STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
R.A.F. GENERAL PARTNERSHIP AND EDEX GENERAL PARTNERSHIP	:	DECISION DTA Nos. 811274 and 811545
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	
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Petitioners R.A.F. General Partnership and Edex General Partnership, c/o Edward R. Feinberg, Esq., One Juniper Drive, Delmar, New York 12054, filed an exception to the determination of the Administrative Law Judge issued on September 29, 1994. Petitioner R.A.F. General Partnership also took exception to the order of the Administrative Law Judge issued on April 22, 1993. Petitioners appeared pro se by Edward R. Feinberg, Esq., General Partner. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners also filed a reply brief. Oral argument was heard on May 11, 1995, which date began the six-month period for the issuance of this decision.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUES

I. Whether claimed irregularities in the hearing process deprived petitioners of a fair and impartial hearing.

II. Whether the notices of determination are jurisdictionally defective.

III. Whether transfers of three parcels of property known as 397 State Street, 395 State Street and 92 Spring Street were properly subjected to real property transfer gains tax by the Division of Taxation.

IV. Whether petitioners' equal protection rights have been violated.

V. Whether the Division of Taxation properly disallowed a step-up in original purchase price for the buyout of a partner's 10% interest in R.A.F. General Partnership.

VI. Whether the Division of Taxation properly disallowed fees paid to Greystone Properties, Inc. as not constituting customary brokerage fees related to the transfer.

VII. Whether the Division of Taxation properly disallowed as part of original purchase price expenses incurred in the purchase of microwave ovens.

VIII. Whether petitioners have established that penalties assessed for failure to timely file certain returns and failure to timely remit tax due should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "17" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On July 13, 1990, the Division of Taxation ("Division") issued to petitioner Edex General Partnership ("Edex") a Revised Statement of Proposed Audit Adjustment. The statement indicates that the Division proposed to impose real property transfer gains tax on Edex's property located at 397 State Street ("397 State"), being contiguous to the 94 Spring Street ("94 Spring") property and the 395 State Street ("395 State") property. The properties are located in Albany, New York. This statement revised an earlier Statement of Proposed Audit Adjustment issued on May 7, 1990 to Edex relating to the same property.

The Statement of Proposed Audit Adjustment provides the following calculation of tax, penalty and interest with respect to the 397 State property:

Consideration	$550,000.00
Brokerage	(22,000.00)
Total taxable consideration	$528,000.00
Less: Original Purchase Price	(40,000.00)
Other Acquisition Costs	(4,642.00)
Capital Improvements	(204,116.00)
Less: 1989 Capital Improvements	(20,923.30)
Total Gain on Project	$258,318.70
10% Tax Due on Gains	$ 25,831.87
Interest: 3/15/89-8/12/90	4,249.61
Penalty at 35%	9,041.05
Total Tax, Penalty and Interest Due	$ 39,122.53

On October 25, 1990, the Division issued to Edex a Notice of Determination of Real Property Transfer Gains Tax Due under Tax Law Article 31-B ("gains tax") assessing tax due in the amount of $25,831.87, plus penalty and interest. The date of transfer indicated was March 15, 1989.

On October 16, 1992, the Bureau of Conciliation and Mediation Services ("BCMS") issued its Conciliation Order which showed tax due of $17,851.09, plus penalty and interest at the applicable rate. The date of transfer was indicated as June 26, 1989. The tax due was computed as follows:

Total gain on project per taxpayer	$124,038.32
Add: Brokerage (Greystone)	50,000.00
Microwaves	4,472.60
Total Gain	$178,510.92
Tax at 10%	$ 17,851.09

On May 7, 1990 and July 13, 1990, the Division issued to R.A.F. General Partnership ("RAF") two statements of proposed audit adjustment for properties located at 395 State and 94 Spring, respectively. The statements indicate that the properties are contiguous.

The statements of proposed audit adjustment provide the following calculations of tax, penalty and interest with respect to the 395 State and 94 Spring properties:

	395 State	94 Spring
Consideration	$499,999.00	$1,300,000.00
Brokerage	-0-	(78,000.00)
Total Taxable Consideration	$499,999.00	$1,222,000.00
Less: Original Purchase Price	(165,000.00)	(766,000.00)
Acquisition Costs	(3,708.00)	(12,545.00)
Capital Improvements	(7,607.00)	(81,354.00)
Selling Expenses	-0-	(11,900.00)
Less: Adjustment for Escrow	-0-	(78,000.00)
Total Gain on Project	$323,684.00	$ 272,201.00
10% Tax Due on Gain	$ 32,368.40	$ 27,220.10
Taxes Previously Paid	-0-	(26,258.00)
Tax Outstanding and Owing	$ 32,368.40	$ 962.10
Interest: 5/15/89-5/30/90	3,870.69	139.35
Penalty at 34%	11,005.12	-0-
Total Due	$ 47,244.21	$ 1,101.45

On November 13, 1990, the Division issued to RAF a Notice of Determination of Real Property Transfer Gains Tax Due under Tax Law Article 31-B assessing tax due in the amount of $32,368.40, plus penalty and interest. The date of transfer indicated on the notice was May 15, 1989 and related to RAF's sale of the property located at 395 State.

On the same date, the Division issued a second Notice of Determination of Real Property Transfer Gains Tax Due under the gains tax law assessing tax due in the amount of $962.10, plus interest. The notice indicated the date of transfer to be May 15, 1989 and related to RAF's sale of the 94 Spring property.

On July 24, 1992, BCMS issued a conciliation order to RAF indicating tax due of $30,214.61, plus penalty and interest, on the 395 State property and a tax credit of $2,236.08, plus interest, on the 94 Spring property.

On February 17, 1984, Edex was formed as a joint venture by Edward R. Feinberg and Rex S. Ruthman. The agreement provided that the profits and losses of the joint venture were to be allocated 50% to Feinberg and 50% to Ruthman. The purpose of the joint venture was to acquire, improve, renovate, manage and develop the 397 State property. On the same date, Mr. Feinberg and Mr. Ruthman executed a Business Certificate for Partners which stated that

they were transacting and conducting business as partners under the name Edex General Partnership. The Business Certificate was filed with the Albany County Clerk's Office on April 20, 1984. Edex acquired title to 397 State from Konstanty M. Naider and Zofia Dolinska by deed dated April 30, 1984.

On the same April 30, 1984 date, Edex entered into a building loan agreement with The Schenectady Trust Company. The loan agreement provided that Edex would renovate the property in accordance with the requirements of all governmental authorities having jurisdiction over the premises. Included within such construction was the installation of microwaves as the main cooking device so as not to have to enlarge the cooking areas to accommodate larger cooking appliances. The cost of the installation of the microwaves into all of the apartments of 397 State was $4,472.60. The 397 State property was subsequently improved and developed into a 3-story, 14-unit apartment structure.

RAF was originally formed as a joint venture by Edward R. Feinberg, Rex S. Ruthman and William D. Alexander by agreement dated February 20, 1984. The purpose of the joint venture was to acquire, improve, manage and develop the 94 Spring property. The profits and losses of the joint venture were to be allocated 45% to Mr. Feinberg, 45% to Mr. Ruthman and 10% to Mr. Alexander. The agreement was amended by Addendum dated May 1, 1984 and further amended by Addendum dated May 20, 1985, by adding the properties located at 395 State and 28-30 Robin Street, Albany, New York, respectively, to the properties covered by the agreement.

On September 1, 1986, Messrs. Feinberg, Ruthman and Alexander entered into a Re-State R.A.F. General Partnership Agreement to clarify the intent of the original agreement as it defined the legal relationships which existed and which would continue to exist between the parties, which was to form a general partnership. The respective interests of the partners remained the same. The purpose of the re-stated agreement was to assure the officials of Citibank, from whom RAF sought refinancing of certain properties, that RAF was in fact a partnership and not a joint venture.

By agreement dated January 11, 1989, Mr. Alexander transferred his entire partnership interest in RAF to Messrs. Feinberg and Ruthman. This transfer resulted in Messrs. Feinberg and Ruthman each having a 50% interest in the partnership. The remaining partners filed, on July 11, 1989, a Certificate of Continuing Business under Partnership Name after Withdrawal of Partner with the Clerk's Office of the County of Albany.

RAF acquired title to 94 Spring by deed dated April 30, 1984 from Konstanty M. Naider and Zofia Dolinska. The 395 State property was conveyed on June 29, 1984 from Willard B. Warring, as executor of the estate of Cora P. Zeh, to Edward Feinberg, Rex S. Ruthman and William Alexander, individually and d/b/a RAF. The 94 Spring premises were subsequently improved and developed into a 13-story, 97-unit apartment structure, while 395 State was subsequently improved and developed into a 4-story, 10-unit apartment structure. Included in the 395 State property is an adjacent parking lot located at 92 Spring Street ("92 Spring").

The 395 State and 92 Spring parcel of property is contiguous and/or adjacent to the 397 State property.

The 395 State and 92 Spring parcel of property is contiguous and/or adjacent to the 94 Spring property.

The 94 Spring property is contiguous and/or adjacent to the 397 State property.

All property at issue was held by petitioners to generate rental income and were all managed by the 397 State Street Management Co., Inc.

On or about January 11, 1989, Edex entered into an agreement for the sale of the 397 State property to John Culpo. The contract price for the sale of the property was $550,000.00. On June 26, 1989, Edex executed a deed conveying 397 State to John and Madeline Culpo pursuant to the terms of the contract. Gains tax questionnaires (Forms TP-580 and TP-581) were filed by petitioner Edex, as transferor, and by John Culpo, as transferee. In response, the Division issued a Tentative Assessment and Return, dated March 24, 1989, to Edex indicating no gains tax due.

Also on or about January 11, 1989, petitioner RAF entered into a contract for the sale of the 94 Spring property to John Culpo. The contract price for the sale of 94 Spring was $1,300,000.00. On June 26, 1989, RAF executed a deed conveying 94 Spring to John and Madeline Culpo pursuant to the terms of the contract. Real property transfer gains tax was paid in the sum of $26,258.00, based on consideration of $1,300,000.00. Gains tax questionnaires were filed by RAF, as transferor, and John Culpo, as transferee, reporting the transfer.

In December 1988, petitioner RAF entered into a contract for the sale of the 395 State property to John Culpo. The contract price for the sale of 395 State and 92 Spring was $499,999.00. On June 26, 1989, RAF executed a deed conveying 395 State and 92 Spring to John and Madeline Culpo pursuant to the terms of the contract. Gains tax questionnaires were not filed by RAF, as transferor, and John Culpo, as transferee, as it was felt that the transfer was exempt from the gains tax.

On June 26, 1989, Edward R. Feinberg and Rex S. Ruthman were the sole partners of Edex and RAF.

Greystone Properties, Inc. ("Greystone") was a licensed real estate broker in 1989. By check dated April 7, 1989, Roberts Real Estate paid out of escrow funds $100,000.00 to Greystone. In a letter dated December 1, 1989, Greystone explained the basis for the $100,000.00 fee. Greystone stated that it performed the services of: assisting RAF in resolving certain cash flow problems and internal management concerns and assisting RAF in marketing its properties, including 28-30 Robin Street, and in finding property suitable for Internal Revenue Code § 1031 exchange status with the State Street properties. RAF retained Roberts Real Estate to do the marketing of its properties but agreed to pay to Greystone an equal amount to what Roberts was to receive if RAF was successful in resolving the difficulties that had made it seek restructuring -- sale of any of its properties, restructuring of the partnership, acquisition of suitable replacement properties -- which would leave RAF with sufficient cash to satisfy the needs which prompted this activity. The letter concluded as follows:

> "During the latter part of 1988, Greystone assisted R.A.F. in negotiating agreements with several prospective purchasers brought to R.A.F. by Roberts Real

> Estate. An arrangement between R.A.F. and John Culpo was finally arrived at in late 1988 with the aid of Greystone. At the same time, the partners agreed to an internal reorganization, Mr. Alexander departed in consideration of the remaining partners assuming his obligations, including the obligations still inherent in the condition of 28-30 Robin Street which was not involved in any sale. Finally, Greystone assisted in finding several suitable exchange properties and assisted in placing them under contract. Roberts agreed to receive its fee of $100,000 from the sales of 94 Spring Street and 397 State Street. Hence, Greystone's fee would arise from 395 State Street although there are not agreements between Roberts and Greystone to this affect. When the contingencies to the sale between R.A.F. and Culpo lapsed, Greystone received its monies contingent on R.A.F. completing an exchange. As R.A.F. completed an exchange within the statutory framework, the monies are now earned.
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> "Hopefully this explains the basis for Greystone's fee."

Edex entered into an exclusive right to sell listing agreement, dated September 16, 1988, with Roberts Real Estate for the 397 State premises. The period of the agreement was September 16, 1988 through September 16, 1989. On the same date and by the same person, Mr. Feinberg, RAF entered into an exclusive right to sell listing agreement with Roberts Real Estate for the 94 Spring property. The period of the agreement was September 16, 1988 through September 16, 1989. The brokerage agreement statement for the 94 Spring property indicates that RAF paid Roberts Real Estate a total commission of $78,000.00 on the sale of the property.

Prior to the scheduling of these matters for hearing, various correspondence passed between Mr. Feinberg, as representative of petitioner RAF, and the Division of Tax Appeals. The correspondence and related events are as follows:

a) On April 22, 1993, the Division of Tax Appeals issued an Order in the Matter of the Petition of R.A.F. General Partnership denying petitioner's motion for an order striking the answer and granting a default determination in its favor due to the late-filed answer and, alternatively, dismissing the proceedings in the instant matter on the grounds that the Division of Tax Appeals lacks subject matter jurisdiction over the transaction which the Division claims as the basis of its assessment due to an incorrect date of transaction on the Notice of Determination.

(b) RAF filed a Petition for Judicial Review of the Order dated April 22, 1993 with the Appellate Division of the Supreme Court for the Third Judicial Department on August 16, 1993.

(c) The Division of Tax Appeals wrote Mr. Feinberg on October 1, 1993 asking whether RAF should be scheduled in February or March 1994.

(d) The Division's motion to dismiss this petition was denied by the court on October 14, 1993.

(e) On October 25, 1993, RAF requested that the instant matter be adjourned without date until after the decision of the court on the pending Article 78 proceeding. Otherwise, the hearing should be scheduled in March 1994.

(f) On the same date, RAF (and Edex) were informed that a hearing had been scheduled for December 3, 1993.

(g) In a letter dated October 29, 1993, the Division's representative put forth his reasons why the two matters should be scheduled together.

(h) On November 1, 1993, the Division of Tax Appeals, after considering the arguments of both parties, indicated that the two matters would proceed together.

(i) On December 3, 1993, the matters of Edex and RAF were heard together.

We modify finding of fact "17" by adding a new paragraph (j) and by renumbering paragraphs (j) and (k) to be paragraphs (k) and (l) as follows:

> (j) At the commencement of the hearing on December 3, 1993, Mr. Feinberg made a motion that these two matters not be joined together for hearing. After hearing arguments by both parties, the Administrative Law Judge denied petitioners' motion and determined that joinder was proper. Petitioners took exception to this determination.
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> (k) During the hearing on December 3, 1993, Mr. Feinberg stated that he would not be prejudiced by proceeding at that time rather than waiting until February/March 1994.

(l) On July 7, 1994, the Appellate Division issued its decision in R.A.F. General Partnership v. Division of Tax Appeals dismissing RAF's petition for failure to exhaust its administrative remedies.[1]

OPINION

Petitioners argue that the notices of determination should be stricken because they relate to tax periods ending before the actual date of transfer of the properties involved. Petitioners claim that the notices of determination are defective and, since more than three years have elapsed from the date of transfer, no claims for a deficiency could now be made or sustained by the Division. They argue that their constitutional rights do not depend on their being able to show that they were prejudiced by the defective notices.

Petitioners also argue that they have been denied due process. Specifically, they claim that: 1) the notices of determination gave the taxpayers inadequate notice of the assessment because the date of transfer was incorrect; 2) the answer of the Division in RAF was untimely filed; 3) the Conciliation Conference was improperly conducted because there were ex parte communications between the Division and the conferee; and 4) the RAF and Edex hearings should not have been scheduled together. Petitioners argue that these factors, considered together, impaired petitioners' rights to a fair and impartial hearing.

Administrative Law Judge Sacca, in his determination of September 29, 1994 (hereinafter "determination"), sustained the notices of determination, relying in part on the analysis of Administrative Law Judge Alston in his April 22, 1993 order in the Matter of R.A.F. General Partnership (hereinafter "order").

Petitioner Edex takes exception to the determination and petitioner RAF takes exception to both the order and to the determination.

Petitioners raised precisely the same arguments before the Administrative Law Judges in the motion and at the hearing. The issues of the jurisdictional adequacy of the notices of determination and the timeliness of the Division's answer in Matter of R.A.F. General Partnership were dealt with by the Administrative Law Judge in his order in which he stated:

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[1] We modified this finding of fact to more accurately reflect the record.

> "A review of the foregoing documentation leaves no doubt that, notwithstanding the erroneous date listed on the notices, petitioner was aware of the real property transfers upon which the Division sought to assess gains tax pursuant to the statutory notices dated November 13, 1990. Stated differently, it is clear that the notices alerted petitioner to the assessment, contained sufficient information to apprise petitioner of the basis of the assessment and the specific transaction giving rise to the assessment. It is concluded therefore, that the defects complained of by petitioner do not render the subject notices invalid (see, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892, Fernandez v. Commr., 39 TCM 569, Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989)" (Matter of R.A.F. General Partnership, Administrative Law Judge Order, April 22, 1993).

The Administrative Law Judge found that petitioner RAF was not substantially prejudiced by the late-filed answer of the Division. He stated:

> "[t]ime periods imposed upon an administrative agency for a responsive pleading are directory rather than mandatory . . . Generally, an agency's failure to act within a specified period will not result in dismissal of the agency's action in the absence of a showing of substantial prejudice as a result of the delay (Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115 [1986]; Matter of Geary v. Commissioner of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494, affd 59 NY2d 950, 466 NYS2d 304; Matter of G. H. Walker & Co. v. State Tax Commn., 62 AD2d 77, 403 NYS2d 811; Matter of Hamelburg v. Tully, Sup Ct, Albany County, April 16, 1979, Conway, J.; Matter of Santoro v. State Tax Commn., Sup Ct, Albany County, January 4, 1979, Conway, J.; Matter of Maggin, Tax Appeals Tribunal, March 8, 1990)" (Matter of R.A.F. General Partnership, supra).

We affirm the determination and order of the Administrative Law Judges on these issues for the reasons set forth therein.

Petitioners argue, as part of their denial of due process claim, that "the ex parte contact between the Conferee and the Department so tainted the proceedings as to render the Petitioners' rights to a fair hearing nugatory" (Petitioners' brief in support, p. 11). Petitioners argue that the Division's advocate at the conciliation conference violated Disciplinary Rule 7-110(B) of the Code of Professional Responsibility by engaging in ex parte contact with the conciliation conferee. Further, petitioners argue that the conciliation conferee has violated Canon 3(A)(4) of the Code of Judicial Conduct for the same reason. We find no merit in petitioners' arguments.

It is undisputed that the Division's advocate at the conciliation conference was not an attorney. As set forth in the Preliminary Statement to the Code of Professional Responsibility, "[o]bviously, the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers" (Judiciary Law, Appendix, Code of Professional Responsibility). Further, there has been no showing by petitioners that the conciliation conferee is subject to the Code of Judicial Conduct. More importantly, even if there were some basis for petitioners' arguments, this Tribunal has no jurisdiction to enforce either the Code of Professional Responsibility or the Code of Judicial Conduct.

There is no authority for an Administrative Law Judge or for this Tribunal to review the validity of the proceedings in the Bureau of Conciliation and Mediation Services (see, Matter of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993).

The Bureau of Conciliation and Mediation Services is established within the Division of Taxation and is responsible "for providing conciliation conferences" (Tax Law § 170[3-a][a]). Tax Law § 170(3-a)(e) provides that:

> "[a] conciliation order shall be rendered within thirty days after the proceeding is concluded and such order shall, in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued, notwithstanding any other provision of law to the contrary."

20 NYCRR 4000.5(c) provides that the scope and procedure of a conciliation conference are as follows:

> "(1)(i) The conciliation conference is intended to afford the parties an opportunity to resolve disagreements. With the cooperation of the parties, the conciliation conferee will endeavor to develop those facts and issues on which there is no disagreement and those facts and issues which are in dispute. The goal of the conciliation conferee will be, where possible, in whole or in part, to resolve the controversy between the parties within the framework of the Tax Law, thereby narrowing the scope of or eliminating the need for a hearing in the Division of Tax Appeals."

The Division of Tax Appeals, on the other hand, is established "[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to such a

hearing is specifically provided for, modified or denied by another provision of this chapter" (Tax Law § 2006[4]). Further, hearings "conducted before an administrative law judge and any oral proceedings conducted before the tax appeals tribunal shall be stenographically reported" (Tax Law § 2006[8]). Determinations of Administrative Law Judges are subject to review by the Tax Appeals Tribunal (Tax Law § 2006[7]) and the Tribunal's decisions are subject to judicial review pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") (Tax Law § 2016).

The petitioner who elects to participate in a conciliation conference does not waive any rights to a hearing. The petitioner can terminate the conference proceeding prior to its conclusion and file a petition for a hearing with the Division of Tax Appeals. Further, the petitioner may file a petition with the Division of Tax Appeals if he is dissatisfied with the outcome of the conciliation conference. As petitioners elected to petition for a hearing in the Division of Tax Appeals, petitioners, at hearing, could not rely in any way on the prior proceedings since the conciliation order cannot "be considered as precedent or be given any force or effect in any subsequent administrative proceeding" with respect to petitioners (Tax Law § 170[3-a][f]).

As the Administrative Law Judge concluded in his determination, the due process rights of petitioners were not violated because:

> "[p]etitioner RAF was afforded its opportunity for a hearing prior to a final decision concerning liability for the tax assessed and therefore cannot complain about being denied due process of law at the conference level. The requirement for due process is fully met when a forum exists in which an aggrieved person or entity after notice has the right to be heard (Snyder v. Massachusetts, 291 US 97, 78 L Ed 674; Twining v. State of New Jersey, 211 US 78, 53 L Ed 97; Metallic Flowers v. New York, 4 AD2d 292, 164 NYS2d 227, mod on other grounds 5 NY2d 246, 183 NYS2d 801, remittitur denied 6 NY2d 997, 191 NYS2d 976). In addition, the order of the conferee was not final, as petitioner RAF had the opportunity to petition for a hearing and except to the Tax Appeals Tribunal. There is no due process right to a hearing (or conference) before an agency whose orders will affect property rights where the agency's order is not a final one (City of Newburgh v. Park Filling Station, 273 App Div 24, 75 NYS2d 439, affd 298 NY 649)" (Determination, conclusion of law "K").

On the issue of the joinder of both matters for hearing, petitioners argue that joinder is proper only on a motion made by one of the parties pursuant to section 602(a) of the CPLR. However, petitioners point to no authority or precedent which demonstrates that it is improper for the Division of Tax Appeals to join cases for hearing or that it is necessary to bring a motion before the Division of Tax Appeals in order to join two or more cases for a hearing. It is clear that on October 29, 1993, the Division's representative requested joinder because of the existence of a common question of law or fact. Further, the record contains no response by petitioners to the October 29, 1993 letter of the Division's representative. Thus, it can be concluded that there was no objection made by petitioners prior to their motion at the hearing on this issue. Further, given the common factual and legal issues in each of these proceedings, we affirm the determination of the Administrative Law Judge to join these matters for hearing.

Petitioners also argue that it was improper for the Division to aggregate the consideration given for the transfers of the properties at issue. In his determination, the Administrative Law Judge upheld the aggregation of the consideration received for the transfers for purposes of applying the $1,000,000.00 exemption. We affirm his determination.

Section 1441 of the Tax Law imposes a tax on gains from the transfer of an interest in real property at the rate of 10%. Section 1443(1) provides an exemption from taxation if consideration paid or to be paid for the transfer of such an interest is less than $1,000,000.00.

The Administrative Law Judge discussed the applicability of the aggregation clause of section 1440(7) and sections 590.42 and 590.43 of the Commissioner's Rules and Regulations (20 NYCRR) in determining whether the $1,000,000.00 threshold is met for purposes of imposing the gains tax. In this case, there were three separate parcels transferred by two distinct entities to the same transferees. The parcels were, however, contiguous. Further, they were all managed by the same management company and used for the production of rental income. Finally, the same two individuals were the sole partners of the entities that owned these properties.

The Administrative Law Judge found that the "look through" principle must be applied here and, having done that, he reached the conclusion that there was the same transferor in each real property transfer at issue. In conclusions of law "D" and "E," he stated that:

> "D. This case appears, at first glance, to fit within the above regulation [590.43(b)]. That is, each petitioner alone held the title to separate albeit adjacent parcels. In fact, petitioners argue that this case is stronger than the regulation in that the partnership transferees were also separate and independent entities. However, upon examination of the facts and circumstances, it becomes apparent that petitioners, though legally statused as separate owners, cannot be considered separate and independent with respect to the subject transfers.
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> "Pursuant to Tax Law § 1440(7) and its interpretation as formulated in 20 NYCRR 590.42, 'the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property' (20 NYCRR 590.42). Thus, consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee are added together for purposes of applying the $1,000,000.00 exemption (20 NYCRR 590.42).
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> "The Tribunal has stated, in Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), that the interpretation set forth at 20 NYCRR 590.42 is 'well within the statutory language of the first sentence of section 1440.7' (see also, Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003). 20 NYCRR 590.42 addresses transactions which involve a single transferor and one transferee. In the instant matter, it is undisputed that there was only one transferee in all of the real property transfers at issue. While on their face the transactions would lead one to believe that there were multiple transferors (i.e., RAF and Edex), the 'look through' principle rooted in the language of the gains tax requires an examination of the entities to determine their beneficial owners. Such examination leads to the conclusion that there was the same transferor in each real property transfer at issue.
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> "E. The 'look through' principle is derived from the language of the Tax Law. For example, Tax Law § 1443(5) provides an exemption '[i]f a transfer of real property, however effected, consists of a mere change of identify or form of ownership or organization, where there is no change in beneficial interest.' The focus of the gains tax through entities pervades the entire statutory scheme imposing the tax (Matter of Von-Mar Realty Co. v. Tax Appeals Tribunal, 191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803). The focus of the gains tax is to look through entities to determine the beneficial ownership of real property, and to focus on the economic reality of the transaction (Matter of Bredero Vast Goed, N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972). The necessity of the 'look through' principle is obvious. In fact, the Tribunal has noted that absent the ability to look through entities the gains

> tax would be rendered a nullity through transactions structured in two steps, with the first step designed to benefit from the Tax Law § 1443(5) exemption and the second from the $1,000,000.00 exemption (see, Matter of Schrier, Tax Appeals Tribunal, July 16, 1992, confirmed 194 AD2d 273, 606 NYS2d 384; Matter of LoScalzo, Tax Appeals Tribunal, January 21, 1993, confirmed 203 AD2d 621, 610 NYS2d 100).
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> "Looking through RAF and Edex it is clear that the beneficial ownership of the subject properties was held by the same individuals. At the time of RAF's transfers to the Culpos, the equal partners of RAF were Rex S. Ruthman and Edward R. Feinberg. When Edex transferred the 397 State property, its equal partners were also Rex S. Ruthman and Edward R. Feinberg. Using 'look through,' there was in essence one transferor of all the properties in question" (Determination, conclusions of Law "D" and "E").

On exception, petitioners argue that the two properties owned by RAF (94 Spring Street and 395 State Street) were obtained from different, unrelated transferors. They were "historically operated and maintained as separate parcels of real property," each had its own tax assessment number, different mortgagees, and were different types of property (one a high rise apartment and one a mid-rise converted house) (Petitioners' brief in support, p. 14). However, petitioners acknowledge that the two structures were owned by the same entity and were located near each other (Petitioners' brief in support, p. 14).

The Administrative Law Judge considered these factors and concluded:

> "[p]etitioners have failed to establish that the only correlation between the subject properties was their contiguity or adjacency. Nor have petitioners established that the properties were not used for a common or related purpose. As noted above, the mere fact that the properties are used to generate rental income is a common or related purpose (Matter of Iveli v. Tax Appeals Tribunal, supra; Matter of Bombart v. Tax Commn. of the State of New York, 132 AD2d 745, 516 NYS2d 989). In this matter, all of the parcels that were transferred were held by petitioners as rental income property. The parcels were all transferred to a single purchaser on the same day. Furthermore, the properties were all managed by a single manager, 397 State Street Management Co., Inc. It must be concluded that the subject properties were used for a common or related purpose" (Determination, conclusion of law "F").

Petitioners acknowledge that "the weight of judicial authority from the Third Judicial Department supports the Division's position that the consideration should be aggregated" (Petitioners' brief in support, p. 14). However, petitioners argue that "it is submitted that such a

finding is violative of the equal protection rights of the taxpayer" (Petitioners' brief in support, p. 14).

This Tribunal does not have the authority to consider claims alleging that a statute is unconstitutional on its face (Matter of Wizard Corp., Tax Appeals Tribunal, January 12, 1989). At the administrative level, statutes are presumed to be constitutional (Matter of Bucherer, Inc., Tax Appeals Tribunal, June 28, 1990). Further, we note that section 1440(7) has been found not to be violative of equal protection by the Appellate Division, Third Department (Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692; Matter of Bombart v. Tax Commn. of the State of New York, supra). However, we can consider whether a statute is unconstitutional as applied (Matter of David Hazan, Inc., Tax Appeals Tribunal, April 21, 1988, affd 152 AD2d 765, 543 NYS2d 545, affd 75 NY2d 989, 557 NYS2d 306). "Taxing statutes, like other social and economic legislation that neither classify on the basis of a suspect class nor impair a fundamental right, must be upheld if the challenged classification is rationally related to achievement of a legitimate State purpose" (Trump v. Chu, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it" (Madden v. Kentucky, 309 US 83). As the Court stated in Matter of Bombart v. Tax Commn. of the State of New York (supra):

> "[a]lso unavailing is petitioner's claim that aggregation here invalidly discriminated against the owners of multiple properties used for the production of rental income. Different tax treatment as between the disposition of contiguous properties owned and used for a common or related purpose by a single individual and the transfer of properties not having those characteristics is easily justified by the legitimate objects of administrative convenience and prevention of tax avoidance. Therefore, the imposition of a tax on the aggregate consideration petitioner received does not offend equal protection (see, Trump v. Chu, supra)" (Matter of Bombart v. Tax Commn. of the State of New York, supra, 516 NYS2d 989, 992).

We find that there is no evidence in the record of this matter which supports the argument of petitioners that Article 31-B has been applied to them in a manner that violates their equal protection rights. Therefore, we deny this portion of their exception.

Petitioner RAF argues that it is entitled to a step-up in its original purchase price due to the purchase of the 10% interest of one investor (Alexander) by the other two investors on January 11, 1989. The Administrative Law Judge determined that this petitioner was not entitled to a step-up in original purchase price because, although the remaining partners acquired this 10% interest subsequent to March 1983, it was acquired more than three years from the acquisition of their original interest in the partnership. Based on the provisions of former 20 NYCRR 590.45,[2] the Administrative Law Judge determined that:

> "[t]he partners may not aggregate their interests because 20 NYCRR 590.45(d) states, in part:
>
> > "'Interests acquired after March 28, 1983 are added together in determining whether an acquisition of a controlling interest has occurred. No acquisition of stock will be added to another acquisition of stock if they occur more than three years apart, unless the acquisitions were so timed as part of a plan to avoid the gains tax' (20 NYCRR 590.45[d]; emphasis added).
>
> "William Alexander's 10% interest was purchased in 1989, more than three years after the partners had acquired their original interest; therefore, there was no acquisition of a controlling interest and no step-up can be allowed. As the Tribunal stated in Matter of SKS Associates (Tax Appeals Tribunal, September 12, 1991):
>
> > "'in the absence of a taxable event (i.e., acquisition of a controlling interest), the regulation in 20 NYCRR 590.49(b) explicitly disallows the entity a step-up in its original purchase price in the real property'" (Determination, conclusion of law "G").

Petitioners dispute this determination and, relying on the decision in Matter of Rose (Tax Appeals Tribunal, March 10, 1994), argue "[t]hat such transactions may have been separated by more than three years is irrelevant" (Petitioners' brief in support, pp. 16-17). However, we find petitioners' reliance misplaced. In Rose, the issue was whether the Division could assert an additional tax deficiency more than three years after the transfer had occurred. There was no discussion of the acquisition by the petitioner of a controlling interest in an entity which owned

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[2]Section 590.45 was renumbered as section 590.46 and amended on October 24, 1994. However, these amendments have no effect on the conclusions of the Administrative Law Judge as applied to the situation of petitioner RAF herein.

an interest in real property. Further, all the interests acquired by the petitioner in that case were acquired prior to the effective date of Article 31-B (March 28, 1983). As a result, we find that petitioners have failed to demonstrate that the determination of the Administrative Law Judge was incorrect.

Petitioner RAF argues that because Greystone Properties, Inc. was paid from the proceeds of the sales and because Greystone was a licensed real estate broker, the amount paid to Greystone must be held to be a brokerage fee and petitioner RAF is entitled to deduct it from its consideration. The Administrative Law Judge determined that the amount paid to Greystone was not allowable as a brokerage fee because, after analyzing the services provided to petitioners by Greystone, he concluded that "[i]t is apparent that Greystone provided RAF with a management study and received its fee based upon the success of its recommendations. As the fee was not a customary brokerage fee, it is not allowable pursuant to Tax Law § 1440(1)" (Determination, conclusion of law "H"). We agree with the Administrative Law Judge. Petitioners do not dispute the facts found by the Administrative Law Judge as to the nature of the services provided by Greystone. Petitioners have not met their burden to show that the services of Greystone were customary brokerage fees paid by the transferor to sell the property, as required by section 1440(1)(a). Further, the fact that section 1440(5) has been amended to allow the inclusion of additional fees by a transferor to sell property does not mean that it has retroactive application to petitioners' transfers. That amendment is applicable only to transfers occurring on or after June 9, 1994 (L 1994, ch 170).

While petitioners raise the issue of the disallowance of the cost of purchasing microwave ovens from their original purchase price on exception, they provided no argument on that issue. Since the record contains no evidence in support of petitioners' position, we affirm the Administrative Law Judge's disallowance of such costs for the reasons stated in his determination.

Petitioners argue at page 15 of their brief that: "[e]ven if it is found that aggregation is warranted, it is submitted that the taxpayers' positions were valid and supported by reasonable

interpretations of the statutes and regulations and thus any and all penalties should be abated" (Petitioner's brief in support, p. 15). On this issue, the Administrative Law Judge concluded that:

> "[p]etitioners argue that their positions were valid and supported by reasonable interpretations of the statutes and regulations.
>
> "Prior to the date of transfer, the State's Appellate Division and the Tax Appeals Tribunal had held that the focus of the gains tax was to look through entities to determine the beneficial ownership of the real property at issue. However, petitioners did not pay the taxes determined to be due. In light of the court and Tribunal decisions, petitioners could have at least inquired of the Division as to the taxable status of the transactions at issue. Therefore, based on the Division's articulated policy, as upheld by the courts, as well as petitioners' failure to remit tax, despite the clear authority to the contrary, it is concluded that petitioners have not established reasonable cause (Benaquista, Polsinelli & Serafini Mgt. Corp. v. Commr. of Taxation & Fin., 191 AD2d 80, 598 NYS2d 829; Felix Industries v. State of New York Tax Appeals Tribunal, 183 AD2d 203, 589 NYS2d 641; Matter of Aire Bon Associates, Tax Appeals Tribunal, April 18, 1991)" (Determination, conclusion of law "L".

We agree with the Administrative Law Judge. Since, as petitioners acknowledge, the weight of judicial authority from the Third Judicial Department supports the Division's position that the consideration should be aggregated (Petitioners' brief in support, p. 14), petitioners have not established that their failure to remit the appropriate tax was due to reasonable cause and not due to willful neglect in order to entitle them to a remission, abatement or waiver of all or a part of the penalty imposed, as provided by section 1446(2) of the Tax Law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of R.A.F. General Partnership and Edex General Partnership to the determination of the Administrative Law Judge is denied;

2. The exception of R.A.F. General Partnership to the order of the Administrative Law Judge is denied;

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

4. The order of the Administrative Law Judge is sustained;

5. The petitions of R.A.F. General Partnership and Edex General Partnership are denied; and

6. The notices of determination are sustained.

DATED: Troy, New York
November 9, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner