the hearing on this matter, the representative for petitioners stated:

> "There are certain areas which I will not address and that Mr. Glannon and I decided before the conference that the Department would cease to question, the validity of the transactions based on identities of the parties, so that I would not address that in my answer. And the Department seems to accept the fact that the contracts were, in fact, recorded and therefore the intent, evidence of the existence of the options, is clearly established" (Tr., p. 38).

The Division's representative responded:

> "That's correct. We wouldn't be challenging those items. We wouldn't be raising those arguments" (Tr., p. 38).

OPINION

Tax Law § 1443(6) establishes the grandfather exemption as follows:

> "Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax [commissioner]. A written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for the purposes of this subdivision."

The general application of the grandfather exemption is described at 20 NYCRR 590.21 as follows:

> "Question: How is the exemption described in section 1443(6) of the Tax Law applied?
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> "Answer: Section 1443(6) states that a total or partial exemption will be allowed:
>
> > 'Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission.'
>
> "The intent of the Legislature, in our judgment, was to exempt those contracts pursuant to which the parties, through some evidence external and in addition to the contracts, committed themselves to the transaction. The statute leaves discretion to the Commissioner of Taxation and Finance to determine what sort of independent evidence is acceptable. However, that discretion is to be guided by the two examples set forth in the law, namely the payment of a deposit or the recording of the contract.
>
> "Each of these statutory examples conveys a sense of binding action by the parties, above and beyond the signing of a contract. The exercise of discretion on the part of the department in this area is to be guided in a similar way."

The Division has applied the grandfather exemption to option contracts through the following question and answer at 20 NYCRR 590.24:

> "Question: If a written option contract to purchase real property was granted prior to March 29, 1983, is the transfer of real property pursuant to the exercise of the option after March 28, 1983, grandfathered and exempt from the tax by reason of section 1443(6) of the Tax Law?

> "Answer: Yes. The transfer of the real property is exempt under the grandfather provision, provided that the option is in writing, is supported by consideration, includes all substantial terms of the sale and is confirmed by independent evidence as described for contracts in general . . . If the optionee assigns the option prior to its exercise, the exercise of the option by the assignee will still be exempt pursuant to the grandfather clause, whether or not the assignor or assignee has use and possession of the realty.
>
> "The optionee/assignor may be subject to tax on the assignment, if the assignment occurred on or after September 4, 1984."

The Administrative Law Judge concluded that because the lease agreements containing the options were in writing, signed by the party to be charged (the lessor) and supported by consideration, the agreements satisfied the writing requirement of the statute of frauds. The Administrative Law Judge also concluded that the options satisfied the requirement of 20 NYCRR 590.24 that they contain all of the substantial terms of the sale.

On exception, the Division contends that the transfers were not made pursuant to binding contracts entered into before March 28, 1983, but were instead made pursuant to the five agreements to sell dated December 8, 1989. To support its position, the Division relies on the November 2, 1989 letter to petitioners from Horn & Hardart which stated "[t]his letter shall supersede all prior agreements among us with respect to the sale of the above properties, other than the leases between you and us of such properties."

We see no merit to the Division's contentions.

First, an option to purchase by its nature requires a subsequent contract between the parties if the option is exercised. Notwithstanding this circumstance, the Division adopted regulations (20 NYCRR 590.24) that specifically provide that an option to purchase can be a grandfathered contract. Thus, the fact that the parties executed contracts on December 8, 1989 to carry out the transfers of the properties is not in itself noteworthy.

Further, we do not agree with the Division's interpretation of the November 2, 1989 letter. Immediately before the sentence quoted by the Division, the letter states it "will constitute written confirmation of the agreement between us for the sale of the above properties . . . consequent upon the exercise of the options to purchase contained in each of the leases

therefor . . . ." Considered in its entirety, the letter does not suggest, as the Division contends, that the options to purchase had been set aside by the parties. Instead, the letter indicates that the exercise of the purchaser's rights under the options led to the November 2, 1989 letter and that the letter merely summarized the circumstances of the parties.

Nor do we think it fatal to petitioners' case that the November 2, 1989 letter states that the parties' attorneys will negotiate the contracts in accordance with the letter. The Division's regulation requires that the option contain the substantial terms of the sale; the regulation does not require that the option contain all of the terms of the sale.

The sale price is the only sale term identified by the Division as not being established by the options. The Administrative Law Judge noted that although the options did not set an explicit sales price, each one contained a method for calculating the purchase price,

> "which was to represent a 'fair value of the premise based upon its current use therefor' and if the parties could not arrive at such a fair value, then the price was to be determined by arbitration as set forth in another section of the lease agreement, with the proviso that any sales price set by an arbitrator would be subject to a minimum sales price provided for in each of the options" (Determination, conclusion of law "A").

In analyzing the effect of the absence of an explicit price the Administrative Law Judge relied on contract case law. Specifically, the Administrative Law Judge relied on the case of Martin Delicatessen v. Schumacher (52 NY2d 105, 436 NYS2d 247) for the proposition that the absence of an explicit term would not render a contract invalid if the agreement contained a methodology for determining the missing term or if the agreement invited recourse to an objective condition or standard to establish the missing term. In the instant case, the Administrative Law Judge concluded that "[t]he parties' agreement to be bound by the ultimate findings of the arbitration process provides a solid basis for finding that the parties herein intended to be bound by the option terms" (Determination, conclusion of law "A").

The Division's challenge to this conclusion of the Administrative Law Judge is simply that he incorrectly relied on contract cases and that none of the cases cited by the Administrative Law Judge dealt with the gains tax law and regulations.

The issue under the grandfather exemption is whether there is a binding agreement to sell real property (Matter of American Express Co. v. Tax Appeals Tribunal, 190 AD2d 104, 597 NYS2d 485, lv denied 82 NY2d 663, 610 NYS2d 151). In making this determination, it is appropriate to apply the principles of contract law developed and stated in the case law, whether or not these cases involved the gains tax (see, Matter of American Express Co. v. Tax Appeals Tribunal, supra; Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158). Therefore, we hold that the Administrative Law Judge correctly relied on contract case law and affirm his holding, for the reasons stated in the determination, that the options contained the substantial terms of the transfer.

Based on the above, we conclude that the transfers at issue were made pursuant to the options contained in the leases entered into prior to March 28, 1983.

The next issue before us is raised by petitioners. Petitioners contend that the Administrative Law Judge erred in considering whether there was sufficient independent evidence to confirm the execution of the options as required by section 1443(6) of the Tax Law. Petitioners argue that the Division's representative agreed at the hearing that the independent evidence was no longer in issue and that in reliance on this statement petitioners did not introduce proof on this issue. The agreement relied on by petitioners is recorded at page 38 of the hearing transcript and is set forth above in the findings of fact.

In response, the Division contends that it did not agree that the independent evidence was no longer an issue. In support of its position, the Division points to other statements in the record where 1) it generally stated that the transfers were not entitled to the grandfather exemption and 2) it conceded that the leases or memoranda of the leases were recorded. Two of the Division's general statements preceded the hearing and, thus, cannot be used to counter what could be explained as a subsequent change of position by the Division. The third general statement was made at the hearing as follows: "And then when you add in the third matter that this is an exemption and the taxpayer must show clear title to that exemption, I don't think that the taxpayer has met that burden that they were entitled to the grandfather exemption" (Tr.,

p. 34). This general statement was immediately followed by the exchange set forth in the facts where the Division specifically agreed to the statement by petitioners' representative that the evidence of the existence of the options was clearly established and would not be challenged by the Division. The only reasonable reading of these statements is that the second specific statement clarified and limited the general statement. The general statement cannot reasonably be read to negate the later, specific statement.

Further, we do not see that the Division's stipulation, at page 42 of the transcript, that the leases or lease memoranda were recorded in any way negates its earlier statement that it would not raise the independent evidence issue.

Therefore, we find that the Division agreed at the hearing that the independent evidence question was no longer an issue in the case and that the Administrative Law Judge erred in concluding that petitioners were required to submit proof on this issue (see, Matter of Howard Enterprises, Tax Appeals Tribunal, August 4, 1994; Matter of Angelico, Tax Appeals Tribunal, March 31, 1994 and Matter of Clark, Tax Appeals Tribunal, September 14, 1992 [where we held that that the petitioners could not be required to prove an issue that had not been raised by the Division prior to the close of the hearing]).[5]

The last issue before us is whether the Administrative Law Judge erred in holding that the purchase of the premises at 50 West 33rd Street was not pursuant to the option in the lease because the option was exercised earlier than the lease allowed.

Petitioners argue that this was merely a change in the timing of the sale and that under the Division's regulation this type of change is not substantial and will not cause the transfer to lose the benefit of the grandfather exemption. The Division did not respond to the arguments of petitioners on this point.

The Division's regulations on amendments of grandfathered contracts provide, in pertinent part, as follows:

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[5]The Division argued that petitioners should not be allowed to submit new evidence on exception concerning the independent evidence issue. The conclusion that the Division was bound by its agreement was not based upon the evidence in question; therefore, the fact that this evidence was not admissible (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991) is irrelevant.

> "Question: If a contract entered into on or before March 28, 1983 is amended after such date, will the contract continue to be exempt by reason of section 1443(6) of the Tax Law?
>
> "Answer: Yes. As long as the amendment is of a nonsubstantial nature. The determination of what constitutes a nonsubstantial change will be made on a case-by-case basis. However, any change in the amount of consideration for the real property automatically results in a transfer which is not pursuant to a written contract entered into on or before March 28, 1983, and thus such transfer is taxable.
>
> "Question: If the closing date provided for in a grandfathered contract is postponed, with additional payments by the purchaser, is the transfer of real property still exempt?
>
> "Answer: Yes, if it is shown that the additional payments do not constitute additional consideration as set forth in the question and answer on postponed closing dates" (20 NYCRR 590.22[a] and [b]).

Based on these regulations and the absence of any argument by the Division, we can only conclude that the change in the exercise date of the option was a nonsubstantial amendment of the option and that this amendment does not effect the application of the grandfather exemption to the transfer of 50 West 33rd Street.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Fulton Associates, Joseph M. Mattone and the Estate of James J. Mannix are granted;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above; and

4. The petitions of Fulton Associates, Joseph M. Mattone and the Estate of James J. Mannix are granted.

DATED: Troy, New York
May 11, 1995

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

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