STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALLAN V. ROSE	:	DECISION DTA No. 810234
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Allan V. Rose, One Executive Boulevard, Yonkers, New York 10701, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on April 29, 1993. Petitioner appeared by Vicki G. Cheikes, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Each party submitted a brief in support of their exception and in opposition to the other party's exception. In addition, petitioner submitted a reply brief. Oral argument was heard on January 5, 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 petitioner's original purchase price for certain real property should include the amount paid by a petitioner-controlled corporation to acquire from petitioner a part interest in the real property, which interest was subsequently transferred back to petitioner upon the controlled corporation's liquidation.

II. Whether petitioner has established sufficient basis to warrant abatement of penalties.

III. Whether the record in this matter should be reopened to allow for the submission of evidence with respect to brokerage commission payments made by petitioner subsequent to the hearing.

FINDINGS OF FACT

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

Petitioner, Allan V. Rose, has been involved since approximately 1960 in the real estate business. His activities have encompassed investment,development, construction, management and ownership of various properties, including purchasing tracts of land and building housing developments, shopping centers and offices.

On March 17, 1979, petitioner entered into a contract to purchase from Searingtown Corporation ("Searingtown") certain unimproved real property ("the property") located in the Village of North Hills, New York. As of the March 17, 1979 date of execution of the contract, the property was being used as a private 18-hole golf course and golf club. The contract purchase price for the property was $9,500,000.00. However, subsequent amendments to the contract, including purchase price changes both up and down, ultimately resulted in a $9,000,000.00 purchase price to be paid.

Petitioner's intent at the time of purchase was to build residential housing on the property. The contract provided that it was subject to the seller (Searingtown) being able to obtain a favorable tax ruling from the Internal Revenue Service with regard to the sale. In addition, petitioner was obligated, at his cost, to apply for a change of zoning so that the property could be used for a residential development.

In 1980, shortly after the contract was executed, the Village of North Hills enacted changes to its zoning regulations so as to reduce the allowable residential density for the property. By its action, the Village effectively reduced the number of residences which could be built on the property, therefore resulting in a reduction in the value of the property as a residential development. In response to this zoning action petitioner, together with Searingtown, commenced litigation against the Village. Petitioner believed that success in this litigation would result in a substantial increase to the value of the property.

At hearing, petitioner presented the testimony of one Robert Cheikes, Esq., regarding the subject property and certain income tax planning undertaken relative thereto. Mr. Cheikes had been petitioner's tax attorney since approximately 1961. He indicated that he knew of petitioner's contract to purchase the property, and also knew of the ongoing litigation concerning zoning of the property. He also understood that if petitioner prevailed in the litigation and if residential subdivision approvals were obtained, the value of the property would greatly increase. In or about 1980, Mr. Cheikes advised petitioner that under then-existing Federal income tax law, if petitioner proceeded to build and sell residences, he would be treated as a "dealer" and taxation on the profits or gain from his development would be taxed at ordinary income rates. In an effort to minimize such income tax liability, Mr. Cheikes recommended a plan whereby petitioner could cause some of the gain on the property to be taxed at capital gain rates rather than at ordinary income rates. More specifically, Mr. Cheikes proposed the "sale" of a portion of the property to a corporation (created and) controlled by petitioner. Mr. Cheikes advised that the corporation could build and sell residences and that its profits would be taxable at ordinary income rates. However, by enabling the corporation to pay more for its portion of the property than petitioner was obligated to pay for that same portion under the contract of sale with Searingtown, the corporation would have a higher (stepped-up) cost basis in its property thereby reducing its ultimate profits and hence its ultimate income tax liability. In addition, if properly structured as a bona fide sale for income tax purposes, petitioner's gain on his transfer of a part interest in the property to a controlled corporation would be taxed as a capital gain reportable over time under the installment method of reporting.

In connection with this advice, Mr. Cheikes organized a corporation known as Parkwest Realty Corporation ("Parkwest") on December 23, 1981. Parkwest was organized solely for the purpose of taking title to a one-third interest (actually to a particularly specified [metes and bounds] portion) in the Searingtown contract property. Parkwest was at all times wholly owned and controlled by petitioner, Allan V. Rose.

As described above, the purpose for organizing the corporation and for allowing it to acquire a portion of the property was to permit petitioner to "sell" for income tax purposes a portion of the property to a controlled corporation at a price higher than he would be paying to Searingtown for the same portion of the property under the contract. As of the time that Parkwest was created, petitioner held the contract right to purchase the property but, because the zoning litigation was ongoing, closing had not occurred and petitioner did not hold title to the property.

Offered in evidence in conjunction with Mr. Cheikes' testimony were two copies of a document entitled "Assignment and Assumption of Portion of Contract". The first such copy came from Mr. Cheikes' files. It indicates a date of December 23, 1981 and, as testified to by petitioner, contains the signature of Allan V. Rose in his own right and as president of Parkwest. The second such copy of the document (allegedly the original) also reflects, in addition to the foregoing date and signatures, a January 26, 1984 date of consent to the assignment by Searingtown.[1] The assignment document itself specifically allows the assignee (Parkwest) "to receive title to [a portion of the contract real estate]." The assignment document does not state among its terms any price or consideration to be paid by Parkwest, nor does it include any specific terms from which a price for the property interest being assigned could be determined.

Petitioner alleges that the above-described assignment was not to give Parkwest (an admittedly controlled entity) an interest without cost, but rather was to show, specifically for Federal income tax purposes, a sale of the interest from petitioner to Parkwest, thereby avoiding the application of then Internal Revenue Code ("IRC") § 351 and its carryover basis rules. However, in 1981, the zoning change litigation surrounding the property remained ongoing. Petitioner therefore maintains that he did not know when (or if) he would obtain title to the property, and did not know what value the property would have on the eventual closing date. In this regard petitioner argues that he could not have set a price in 1981 and remain assured of

[1]The contract with Searingtown generally prohibited assignment thereof without Searingtown's consent. However, Searingtown had agreed under the contract that it would consent to any assignment where the assignee was a corporation controlled by petitioner (see, Exhibit "6," ¶ 13).

obtaining the greatest possible income tax benefit from his planning or be assured of satisfying the Internal Revenue Service that a bona fide sale had occurred (i.e., one where the selling price was neither under nor, more importantly, over valued). Upon this basis, petitioner argues that the parties (petitioner and Parkwest) understood and agreed that the price would be fair market value upon closing.

Petitioner was ultimately successful in the zoning litigation and, on February 8, 1984, transfer of title to the property occurred. Shortly before said date, and at Mr. Cheikes' recommendation, petitioner caused the property to be appraised. The appraiser valued the entire property at $22,000,000.00, and valued section one thereof (the portion covered by the purported assignment to Parkwest) at $8,000,000.00.[2]

On the February 8, 1984 date of closing, petitioner and Parkwest entered into a supplementary agreement (entitled "Modification of Assignment and Assumption of Portion of Contract") modifying the 1981 assignment and assumption agreement so as to spell out the price and payment terms not specified in the 1981 assignment document. More specifically, this modification agreement states that "[a]t the time of said assignment it was agreed that the consideration to be paid . . . would be the fair market value at the time of closing . . . ." The modification document goes on to provide that petitioner would pay Searingtown two-thirds of the contract price (or $6,000,000.00) and Parkwest would pay Searingtown the balance of the $9,000,000.00 contract price (i.e., $3,000,000.00). In addition, Parkwest would pay petitioner $5,000,000.00 for the section one interest in the property, such amount being the difference between the $8,000,000.00 appraised value of section one and the $3,000,000.00 Parkwest was paying to Searingtown. This $5,000,000.00 payment was made on February 8, 1984 by execution and delivery of Parkwest's negotiable five-year promissory note to petitioner in the face amount of $5,000,000.00, carrying interest at the rate of 11% per annum with a maturity date of February 8, 1990. Amortization and payment of the note was structured in accordance

[2]The appraisal was based on use of the property as a 225-unit condominium development with a nine-hole golf course. Development was envisioned in three sections, with section one (the portion assigned to Parkwest) including a clubhouse and recreational facilities.

with the anticipated development construction schedules such that as amounts came due under the note, Parkwest would (or hopefully should) have sufficient cash available to meet its payment obligations under the note.

At the February 8, 1984 closing of title, Searingtown executed and delivered a deed for section one of the property to Parkwest and a deed for the balance of the property to petitioner. These deeds were both duly recorded. Separate statements of no tax due with respect to Tax Law Article 31-B ("gains tax") were issued by the Division of Taxation ("Division") to petitioner (for the Searingtown to petitioner transfer) and to Parkwest (for the Searingtown to Parkwest transfer). Though unspecified, it appears undisputed that the March 17, 1979 contract between Searingtown and petitioner was not subject to gains tax pursuant to the "grandfather" exemption afforded under Tax Law § 1443.6. However, the Division has asserted that it has no record of transferee and transferor questionnaires having been filed with respect to the 1984 modification agreement between petitioner and Parkwest, or otherwise with regard to the assignment from petitioner to Parkwest. The record contains no evidence to show that such filings were made. By contrast, petitioner maintains that the assignment was executed in 1981 and since the gains tax was not then enacted no filing was required.

Shortly after the February 8, 1984 closing on the property, Parkwest changed its corporate name to Links Development Corp. ("Links"). This change was made to reflect the fact that the property, as developed, would be known as "The Links at North Hills".

From 1984 through 1986, Links paid petitioner the interest due pursuant to the note. Links carried its section of the property on its books at an $8,000,000.00 cost. In 1986, the IRC was revised such that, among other things, ordinary income tax rates were reduced to a maximum of 28% and the difference in tax rates between ordinary income and capital gains was eliminated. In addition, other IRC changes served to repeal those provisions which had enabled corporations to be liquidated without adverse tax consequences. Accordingly, in December 1986, Links paid petitioner in full the $5,000,000.00 principal due on account of the note, Links was liquidated

pursuant to IRC § 333, and its interest in the property (its sole asset) was distributed to petitioner.

At or about the same time (late 1986 and early 1987), petitioner embarked on an acquisition of some 40 hotels located in various states at a cost of approximately $200,000,000.00. Petitioner also obtained final subdivision approval for The Links at North Hills, and apparently as a consequence began receiving many unsolicited offers to purchase the property. As petitioner described in testimony, one offer became too good to refuse. Consequently, in December 1986, petitioner executed a contract to sell the property to Rabco Links Development Company ("Rabco") at a price of $49,000,000.00. It is the proper measure of gains tax due on this December 1986 contract of sale, consummated in 1987, which is at issue herein.

For the years 1984 and 1985, Links filed Federal and New York State corporation tax returns and reports under subchapter S which show Links' purchase price (cost basis) for section one of the property as $8,000,000.00 and also reflect its interest payments to petitioner on account of the $5,000,000.00 note. Links also filed final 1986 Federal and New York State corporation tax returns and reports showing its liquidation. Petitioner, in turn, reported the full $5,000,000.00 gain on the liquidation of Links on his 1986 Federal and New York State personal income tax returns. By virtue of the liquidation of Links petitioner assumed, for income tax purposes, Links' $8,000,000.00 adjusted cost basis for section one of the property, and also became the 100% owner of the property in his own name.

In connection with the 1987 sale of the property, transferor and transferee questionnaires (Forms TP-580 and TP-581) were filed. On these questionnaires, petitioner claimed an original purchase price for the property of $14,000,000.00, which amount includes Links' purchase price for its interest in the property ($8,000,000.00 as carried over to petitioner for income tax purposes), plus petitioner's purchase price for his interest in the property ($6,000,000.00).[3] In

[3]In fact, the original purchase price reported was $14,021,247.00, which amount includes allowable closing costs. As the closing cost items are not in dispute, for purposes of clarity the claimed original purchase price shall be referred to herein as $14,000,000.00. Similarly, Parkwest/Links received title to a specifically described portion

simplest terms, the original purchase price issue presented herein is whether the $5,000,000.00 assignment price between Parkwest/Links and petitioner, which enabled a step-up in basis for income tax purposes, may also be recognized for gains tax purposes.

Included with petitioner's pre-transfer gains tax filings on the 1987 sale was an affidavit describing the basis upon which the $14,000,000.00 claimed original purchase price was calculated. This affidavit describes the purported 1981 assignment to Parkwest/Links, the relationship between petitioner and Parkwest/Links, and the purchase price paid by Parkwest/Links. With minor adjustments not relevant hereto, the Division issued a tentative assessment in the amount of $3,110,055.00, substantially in conformance with the transferor and transferee questionnaires submitted in connection with the 1987 sale. This tentative assessment of tax was paid at the time of closing in 1987 and the deed to the property was recorded.

In or about 1989, the Division audited the 1987 transaction by which the property was sold. As a result of this audit, allowable capital improvement expenses were increased by $266,593.00. However, a claimed "other acquisition cost" of $400,000.00, representing specifically a claimed brokerage fee paid or payable to one Robert Lehrer, was disallowed pending substantiation of payment of such expense. In addition, petitioner's claimed original purchase price was reduced by $5,000,000.00 based upon disallowance of the increase resulting from the described transaction between petitioner and Parkwest/Links. Finally, penalties in the amount of $179,669.00 were imposed.

On July 26, 1990, the Division issued to petitioner a Notice of Determination of Gains Tax Due under Tax Law Article 31-B, assessing additional gains tax due in the amount of $513,340.00, plus penalty and interest, based upon the audit changes described above.

With respect to the brokerage commission, petitioner has submitted a July 8, 1991 letter from one Alan Glass, CPA, who was Links' controller, stating that as of such date Links had paid a total of $150,000.00 to Robert Lehrer as broker. In addition, petitioner submitted a July 10,

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of the property from Searingtown, sometimes described herein as section one, while petitioner received from Searingtown sections two and three (the balance of the property). For ease of reference herein, the interest acquired by Parkwest/Links may be referred to as a one-third interest, while that received by petitioner may be referred to as a two-thirds interest.

1991 letter from Mr. Lehrer confirming that $150,000.00 had been received as of such date. Petitioner also submitted copies of cancelled checks totalling $45,000.00 paid in the amounts of $25,000.00 on April 11, 1991 and $20,000.00 on November 8, 1991. Finally, petitioner submitted two additional letters from Alan Glass, dated July 16, 1992 and July 21, 1992, respectively. The first of such letters lists brokerage commissions totalling $170,000.00, paid in the amounts of $100,000.00 in 1988, $25,000.00 in 1990 and $45,000.00 in 1991. The second letter specifically references the $25,000.00 paid in 1990 as having been paid by check, and notes further that the cancelled check itself is in storage among petitioner's (voluminous) records. Adding the $20,000.00 payment made by check dated November 8, 1991 to the $150,000.00 amount claimed and confirmed by the July 8, 1991 (Glass) letter and July 10, 1991 (Lehrer) letter, totals and reconciles the $170,000.00 amount claimed as paid by the July 16, 1992 (Glass) letter. At hearing, petitioner testified that the remainder of the commission amount was admittedly due and owing but that, for business reasons allegedly unrelated to the Links property, full payment had not yet been made to Mr. Lehrer. While no brokerage agreement or contract was submitted in evidence, petitioner did offer a letter from Long Island Realty Co. (Robert Lehrer) dated March 17, 1979, signed by Mr. Lehrer and (as agreed to) by Searingtown. By this letter, Mr. Lehrer agrees to look to the purchaser and not Searingtown for payment of any commission due.

OPINION

The Administrative Law Judge concluded that petitioner failed to offer objective, verifiable, independent evidence that the assignment document was executed in 1981 and entitled to the grandfather exemption of section 1443(6) of the Tax Law. Relying on Matter of Old Nut Co. v. New York State Tax Commn. (126 AD2d 869, 511 NYS2d 161, lv denied 69 NY2d 609, 516 NYS2d 1025) and also on Matter of Yanowicz v. Department of Taxation & Fin. (140 AD2d 866, 528 NYS2d 906) and Matter of American Express Co. & American Express Intl. Banking

Corp. (Tax Appeals Tribunal, April 23, 1992),[4] the Administrative Law Judge held that petitioner's testimony and that of his tax attorney were not independent evidence as required by section 1443(6). The Administrative Law Judge noted that the latter person did not draft the assignment, nor witness its execution. The Administrative Law Judge also found it noteworthy that the consent of Searington, which was required on any assignment, was not given until January 26, 1984.

On exception, petitioner argues that the incorporation of Parkwest is independent evidence to establish that the assignment was executed in 1981. We disagree. The incorporation of Parkwest indicates that petitioner intended to transfer a portion of the property to Parkwest, but the act of incorporation does not establish when the assignment to Parkwest was executed. Nor do we see any basis to petitioner's contention that the proof of execution should be liberally evaluated taking into account the circumstances, the situation of the parties and the objectives they were seeking to achieve. To the contrary, the Appellate Division, Third Department has sustained a strict application of the proof requirement of section 1443(6) (see, Matter of Yanowicz v. Department of Taxation & Fin., supra; Matter of Old Nut Co. v. New York State Tax Commn., supra). Because we agree with the Administrative Law Judge's analysis that the testimony of petitioner and petitioner's tax attorney does not satisfy the requirement of section 1443(6) of the Tax Law, we affirm the Administrative Law Judge's conclusion on this issue.

Next, we consider whether even if petitioner had established the 1981 execution of the assignment, the 1984 modification adding a sales price would deny the transfer the benefit of the grandfather exemption. The regulations at 20 NYCRR 590.21 provide that the amendment of a grandfathered contract in a substantial manner will render the transfer taxable. The regulation further provides that any change in the amount of consideration is a substantial amendment. The Administrative Law Judge suggested that the addition of a price term was at least as substantial as changing an existing price and should preclude application of the exemption. The

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[4]Subsequently, American Express was affirmed by the Appellate Division (Matter of American Express Co. v. Tax Appeals Tribunal, 190 AD2d 104, 597 NYS2d 485, lv denied 82 NY2d 663, 610 NYS2d 151).

Administrative Law Judge also found it curious that the 1981 assignment did not set the price at fair market value as appraised at the time of closing.

On exception, petitioner argues that the 1984 modification did not change the amount of consideration because the 1981 assignment contained no price at all. Further, petitioner contends that the 1984 modification "not only specified the terms Petitioner and Links had always understood were required, terms they had understood since the execution of the 1981 Assignment, but specified terms which they were unable until then, to spell out. Therefore, the Modification did not change the terms of the 1981 Assignment at all, much less change them 'substantially'" (Petitioner's brief on exception, p. 14).

We agree with the Administrative Law Judge that the addition of a price was a substantial modification to the 1981 assignment. With respect to petitioner's contention that the price was always understood to be fair market value, section 1443(6) requires a written contract. To be meaningful, we conclude that this statute must be interpreted to require that the material terms of the contract must be in writing and that an unwritten understanding does not satisfy the statute (see, Matter of Bredero Vast Goed, N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). We also share the Administrative Law Judge's view that the 1981 assignment could have expressed the concept that the price of the property would be fair market value as determined by appraisal at the time of closing.

Based on the above, we agree with the Administrative Law Judge that petitioner is not entitled to treat the $5,000,000.00 as paid pursuant to a grandfathered contract and is not entitled to an increase in original purchase price on this basis.[5]

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[5]Petitioner has not challenged the Administrative Law Judge's conclusions that petitioner was not entitled to an increase in original purchase price based on either the $5,000,000.00 payment by Parkwest to petitioner in 1984 or on the 1986 transfer back to petitioner from Parkwest/Links. Relying on Matter of Schrier (Tax Appeals Tribunal, July 16, 1992 [which was subsequently affirmed, Matter of Schrier v. Tax Appeals Tribunal, 194 AD2d 273, 606 NYS2d 384]), the Administrative Law Judge held that these transactions did not result in an increase in original purchase price because the transactions were exempt from tax pursuant to section 1443(5) as a mere change in form of ownership (see, 20 NYCRR 590.50 [a] and [b]). However, at oral argument on this matter, petitioner pointed out that if these mere change transactions had been completed prior to the effective date of the gains tax, the Division would have agreed that petitioner was entitled to a step up in original purchase price. We do not see how the treatment of pre-gains tax, mere change transactions is determinative of the post-gains tax treatment of such transactions.

The next issue before us is whether the Administrative Law Judge properly abated penalty in this case. The basis stated by the Administrative Law Judge was "giving cognizance to the complexity of the transaction and noting specifically petitioner's full disclosure thereof, allows the conclusion that abatement of penalties is warranted" (Determination, conclusion of law "H"). In its exception, the Division challenges the Administrative Law Judge's conclusion, arguing that:

> "[t]his Petitioner, without bothering to request any advice or guidance from the Division of Taxation, intentionally adopted a filing position which had the effect of sheltering an additional $5,000,000 in gain from taxation. This favorable filing position was not advanced accidentally. To the contrary, the submission of a supporting affidavit reflects a recognition that there was a distinct possibility that the Division of Taxation might not agree with the filing position taken. People do not normally submit affidavits to explain expenses which they are sure are allowable components of Original Purchase Price. A more likely explanation for the affidavit is that it was submitted in anticipation of a possible future audit and the imposition of penalties by the Division of Taxation. Under these circumstances, Petitioner's failure to pay the proper amount of tax due is attributable to willful neglect" (Division's brief on exception, p. 6).

We accept the Division's comments that affidavits are not usually submitted to explain expenses which are clearly allowable and that petitioner's submission of the affidavit can be seen as an expression of doubt on petitioner's part as to the allowability of the amount. Viewed in this light, we think that by submitting the affidavit as part of the pre-transfer audit procedure, petitioner was calling attention to, and inviting the Division's scrutiny of, this element of the transfer. In our view, this attention getting activity was equivalent to asking the Division's opinion on whether petitioner was entitled to the increase in original purchase price. We conclude that in this circumstance, petitioner reasonably interpreted the issuance of the tentative assessment as an acceptance by the Division of the increase in original purchase price and that this constitutes reasonable cause for the underpayment.

We find the Division's reliance on Matter of River Terrace Assocs. (Tax Appeals Tribunal, October 22, 1992) misplaced because that case involved a gains tax filing premised upon a legal position that was contrary to the explicit interpretation of the Division. In contrast, the question here is a factual one: whether the Division in the exercise of its discretion under section 1443(6) of the Tax Law and 20 NYCRR 590.20 would find that petitioner was entitled to the grandfather exemption.

Next, the Division argues that petitioner did not fully disclose the transaction because "[t]here is no analysis, or even any mention, of the section(s) of the Gains Tax, or the Gains Tax regulations, relied on for the positions taken" (Division's brief on exception, p. 7). We think that the disclosure that is pertinent here is disclosure of facts, not legal reasoning, and the Division has not suggested that petitioner did not fully disclose the pertinent facts. In any event, petitioner did state in the affidavit that:

> "[b]oth the Contract and the Assignment were entered into prior to the enactment of the Real Property Transfer Gains Tax ('Gains Tax'). Therefore, the conveyances from Searingtown Corporation of two-thirds of the Property to me and one-third of the Property to Links were not subject to the Gains Tax, and Statements of No Tax Due were accordingly issue, copies of which are attached hereto as Exhibits A and B" (Exhibit "I").

We do not see what value a statement by petitioner that section 1443(6) of the Tax Law was the statutory basis for his claim would have added to the Division's evaluation of the matter.

Next, the Division argues that disclosure cannot be a basis for finding reasonable cause because by Chapter 55 of the Laws of 1992 the Legislature added a new section 1446(5) to the Tax Law which temporarily expanded the definition of reasonable cause to include disclosure in certain circumstances during the pre-transfer audit procedure. This expanded definition does not apply to this transaction (the amendment ceased to be effective on March 1, 1993), and the Division argues that the amendment demonstrates that under the unamended statute, disclosure does not constitute reasonable cause. We are not persuaded by this argument because we believe that the disclosure referred to by the amendment was simply a separate identification on the pre-

transfer forms or schedules of the item the taxpayer was claiming, e.g., excluding a specific amount from consideration as a brokerage commission. We think that the amendment was not describing as disclosure the kind of detailed explanation submitted by petitioner in this case that clearly invited the Division's scrutiny. Accordingly, we conclude that the amendment does not preclude our holding that petitioner's reliance on his detailed explanation to the Division constituted reasonable cause.

The final issue before us concerns the deduction from consideration for the $400,000.00 brokerage commission. At the time of the hearing, petitioner had paid only $170,000.00 of the commission; therefore, the Administrative Law Judge limited the deduction to this amount. Since the hearing, petitioner claims to have paid the remainder and to have cancelled checks to prove the payment. Petitioner requests that the record in this case be reopened to permit petitioner to submit the cancelled checks or that the matter be remanded to the Administrative Law Judge for a further hearing on this issue. Petitioner suggests that this procedure will be more efficient for all concerned than if he is required to file a claim for a refund.

In response, the Division argues that under Matter of Jenkins Covington (Tax Appeals Tribunal, November 21, 1991),[6] the record may not be reopened because petitioner has failed to show that he has new evidence which could not have been discovered before the hearing. The Division contends that petitioner was in control of whether the payments were made and that he made a conscious decision not to pay them. The Division also questions whether the commission was ever a legitimate debt. Finally, the Division argues that petitioner would not be entitled to claim a refund for these payments because section 1445(3) of the Tax Law prohibits a refund of tax determined to be due pursuant to section 1444 of the Tax Law.

It is our established policy that additional evidence will not be accepted after the record is closed (see, Matter of Sole to Sole, Tax Appeals Tribunal, July 1, 1993; Matter of A & J Auto

[6]Subsequently, Jenkins Covington was affirmed by the Appellate Division (Matter of Jenkins Covington v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151).

Repair Corp., Tax Appeals Tribunal, May 6, 1993; and Great Eastern Print. Co, Tax Appeals Tribunal, February 20, 1992). We stated the rationale for this rule in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing."

We have made few exceptions to this rule and only for very special circumstances (see, Matter of Wyman, Tax Appeals Tribunal, December 31, 1992).

Petitioner has not convinced us that we should make an exception to our policy in this case. Although the evidence at issue did not exist at the time of the hearing, petitioner created it by paying the commission and has not argued that he was precluded from creating it in time for the hearing. Absent such circumstances, we are not willing to make an exception to our policy and reopen the record.

We reach this result without relying on Matter of Jenkins Covington v. Tax Appeals Tribunal (supra) as suggested by the Division. In Jenkins Covington, the taxpayer sought to set aside a Tribunal decision that finally decided the matter. In contrast, at the time of petitioner's request to reopen the record, this matter was still pending in the Division of Tax Appeals and had not yet been the subject of a final agency decision. Thus, we agree with petitioner that we have the discretion to reopen this record, but we decline to do so for the reasons set forth above.

Finally, we agree with the Division that petitioner will not be able to seek a refund of tax paid with respect to the brokerage commission at issue. Section 1445(3) of the Tax Law provides, in part, that:

> "[a] person shall not be entitiled to a refund under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section fourteen hundred forty-four where he has had a hearing or an opportunity for a hearing, as provided in said section."

Because the tax due with respect to the claimed brokerage commission was determined pursuant to section 1444, petitioner will have no opportunity other than this one to litigate this issue (see,

Westbury Smoke Stax, Ltd. v. New York State Tax Commn., Sup Ct, Special Term, Albany County, Mar. 3, 1987, Bradley, J., affd 142 AD2d 878, 531 NYS2d 65, lv denied 73 NY2d 706, 539 NYS2d 299; Matter of Shoreline Oil, Tax Appeals Tribunal, April 8, 1993; and Matter of Sliford Rest., Tax Appeals Tribunal, October 10, 1991 [which all involved the comparable provision of Article 28 of the Tax Law § 1139[c]).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

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

2. The exception of Allan V. Rose is denied;

3. The determination of the Administrative Law Judge is affirmed;

4. The petition of Allan V. Rose is granted to the extent indicated in conclusions of law "G," "H" and "I" of the Administrative Law Judge's determination, but is otherwise denied; and

5. The Division of Taxation is directed to modify the Notice of Determination dated July 26, 1990 in accordance with paragraph "4" above, but such Notice is otherwise sustained.

DATED: Troy, New York
June 30, 1994

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

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