STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHOLOM DRIZIN	:	DECISION DTA No. 811808
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 30, 1995 in the matter of the petition of Sholom Drizin, 441 Crown Street, Brooklyn, New York 11225-3119. Petitioner appeared by Jeremy Heisler, Esq. and Martin Kurlander, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel). The Division of Taxation also made a motion to reargue, following the issuance of the Administrative Law Judge's determination, which was denied by an order of the Administrative Law Judge dated June 20, 1996.

The Division of Taxation filed a brief in support of its exception and a reply brief. Petitioner filed a brief in opposition. Oral argument was not requested.

Commissioner Pinto delivered the decision of the Tax Appeals Tribunal. Commissioners DeWitt and Jenkins concur.

ISSUES

I. Whether petitioner is liable for gains tax on his transfer of a 35% interest in Taft Partners Development Group, a partnership having an interest in real property.

II. Whether the penalty imposed pursuant to Tax Law former § 1446(2)(a) should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "15" and "21" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

The Division of Taxation ("Division") issued a Notice of Determination, dated April 30, 1992, to petitioner, Sholom Drizin, assertingreal property transfer gains tax due of $643,309.00, plus interest of $804,228.86 and penalties of $225,158.00, for a total amount due of $1,672,695.86. The "Computation Section" of the notice contained the following explanation:

> "Section 1447.3 of Article 31B of the tax law states in part '...in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire... the transferee shall be personally liable for the taxes stated to be due in a Notice of Determination... and such liability may be assessed and enforced in the same manner as the liability for the tax under this Article...'
>
> "A search of our files failed to find a filing on the transfer of CONTROLLING INTEREST OF TAFT PARTNERS DEVELOP from MENT GROUP YOU TAFT PARTNERS DEVELOPMENT GROU to P [sic].
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> "Such filing is required by section 1447.3 of the tax law. Therefore, taxes have been computed as shown."

On January 5, 1984, Royale Towers Associates ("seller") and Sholom Drizin ("purchaser") entered into an Amended and Restated Agreement For Sale and Purchase (Division's Exhibit "F") of the Taft Hotel. According to this purchase and sale agreement, the purchase price was to be $32,505,280.00 "subject to credit adjustments, prorations and reimbursements, provided for herein and to the terms of Section 2, 10 and 20." The terms also provided that contemporaneously with the execution and delivery of the contract the purchaser was to deposit $3,200,000.00 with the seller.

The property known as the Taft Hotel is located at 761-779 Seventh Avenue, New York, New York.

It is noted that petitioner is not a native-born American and, at times during the hearing, had some difficulty expressing himself in English.

During the hearing, petitioner testified that he gave the $3,200,000.00 deposit to a Mr. Halloran (tr., pp. 15-16).

Petitioner testified that the Taft Hotel needed to be refurbished. He estimated that an additional "$40-, $50,000,000" was needed "to rebuild the hotel" (tr., p. 18). He stated that he did not have the ability to obtain a mortgage of the magnitude required to both purchase and renovate the property (tr., p. 16). Petitioner asked Philip Winograd to find a partner who would provide the financing.

Philip Winograd is the real estate broker who found the Taft Hotel for petitioner. During the hearing, Mr. Winograd described the Taft Hotel as "a big property" located "on the west side" (tr., p. 69). He further stated that at that time it was becoming fashionable "to move west from east" (tr., p. 69).

Mr. Winograd averred that petitioner asked him to "procure a person who could provide financing for a 50% interest" (tr., p. 63). When asked how he went about finding that person, Mr. Winograd responded, in pertinent part:

> "We prepared a brochure, and I went around to all the developers that I knew that could get this kind of money, and were interested in this project. And I introduced him to several others that didn't work out, and these people were amenable, agreeable.
>
> "You know, sometimes you can talk to a Mr. Cohen two months earlier, and 'No, no, no. I'm not interested.' And you have to understand, in the 80's, it was a violent time in New York with real estate. I mean trading, real estate property, it was like a monopoly. And two months later they were happy to get a chance to buy the property, or, go in partners in the property" (tr., pp. 72-73).

According to Mr. Winograd, he introduced Steve Goodstein, Martin Goodstein, Arthur G. Cohen and Jacob I. Sopher to petitioner as prospective investors.[1]

Petitioner stated that he did not know Messrs. Goodstein, Cohen and Sopher prior to being introduced to them by Mr. Winograd.

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[1]Martin Goodstein is Steven Goodstein's brother.

On March 1, 1984, petitioner entered into an Agreement of Assignment ("assignment") (Division's Exhibit "G"), wherein petitioner was the assignor and Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were collectively listed as the assignee, "having a place of business c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

According to the terms of this assignment, petitioner assigned a 50% interest in the agreement for sale and purchase of the premises located at 761-779 Seventh Avenue, New York, New York, dated January 5, 1984, which he had with Royale Towers Associates to the assignee in return for assignee's payment to petitioner of $1,600,000.00. In addition, pursuant to paragraph 4(a) of this assignment, petitioner and the assignee were to enter into a limited partnership agreement and the partnership was to acquire title to the premises.

On March 7, 1984, petitioner entered into an Agreement of Limited Partnership of Taft Partners Development Group ("agreement") (Division's Exhibit "H").

Pursuant to the agreement: (a) Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were, collectively, the managing general partners; (b) petitioner, Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were general partners; and (c) Andrew Goodstein, Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel, as trustees f/b/o Michele A. Goodstein u/t/a dated July 7, 1967, f/b/o Geoffrey A. Goodstein u/t/a dated July 7, 1967, and f/b/o Shari L. Goodstein u/t/a dated July 7, 1967, and Samuel Lewis were limited partners.[2]

The general partners held the following percentage interests in the partnership: petitioner - 50%; Arthur Cohen - 20%; Steven Goodstein - 8.5%; Martin Goodstein - 2%; and Jacob Sopher - 10%. The remaining 9.5% interest was held by the limited partners (tr., pp 43-47).

We modify finding of fact "15" of the Administrative Law Judge's determination to read

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[2]Trustees Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel were listed in the agreement "with an address c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

as follows:

> Petitioner testified that, after a month's negotiation, he and the others entered into a written assignment agreement (see, Finding of Fact "11"). He further stated that there was no other written agreement to protect him (tr., pp. 38-39).
>
> Petitioner averred that even though he did not make any money, he was very pleased with the deal because the other partners were providing the financing for both the purchase and the construction. In addition, he stated that he was very pleased with his 50% interest and his position as a general partner because he had control (tr., p. 40). However, the terms of the agreement provide that he was not a "managing partner," like each member of the investors group, with ultimate financial control over the partnership.[3]

According to petitioner, on March 2, 1984, a discussion was held between him and Steven Goodstein. He testified that he intended to make a big hotel, while Mr. Goodstein wanted to develop condominiums.[4] At that time, petitioner also requested access to the books.

Petitioner averred that, within hours of that discussion, he received a telephone call from someone who said "You better come up" (tr., p. 19).[5]

Petitioner proferred the following testimony about what subsequently transpired:

> "I actually came up with my friend Joshua Sopher, and he start to this and they start -- They don't want me to be a general partner. And here it comes the worse fight, and we was fighting for the whole week, till the end of the week.
>
> "We agreed that they would pay me, and I sold them additional -- It was actually not a sale. They put me like on an option that they were able to buy additional 35%. And I have 15%, and I should be 15%, I should be limited partner. I did not like it, but --" (tr., pp. 19-20).

When asked by his representative to indicate with whom he had the conversation concerning the sale of the 35%, petitioner responded "[w]ith Steve Goodstein was behind the whole thing" (tr., p. 20). He further stated:

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[3] We modified this finding to more accurately reflect the record.

[4] Petitioner explained that he had been involved in construction and wanted to be involved in the construction along with Steven Goodstein, who was the principal in the Goodstein Construction Company.

[5] Petitioner could not recall exactly who called him.

> "Steve Goodstein forced me, forced me to sell, to become a limited partner. And he forced on all the partners, and I don't know if they all agree with him at this time on March 7th, but he wants me out of the books. He doesn't want me there" (tr., p. 21).

Petitioner testified that he sold the 35% interest to Steven Goodstein under duress and threat. He proferred the following explanation as to the manner in which he was forced to sell the 35% interest to Steven Goodstein:

> "Because you see I sign already with him a contract. And I could not provide the financing by myself, but I could take other people, other people who had the strength to get the money. But when I signed already the first contract with Steven Goodstein, the 50%, so I can not go and take out the money. I was already tied up to him.
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> "And he says he's going -- For him to lose a million six is nothing for them in their position. For Arthur Cohen and them, a million six, and he says he's going to lose all the money. And apparently, I found out later that they was negotiating behind my back, if I'm going to be stubborn and not to give them the 35%, actually Steve Goodstein said they're going direct to Halloran and buy from him without me, with me the hotel.
>
> "So they forced me, and I did not have the choice to take another partner, and I could not -- and I could not -- I could not go with -- and I did not want to go with them. I know what Goodstein's going to do to the hotel. Actually, he did, and I felt it already" (tr., pp. 23-24).

On March 7, 1984, petitioner ("seller") and Steven Goodstein ("purchaser") entered into a Partnership Interest Acquisition Agreement ("acquisition agreement") whereby petitioner sold to Steven Goodstein the 35% interest in Taft Partners Development Group ("Taft") for $8,320,000.00. Upon consummation of the sale of petitioner's 35% interest, his remaining 15% interest in Taft automatically converted to a limited partner's interest.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

> According to the terms of the acquisition agreement, petitioner, simultaneously with the receipt of the $1,600,000.00 downpayment and the Letter of Credit in the amount of $6,720,000.00, was to execute and deliver to Steven Goodstein an instrument "for the purpose of assigning the Interest to Purchaser or his assignee(s) or designee(s)." In addition, petitioner was to execute any documents or certificates required "in connection with the transfer of the Interest and the conversion of Seller's remaining interest in the Partnership to a limited partner's interest."

Pursuant to paragraph 6, the agreement was:

> "conditioned upon Purchaser obtaining and delivering to Seller the Letter of Credit, prior to or simultaneously with the Downpayment on a date not later than the date the Partnership acquires title to the Premises."

This paragraph also provided that, in the event that the Letter of Credit was not obtained and delivered to the seller or if it did not comply with the requirements contained in paragraph 5, the transaction would be null and void and "neither party shall have any claim against the other." Paragraph 7 of the acquisition agreement contained the "Conditions Precedent" to the consummation of the sale of the interest, which included inter alia: that the March 1, 1984 assignment between petitioner, Steven Goodstein, Martin Goodstein, Arthur Cohen and Jacob Sopher "shall not have been rescinded".

The agreement also specifically provided that petitioner was responsible for making the requisite real property transfer gains tax (hereinafter "gains tax") filings and paying the tax which "may" be due, regardless of whether the State made a claim for said taxes at closing or at any future time.[6]

According to paragraph 11 of the acquisition agreement, Steven Goldstein, as purchaser, could freely assign his rights thereunder "provided the assignee(s) shall assume in writing all duties and obligations of Purchaser."

Petitioner's Exhibit "3" is the Real Property Transfer Gains Tax Questionnaire - Transferee, Form TP-581 ("transferee questionnaire") which petitioner executed as a partner of Taft. According to the transferee questionnaire, Taft was the transferee which was acquiring a 100% fee interest in 761-779 Seventh Avenue, New York, New York, Section 4, Block 1003, Lot 1 on May 15, 1984 for $32,280,000.00 from transferor, Royale Tower Associates.

Attached to the transferee questionnaire was petitioner's affidavit, sworn to on May 21, 1984. In his affidavit, petitioner stated:

> "1. I am making this affidavit to set forth the details regarding my purchase of premises known as 761-779 Seventh Avenue, which property is known as the 'Hotel Taft'.
>
> "2. The Contract of Purchase was entered into by me as of January 5, 1984 for a purchase price of $32,505,280.00. Simultaneously with the execution of the Contract of Purchase a downpayment of $3,200,000.00 was deposited thereunder.

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[6] We modified this finding to more accurately reflect the record.

"3. Thereafter on March 1, 1984 an understanding was arrived at between myself and Messrs. Arthur G. Cohen, Steven Goodstein, Martin Goodstein and Jacob I. Sopher under the provisions of which I assigned to said four individuals a 50% interest in the Contract of purchase in consideration for the payment of $1,600,000.00, representing one-half of the downpayment deposited under the Contract of Purchase. A copy of the instrument of assignment dated March 1, 1984 is attached hereto as Exhibit 'A'.

"4. Thereafter the five holders of interests in the Contract of Purchase assigned the respective interests of the purchaser in and to the Contract of Purchase to Taft Partners Development Group, a limited partnership, comprised of the same individuals, as General Partners and children and related parties of said individuals as Limited Partners. A copy of the assignment to the limited partnership is annexed hereto as Exhibit 'B'.

"5. The Limited Partnership Agreement provides for all profits to be shared among the General Partners and Limited Partners in accordance with the respective capital contributions of each. A copy of Exhibit A to said Limited Partnership Agreement is annexed hereto as Exhibit 'C' which shows, for example, that my capital percentage remains at 50%.

"6. No Gains Tax is due with reference to the two assignments herein referred to by reason of the fact that no profit or consideration was realized by the assignors as a result thereof."[7]

On June 11, 1984, Chase Manhattan Bank ("Chase") sent a loan commitment letter for the purchase and renovation of the fee premises located at 777 Seventh Avenue, New York, New York to the Goodstein Construction Company.[8]

Included as part of the terms in Chase's loan commitment letter were the following:

"We agree to lend $102,000,000 to a partnership comprised of Martin and Steven Goodstein, Arthur Cohen and Henry Sopher (hereinafter and in the General Conditions attached hereto termed the 'Borrower') of which up to $41,000,000 shall be advanced for acquisition of the Premises (the 'Acquisition Allocation'), with the balance (the 'Construction Allocation') to be advanced for the renovation of the existing building located on the Premises into a multi-use condominium building containing 20,470 square feet of professional space, 23,493 square feet of retail space, 24,470 square feet below

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[7] None of the exhibits referenced in petitioner's affidavit were annexed to the transferee questionnaire submitted into the record.

[8] The loan commitment letter was addressed to "The Goodstein Construction Company, 211 East 46th Street, New York, New York, Attention: Mr. Martin Goodstein."

> grade, including a 4,996 square foot health club and residential space containing 720 condominium apartments aggregating 343,207 saleable square feet of space, all of which shall be completed within 24 months from the date of the loan closing."

Additionally, Chase required that a guaranty of payment of the note be executed by Martin and Steven Goodstein, Arthur G. Cohen and Henry Sopher.

Petitioner submitted five letters, addressed to himself and the other members of Taft, dated March 2, 1984, June 19, 1984, June 21, 1984, July 12, 1984 and July 27, 1984, respectively, from Sidney Hoffman, Controller of Goodstein Construction Corp. Each of these letters requested money, to fund Taft's working capital or to pay Taft's various obligations, based upon each member's partnership percentage.[9] The ownership interests in Taft, as reflected in each of these letters, follows:

	Percentage
Steven Goodstein	8.5
Martin Goodstein	8.5
Andrew Goodstein	3.0
Arthur Cohen	20.0
Jacob Sopher	10.0
Sholom Drizin	50.0

In response to the Division's questions concerning the relationship between the four gentlemen who had been assigned 50% of petitioner's right to buy the property, and why they were all listed to one address, petitioner testified as follows:

> "They were fighting. You know, business interest, and they separate individuals. Arthur Cohen was in the banking. Hank Sopher is selling condominiums. And Martin Goodstein is a separate story. They are separate individuals, separate business. They are separate people.
>
> "I don't know why. Maybe it is easier for the lawyers to write. I really don't know. I really don't know.

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[9]Each letter stated the total amount of money required at that time and the amount due from each member of the partnership. The total amount of money requested in each letter was:

March 2, 1984	$100,000.00
June 19, 1984	$ 30,000.00
June 21, 1984	$ 40,000.00
July 12, 1984	$ 50,000.00
July 27, 1984	$150,000.00

> "Because they have, everybody is separate ideas, separate offices. And they are separate individuals, very separate. I don't know. I don't know" (tr., pp. 35-36).

The Division's representative asked petitioner a series of questions concerning his removal from control by Steven Goodstein, in particular whether the other partners agreed with Steven Goodstein's actions. Petitioner testified that he really did not know where Arthur Cohen stood on the issue. According to petitioner, when Mr. Cohen spoke to him, Mr. Cohen was on his side. However, petitioner did not know what Mr. Cohen said to Steven Goodstein when those two spoke. As for Martin Goodstein, petitioner stated that he was unsure of what Martin's position was because Martin and his brother, Steven, were fighting and were not talking to each other. He averred that he felt Mr. Sopher was the only one on his side and that Mr. Sopher wanted him to remain at 50%.

Petitioner testified that Steven Goodstein never stated that he was acting on behalf of Messrs. Cohen and Sopher. Petitioner could not remember whether or not Steven Goodstein ever stated that he was acting on behalf of his brother, Martin. As for limited partner Andrew Goodstein, petitioner testified that he did not know that Steven had a son (tr., pp. 49-51, 53-55).

On September 24, 1984, petitioner transferred his 35% interest in Taft to Steven Goodstein.

Petitioner's Exhibit "1" is a document, dated September 24, 1984, addressed to petitioner, written by Steven Goodstein, c/o Goodstein Management, Inc., which referenced "Taft Partners Development Group (the 'Partnership')" (emphasis in original). This document set forth, in pertinent part, the following:

> "Reference is made to that certain Partnership Interest Acquisition Agreement, entered into as of the 7th day of March, 1984 between Sholom Drizin, as seller and Steven Goodstein, as purchaser, modified by that certain Modification of Partnership Interest Acquisition Agreement, entered into as of the 18th day of June, 1984, between Sholom Drizin, as seller and Steven Goodstein, as purchaser (the 'Agreement').
>
> "Capitalized terms not defined herein shall be given the same meaning ascribed to them in the Agreement.

> "1. Pursuant to the Agreement, the undersigned hereby delivers to you the sum of $1,600,000 as payment in full of the Downpayment, as provided as paragraph 2 of the Agreement. Pursuant to our agreement of even date and notwithstanding any provision of the Agreement to the contrary, it is hereby understood and agreed that the Letter of Credit* shall be delivered to you on or before ninety (90) days from the date hereof or on such earlier date as the construction loan closing with Chase shall take place. **[10] The letter of credit may be drawn upon on or after 12/24/85 in accordance with the provisions thereof. It is further understood and agreed that, in the event you have not timely received the Letter of Credit as aforesaid, at your option the Interest conveyed by you to the undersigned on this date shall be reconveyed to you, or in the alternative you shall have the right to demand immediate payment from the partnership for the amount secured by the Letter of Credit. (SEE RIDER TO PARAGRAPH '1')"

Petitioner's signature appears at the bottom on the second page of the document directly beneath "ACCEPTED AND AGREED".

It is noted that the copy of this document submitted into the record consisted of two pages only; the referenced Exhibits "A" and "B" and the rider to paragraph "1" were not included.

A copy of the Modification of Partnership Interest Acquisition Agreement, entered into as of June 18, 1984, referenced in the document, dated September 24, 1984, discussed in the preceding Finding of Fact is not part of the record.

At some point in the fall of 1984, Taft purchased the property from Royale Towers Associates. The record is silent as to the exact date. Petitioner testified that he thought that they closed in October of 1984 (tr., p. 49).

As noted in Finding of Fact "1", the Division issued a Notice of Determination, dated April 30, 1992, to petitioner which asserted gains tax due of $643,309.00, plus interest of $804,228.86 and penalties of $225,158.00, for a total amount due of $1,672,695.86.

Petitioner's request for a conciliation conference was deemed timely.

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[10] The following appeared at the bottom of the page:

> "* THE FORM OF WHICH IS ANNEXED HERETO AS EXHIBIT 'A'."
>
> "** THE AMOUNT OF THE LETTER OF CREDIT HAS BEEN DETERMINED IN ACCORDANCE WITH EXHIBIT 'B' ANNEXED HERETO."

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 125289), dated March 26, 1993, sustaining the statutory notice.

Petitioner timely filed a petition, on April 15, 1993, which challenged the assessment of gains tax. Petitioner alleges that the Division: (a) "erroneously determined that Petitioner transferred a controlling interest in real property within New York State, subjecting the transfer to gains tax under Tax Law § 1440"; and (b) "erroneously determined that Petitioner transferred a portion of his interest in real property to a group of individuals who were acting in concert and therefore this was the transfer of a controlling interest subject to gains tax." The petition also asserts that the transfer in issue should not be aggregated with any earlier transfers because each transfer was completely independent of each other and each of the transfers involved different parties; "the various transferees of the various transfers were not part of a group", nor did a relationship exist amongst the various transferees "wherein one transferee influenced or controlled the actions of any others"; the transfer in issue "was made solely between two individuals; there were no other parties or groups involved"; and the transfer in issue was not a transfer of a controlling interest and, therefore, it would not be subject to the gains tax.

The Division served an answer, dated May 24, 1993, on petitioner.

Petitioner was asked by his representative whether, at the time he sold the first 50% interest, he intended to sell any further interest in Taft; he responded, "Definitely, no" (tr., p. 24).

As further support to his position, petitioner submitted his personal affidavit which he executed on July 26, 1994. In his affidavit, petitioner alleges:

> "I, Sholom Drizin am attesting to the fact that on March 1, 1984, when I included the Taft Partnership in the purchasing of the Taft Hotel, and made them 50% partners for providing the financing, I did not have the slightest idea or intention that ultimately I would be forced to relinquish an additional 35% to Steven Goodstein, and become a limited partner on the remaining 15%.
>
> "The transfer of the 35% interest to Steven Goodstein was made under duress and against my will. It was not part of any agreement or plan with the previous transfer."

Petitioner stated that he thought his lawyer told him that he did not have to file any

transfer tax return as a result of his transfer of the 35% interest to Steven Goodstein. Petitioner gave the following response to his representative's query concerning the advice given to him "at the time about filing Capital Gains tax" for the transfer in issue:

> "No filing. I understood that I don't owe, I don't have to pay -- I don't have -- The lawyer's advice is that I don't have to pay gains tax. That's what they advised me. I don't know if they filed or they did not file, this I don't know. But I don't -- Well, I'm just, already it's a long time ago. But I definitely -- If it was supposed to be filed, I was always to my lawyer to obey whatever the law is. And if I would have to pay, I would pay" (tr., pp. 28-29).

After petitioner had rested, the Division's representative attempted to submit only one more document which he had requested from the audit group. His explanation as to the source of the document and the reason for his submission of this document follows:

> "Basically different files. As far as audit goes, there's a file for Taft Partnership, there's a file for Mr. Drizin. And I needed access to the Taft Partnership file. Rather than sending the whole file, they were able to send me the documents I required. And I believe a note, handwritten by Nancy Boise [phonetic], pretty much reads for itself.
>
> "And the sole purpose I'm offering these documents is, I was seeking to find out how Taft Partnership treated the acquisition of this 35% for gains tax purposes, at some point in time in their dealings with the Department.
>
> "Several documents -- The pertinent point, she says in her note that she highlighted information. The highlighting didn't show up on the copies, but I'll show petitioner's representative. It deals with the last page of the group of documents" (tr., pp. 76-77).

According to the Division's representative, the last page of this document was directly relevant because it showed how Taft treated the acquisition for gains tax purposes.

Petitioner's representative was given the opportunity to review the documents and, upon review, he objected to the Division's offer of the documents into evidence. The documents, consisting of some audit workpapers of Taft Partners Development Group, including Ms. Boice's cover note and a Real Property Gains Tax Questionnaire - Transferor, were admitted as the Division's Exhibit "J" (tr., pp. 78-84).

At that point in the proceedings, petitioner's representative asked for a continuance "for the possibility of bringing in other witnesses to negate any inference brought in by this very last

document put in by the State of New York through their Audit Division" (tr., pp. 84-85).

After listening to the arguments made by both petitioner's and the Division's representative on the issue of whether a continued hearing should be granted, Administrative Law Judge Maloney granted petitioner's request for a continued hearing. However, in case, after investigation, petitioner decided not to proceed with the continued hearing, a briefing schedule was to be set.

Prior to the close of the hearing, the Division withdrew its offering of Exhibit "J" and petitioner withdrew his request for a continued hearing. A briefing schedule was set at that time.

The record in the instant matter remained open until August 26, 1994 to afford petitioner the opportunity to submit documents contemporaneous with the 1984 transaction.

Petitioner did not submit any additional documents into the record.

The Division, in its brief, concedes that, based on additional information submitted to it by petitioner, the tax assessment should be reduced from $643,309.00 to $623,541.00; interest and penalty are to be adjusted accordingly based upon this reduction in the amount of tax due. According to the Division's brief, the total amount due (i.e., tax, interest and penalty) as of April 1, 1995 was $1,872,317.00.

The Division's representative brought a motion, on notice to petitioner, for reopening the record, dated June 2, 1995, pursuant to 20 NYCRR 3000.5.[11] The Division submitted the affidavit of David Gannon, Esq., sworn to on June 2, 1995, together with an exhibit annexed thereto in support of that motion. The return date of the motion was July 4, 1995.

In his affidavit in support of the motion for reopening the record, Mr. Gannon made the following assertions:

> "4. At the hearing in this matter, Administrative Law Judge Maloney left the record open until August 26, 1994 to provide

[11]Although not stated in the notice of motion, it appears that the ground for this motion is newly-discovered evidence.

petitioner with the opportunity to 'submit further documents concerning the transaction that took place in 1984. This will be limited to documents contemporaneous with the 1984 transaction' (Tr., p. 89).

"5. Petitioner did not submit any documentation during this time period.

"6. Prior to, during, and subsequent to the hearing in this matter, petitioner and the Division of Taxation have been and continue to be involved in settlement negotiations.

"7. Subsequent to the hearing in this matter, petitioner retained an additional representative, David Eisig of KPMG Peat Marwick. Mr. Eisig has been petitioner's primary contact person concerning settlement negotiations.

"8. During the course of settlement negotiations, Mr. Eisig repeatedly informed me that he was unable to gain access to relevant, material documentation concerning the transfer at issue because petitioner and the Taft Partnership were engaged in substantial litigation which involved, inter alia, the transaction at issue.

"9. In conjunction with the settlement negotiations, on May 31, 1995 it became necessary for me to review for the first time a Division of Taxation file which, although concerning a taxpayer other than petitioner, i.e., Taft Partnership, was directly relevant to the ongoing settlement negotiations to the extent it contained material information relevant to the settlement discussions.

"10. During the review of the file I located the Report of Closing attached as Exhibit 'A'.

"11. This document clearly fits within the category of 'documents contemporaneous with the 1984 transaction' (Tr., p. 89).

"12. Based on the representations made to me by David Eisig (¶ 8 supra), it seems apparent that the reason petitioner did not provide additional contemporaneous documentation by the August, 1994 deadline was that, due to pending litigation between petitioner and the Taft Partnership, petitioner was unable to have access to contemporaneous documents in the possession of the Taft Partnership which related to the transfer at issue, such as Exhibit 'A'.

"13. In light of this access problem, pursuant to this motion the Division of Taxation both requests and consents to the opening of the record in this matter for the sole purpose of allowing the Division of Taxation, on behalf of petitioner, to submit a copy of the Report of Closing.

"14. In the opinion of the Division of Taxation, this offering will not disrupt the current proceedings. The Division of Taxation has

no desire to submit any brief or memorandum concerning this document, as the document speaks for itself. Further, while a return date of July 4, 1995 has been selected pursuant to 20 NYCRR 3000.5, this was done solely (i) to comply with regulation 20 NYCRR 3000.5 and (ii) to fix a point in time for petitioner's reply, if any.

"15. This motion is in no way intended to delay or prolong this proceeding. Consistent with this desire to avoid delay, the Division of Taxation concedes to having the Administrative Law Judge address this motion in her determination.

"16. I realize that the timing and nature of this motion are unique, but given: (i) the unique circumstances surrounding this matter, (ii) the Division of Taxation's efforts on behalf of petitioner, (iii) the Division of Taxation's express desire to avoid further delay, (iv) the Division of Taxation's consent to the opening of the record, and (v) the Division of Taxation's efforts to prepare and file this motion within 48 hours of the discovery of the Report of Closing, I believe that this motion is both appropriate and proper."

Attached to Mr. Gannon's affidavit as Exhibit "A" is the 16-page Report of Closing for the acquisition of the Taft Hotel by Taft Partners Development Group.

Petitioner's representative requested and received a two-week extension of time in which to submit papers in opposition to the Division's motion for reopening the record. The revised return date for this motion was July 20, 1995.

Petitioner's representative brought a cross-motion, on notice to the Division, for reopening of the record, dated July 6, 1995.[12] The return date of this cross-motion was July 27, 1995. The affirmation of Martin Kurlander, Esq., affirmed on July 6, 1995, was submitted in opposition to the Division's motion and in support of petitioner's cross-motion made in the alternative.

Mr. Kurlander, in his affirmation in opposition to the Division's motion for reopening the record and in support of petitioner's cross-motion to reopen the record, made the following assertions, in pertinent part:

[12]Review of the papers submitted in support of petitioner's cross-motion reveals that petitioner is requesting that the record be reopened and a continued hearing be granted to give petitioner the opportunity to present additional witnesses and submit further documentary evidence, if available.

"(2) At the Administrative Hearing of this matter, Your Honor gave petitioner Mr. Drizin until August 26, 1994, to submit additional documents relevant to The Taft Hotel transaction. The State did not request, not [sic] did Your Honor provide it, with the option to offer an [sic] additional evidence.

"(3) Now, nearly one year after the August, 1994 deadline, the Division, in the guise of acting on Mr. Drizin's behalf, moves to reopen the hearing and offer the 'Report of Closing' as a favor to Mr. Drizin. That attempt must be rejected on many grounds.

"(4) The State has no standing to offer a document in evidence on behalf of an adversary.

"(5) The Division hasn't made even a pretense of showing that 'special circumstances' exist which would warrant reopening the record at this late date, more than one year after close of the hearing, and after the parties have finished briefing the case.

* * *

"(7) In the instant matter case the Division of Taxation provides only the conclusory statement of its attorney, David Gannon, Esq., that on May 31, 1995, during review of the Taft Hotel file, 'I (Mr. Gannon) located the report of closing.' (Gannon Aff., ¶ 10) Mr. Gannon fails to demonstrate why, with due diligence, the State could not have obtained the Taft Partners' own closing statement in time for the hearing or before the briefs were submitted.

"(8) From Mr. Gannon's affidavit it is plain that long before the State's motion to reopen, the Division of Taxation had in its possession the Taft Partnership file containing the Report of Closing. (See Gannon Aff., ¶ 9.) The evidence was there; it was just not discovered by Mr. Gannon until he decided to peruse the file in May, 1995. Affirmant respecfully [sic] submits that this lack of investigative zeal does not qualify as the due diligence which is a prerequisite to re-opening of a hearing.

"(9) Obviously, the Division of Taxation believes that the Report of Closing aids its case in a way the testimony and documents already admitted during the Administrative Hearing did not. The State must think so, otherwise it would not apply for the Taft closing statement's admission. It is, therefore, disingenuous for Mr. Gannon to suggest that (1) the document will not disrupt the current proceedings and (2) the State has no desire to submit a brief or a memorandum concerning the document. (Gannon Aff. ¶ 14)

"(10) Nothing could be more procedurally unfair to petitioner Drizin than to allow the Division of Taxation to hide behind Mr. Drizin and slip in new evidence lying long dormant in the Division's files.

"(11) Alternatively, if Your Honor does decide to admit the Report of Closing, then Mr. Drizin's cross-motion should be granted

> and the hearing should be reopened to give Mr. Drizin the chance to call more witnesses and submit further documentary evidence, if available. Reopening should not be a one-sided affair with the Division of Taxation having the right to pick and chose [sic] what evidence may come in. Mr. Drizin should have an equal opportunity to explore issues pertinent to resolution of this case and to do so in the form of live witnesses and written evidence."

The Division submitted a letter, dated July 19, 1995, as both its reply to petitioner's comments concerning the Division's motion and its response to petitioner's cross-motion.

In its letter, the Division stated that it considered the July 27, 1995 return date of petitioner's cross-motion to be in error and that the correct return date is dictated by 20 NYCRR 3000.5, i.e., August 7, 1995.[13]

The Division asserted that petitioner's challenges to the Division's motion and his cross-motion are without merit. It argues that it was simply seeking "to provide the court with one relevant contemporaneous document which the taxpayer had stated he would have provided but for the fact that pending litigation prevented him from accessing the documentation" (Division's letter, p. 4). The Division also contended that petitioner's cross-motion should be denied. It avers that petitioner has had his opportunity to present witnesses and submit written evidence. "Unfortunately, petitioner chose to squander this opportunity by exploring the wrong issues at the hearing" (Division's letter, p. 4).

The Division submitted eight proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into the Findings of Fact herein except number "8," which was modified to more accurately reflect the record.

OPINION

The Division has taken exception to the determination of the Administrative Law Judge,

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[13]Thirty days from July 6, 1995 is August 5, 1995. Since August 5, 1995 falls on a Saturday, the return date would move to the next business day, or August 7, 1995.

specifically the conclusions that petitioner's transfer of his 35% interest in Taft Partners Development Group to Steven Goodstein was not subject to gains tax as an acquisition of an additional controlling interest and that, if the transfer was determined to be subject to the gains tax, the penalties asserted by the Division should not be abated.

The Division argues that petitioner's transfer of his 35% interest in the partnership to Steven Goodstein was taxable as the second acquisition of a controlling interest by the investors brought in by petitioner to develop the real property he had contracted to purchase. The Division argues that the investors, Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher, exhibited a unity in negotiating and consummating the transfer of ownership interests which demonstrates that they were clearly acting in concert. In addition, the Division points out that the acquisitions were closely related in time, the number of purchasers were few and the terms of the contracts to purchase contained mutual terms (20 NYCRR former 590.45[b]). In further support of its position, the Division notes that the language in the second acquisition agreement between petitioner and Steven Goodstein demonstrates an inter-relationship between the acquisition documents.

The Division contends that the investors had an agreement between them as to the course of action they would take regarding the acquisition, as demonstrated by testimony at the hearing, and that one of the investors, Steven Goodstein, was recognized as controlling and influencing the actions of the group and was the driving force behind the development of the real property.

Finally, the Division points out that the Administrative Law Judge concluded that the investors were acting as a single entity when they initially acquired the 50% interest in the contract to purchase and when Steven Goodstein acquired petitioner's 35% interest in Taft Partners Development Group and, the Division emphasizes, petitioner has not excepted to said conclusion. Hence, the Division argues that the regulation at 20 NYCRR former 590.45(d), interpreting Tax Law former § 1440(2), dictates that the second acquisition by the investors was properly subject to the gains tax.

On the issue of penalty, the Division argues that there is no basis for abatement on the grounds that petitioner believed that the investors' second acquisition of a controlling interest was not a taxable event. The Division notes that it is the acts of the transferee which dictate the imposition of tax in entity transfers and that petitioner was not in the position to judge those acts, nor was the administration of the Tax Law ever intended to be delegated to taxpayers (Matter of Harris, Tax Appeals Tribunal, December 30, 1993). The Division points out that it was not petitioner's place to determine the gains tax implications of the second transfer, only his obligation to report the transfer of the interest to the Division, which only then could determine when and if a controlling interest had been transferred. The Division argues that since petitioner was statutorily required to report the transfer of the 35% interest in the partnership pursuant to Tax Law former § 1447 and his ignorance of the law and reliance on the advice of a professional did not constitute reasonable cause, the penalties should not be abated (Matter of Brounstein, Tax Appeals Tribunal, January 30, 1992).

Petitioner argues that the regulation at 20 NYCRR former 590.45(d) does not apply to the instant situation. He argues that the regulation requires that gains tax must have been paid on the first acquisition and that both acquisitions must involve purchases of shares or an interest in an entity or partnership owning or controlling real property. Petitioner argues that even if 20 NYCRR former 590.45(d) is held applicable to the instant matter, it cannot be applied because it is void due to the fact that there can be only one acquisition of a controlling interest and only where the interest acquired is 50% or more of shares, capital or beneficial interest in an entity or partnership owning an interest in real property, with the only exception being the acquisition of equal 50% blocs of shares. Petitioner adds that the Division may not countermand a statute by regulatory fiat.

In addition, petitioner argues that the imposition of penalties is unwarranted in the instant situation. Petitioner relies upon the fact that the Administrative Law Judge determined that the transfer was not subject to taxation and that the interpretive regulations in effect during the March through September 1984 period conveyed the message that no tax should be imposed on

the acquisition of petitioner's 35% interest in the partnership by Steven Goodstein.

The Administrative Law Judge determined below that:

> "[t]he record in this matter clearly indicates that the investors . . . were acting as a single entity when they initially acquired the 50 percent interest in the contract to purchase the Taft Hotel from petitioner and when Steven Goodstien acquired petitioner's 35 percent interest in Taft" (Determination, conclusion of law "L").

However, the Administrative Law Judge rejected the Division's contention that the transfer of the 35% interest was a transfer of a controlling interest to the single entity made up of the four investors, to wit: Messrs. Goodstein, Cohen and Sopher. The Administrative Law Judge reasoned that the investors, as a single entity, already owned a controlling interest in the partnership (defined as more than a 50% interest) and the acquisition of the additional 35% was merely an increase in their interest not subject to gains tax.

Despite the Division's argument to the Administrative Law Judge in its brief below, the Administrative Law Judge chose to disregard the provisions of the regulation at 20 NYCRR former 590.45(d), which addresses situations where more than one acquisition of a controlling interest may occur. The Division again has raised this issue on exception and we will discuss its applicability below.

Importantly, it must be noted that petitioner did not take exception and agreed in his brief with the Administrative Law Judge's conclusion, with which we agree, that the four investors were a single entity and treated them as such. This is an important fact since any analysis of the gains tax ramifications in this matter will be judged from that perspective.

Former Article 31-B[14] of the Tax Law imposed a tax on gains derived from the transfer of real property if the consideration was $1,000,000.00 or more (Tax Law former §§ 1441 and 1443). The transfer of real property was defined to include the transfer or transfers of real property by any method, including but not limited to the acquisition of a controlling interest in any entity with an interest in real property (Tax Law former § 1440[7]). A controlling interest in a partnership was defined to be 50% or more of the capital, profits or beneficial interest (Tax

[14]The real property transfer gains tax imposed by Tax Law Article 31-B was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996 (L 1996, ch 309, §§ 171-180).

Law former § 1440[2]).

In the instant matter, petitioner contracted to purchase the Taft Hotel from Royal Towers Associates on January 5, 1984. On March 1, 1984, petitioner assigned a 50% interest in the purchase contract to a group of four investors in consideration of one-half of the downpayment he had made on the purchase contract. By agreement dated March 7, 1984, petitioner, the group of investors and others entered into a limited partnership agreement called Taft Limited Partnership Group. The terms of this agreement provided that each general partner would make certain contributions to the capital of the partnership, including all right, title and interest in and to the Project.[15] Thus, there was "a mere change of identity or form of ownership or organization, where there [was] no change in beneficial interest" (Tax Law former § 1443[5]; 20 NYCRR former 590.51). Prior and subsequent to the assignment of interests to the limited partnership, both petitioner and the investment group held approximately 50% interests, with the negligible interests of the limited partners.

As found by the Administrative Law Judge and conceded by petitioner,[16] the record clearly indicated that the investors were acting as a single entity when they initially acquired the 50% interest in the contract to purchase the real property and also when Steven Goodstein acquired the 35% interest in the partnership. The Administrative Law Judge found that the investors' assignment of their interest in the contract to the partnership was the point at which they acquired a controlling interest in an entity which held an interest in New York real

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[15]In reviewing the Agreement of Limited Partnership of Taft Partners Development Group, it was found that pages 4 and 23 were missing from the copy in evidence. Page 4 included the definition of the project and also the purposes of the partnership, as disclosed by references in other sections.

[16]In petitioner's brief, it stated:

> "[i]n a thorough and incisive determination, Judge Maloney concluded that [the investors] 'were acting as a single entity when they initially acquired the 50 percent in the contract to purchase the Taft Hotel from [petitioner] and when Steve Goodstein acquired [petitioner's] 35 percent interest in [the partnership]'" (Petitioner's brief, p. 16).

Also, petitioner did not take exception to conclusion of law "L," wherein the Administrative Law Judge made this specific conclusion.

property. The Administrative Law Judge reasoned that any further acquisition of an interest in the partnership would not be taxable, including the acquisition of petitioner's 35% interest.

We disagree with this conclusion. At the outset, we note our agreement with the Administrative Law Judge's reasoning with regard to the retroactive application of the regulations pertinent hereto. During the year in issue, 1984, there were no regulations promulgated pursuant to Article 31-B. The first regulations became effective in September of 1985. However, the courts have held that such regulations are applicable in circumstances like those herein. In Matter of Varrington Corp. v. City of New York Dept. of Fin. (201 AD2d 282, 607 NYS2d 630, affd 85 NY2d 28, 623 NYS2d 534), the Court stated that:

> "[a]lthough a taxing body does not have unfettered authority to make regulations retroactive (Central Illinois Public Service Co. v. United States, 435 US 21, 33, 98 S Ct 917, 923, 55 L Ed 2d 82 [Brennan, J., concurring]), and may not give retroactive effect to regulations that change settled law, particularly where it leads to harsh results for the taxpayer (Redhouse v. Commissioner of Internal Revenue, 728 F2d 1249, 1251-1252, cert denied 469 US 1034, 105 S Ct 506, 83 L Ed 2d 397), nevertheless, a taxing authority's retroactive application of a regulation will be upheld where the choice is a rational one supported by relevant considerations (Chock Full O'Nuts Corp. v. United States, 453 F2d 300, 302)" (Matter of Varrington Corp. v. City of New York Dept. of Fin., supra, 607 NYS2d, at 631).

Generally, regulations interpreting tax statutes are retroactive to the effective date of the statute to which they relate unless the taxing authority limits such retroactive application (see, Internal Revenue Code § 7805(b); Matter of Varrington Corp. v. City of New York Dept. of Fin., supra). All of the statutes applicable herein were in effect during the year in issue, having been a part of the original real property gains tax legislation which added Article 31-B. Said statutes were effective March 28, 1983. Among the pertinent statutes were: Tax Law § 1440(7), which provided that the acquisition of a controlling interest in any entity with an interest in real property constituted a transfer of real property; Tax Law § 1440(2), which provided that a controlling interest in the case of a partnership means 50 percent or more of the capital, profits or beneficial interest in such partnership; and Tax Law § 1443(5), which provided an exemption for a mere change of identity or form of ownership or organization,

where there is no change of beneficial interest.

In promulgating regulations pursuant to statutes, agencies are accorded wide discretion, presumably in deference to their expertise (Consolation Nursing Home v. Commissioner of New York State Dept. of Health, 85 NY2d 326, 624 NYS2d 563). The regulations promulgated pursuant to the Tax Law sections applicable herein were the interpretations of the Department of Taxation and Finance vis-a-vis specific circumstances, whereas the statutes provided that gains tax was imposed on gains derived from the transfer of real property at a rate of 10% (Tax Law former § 1441) and that transfers of real property included the acquisition of a controlling interest in an entity with an interest in real property (Tax Law former § 1440[7]). Where a controlling interest was defined as 50% or more of the capital, profits or beneficial ownership in a partnership (Tax Law former § 1440[2]), the regulations promulgated thereunder provided for the specific application of said statutes. As noted above, although effective after the year in issue, said regulations were retroactive to the effective dates of the statutes pursuant to which they were promulgated, since doing so is considered rational and supported by relevant considerations (Chock Full O'Nuts Corp. v. United States, supra).

Thus, in the instant matter, petitioner's argument that the regulation at 20 NYCRR former 590.45(d) is void ignores the authority of the Department to promulgate regulations interpreting the broad language of the statute. The regulation at 20 NYCRR former 590.45 is entitled "Aggregation of interests acquired" and is addressed to several specific instances including: the syndication of a partnership interest; when a group of persons is acting in concert; multiple acquisitions which straddle the enactment of the gains tax; and the second acquisition of a controlling interest.

The last provision is directly on point in the instant matter. Petitioner transferred a controlling interest to the investors when he assigned 50% of the contract to purchase the Taft Hotel, which interest was subsequently formally exchanged for a partnership interest in a transaction which was a mere change of identity (Tax Law former § 1443[5]). However, once

the partnership had been established, any transfer of interests in the entity owning the interest in real property should have been taxed based on the acts of the transferee or transferees rather than on the transferor (see, Matter of Harris, supra [where the Tribunal stated that, in entity transactions, the activities and intent of the transferee(s) determines whether there is a taxable event, not those of the transferor(s)]). Specifically, 20 NYCRR former 590.44(a) stated that because the statute looked to the acquisition of the controlling interest, it was the act of the transferee which triggered the tax.

In this matter, the four investors were found by the Administrative Law Judge to have been acting in concert as a single entity and to have met the criteria set forth in 20 NYCRR former 590.45 with regard to the unity with which they negotiated and consummated the transfers of ownership interests; that the acquisitions were closely related in time; that there were few purchasers; and that the contracts to purchase contained mutual terms, embodied in the informal and then formal partnerships of petitioner and the investors. Additionally, petitioner's transfer to Steven Goodstein was linked by reference to the earlier agreement of partnership. Thus, the facts of this matter strongly suggest that the purchasers entered into an agreement among themselves to acquire full control of the partnership without petitioner and that Steven Goodstein was the driving force behind this plan.

The acquisition of the additional 35% interest in the partnership was not just an increase in the investors' share but the second acquisition of a controlling interest as provided for in the regulations at 20 NYCRR former 590.45(d). The obvious intent of the regulation was to prevent the avoidance of gains tax by separate transfers. The law aggregated such transfers (as in former section 1440[7]) to assure collection of the tax that was due. In this matter, the record supports the conclusion that the investors group acted to gain a controlling interest at two separate instances, to wit: when it acquired the 50% interest in the contract to purchase the real property and then again when it acquired the 35% interest from petitioner in its effort to gain unfettered control of the affairs of the partnership. Thus, the Division properly found tax due on the transfer of the 35% interest to Steven Goodstein (see, Matter of Iser, Tax Appeals

Tribunal, May 8, 1997).

Petitioner argued that the language of 20 NYCRR former 590.45(d) provided that tax must be paid on all acquisitions of controlling interests which are aggregated with subsequent acquisitions. This argument must fail because its interpretation is too narrow. The section, 20 NYCRR former 590.45, concerned the aggregation of interests acquired and former subsection (d) addressed itself to the aggregation of a controlling interest with other interests acquired within three years. In the example given, the fact that gains tax was paid on the acquisition of the controlling interest is of no more significance than the fact that the interest was in a corporation and not some other entity. In fact, the answer to the hypothetical in the regulation never addressed the issue of tax paid on the acquisition of the controlling interest as a sine qua non for aggregation, yet it did address the issue of grandfathering, the three-year limitation on aggregation and an exception thereto.

Petitioner argues that the Administrative Law Judge's determination that penalties should be abated was correct because petitioner had reasonable cause to assume that no tax was due on his transfer of a 35% interest in the partnership to the investors group. Petitioner cited the sales tax regulations at 20 NYCRR 536.5(d)(1) and (2) for support of his proposition that an honest misunderstanding of fact or law is reasonable in light of the experience, knowledge and education of the taxpayer. Petitioner points to the determination and order of the Administrative Law Judge for support of his claim of reasonable cause for not filing a return or paying the tax.

The Division counters with the argument that the Division, not petitioner, is charged with the duty of administering the Tax Law, citing Tax Law former § 1448. The Division noted the pre-transfer audit procedures which dictate the information that must be reported so that the Division can accurately issue tentative assessments of tax due, citing Tax Law former § 1447(1) and (2).

In this particular matter, petitioner has raised the fact that there were no promulgated regulations, only the Publication 588, which did not provide as much detail as the regulations

issued in 1985. However, it is noted that petitioner was astute enough to provide for compliance with the gains tax in his contract with Mr. Goodstein regardless of whether a claim was asserted by State or City authorities at the time of closing or at any time thereafter. Certainly, the parties to the contract for the sale of the 35% interest knew of the importance of the interest transfer and the possible gains tax ramifications, given this provision. In any event, as the Division pointed out, a prudent transferor would have filed the proper forms to inform the Division of the shift in interests in an entity with an interest in real property so that the transfer, and any subsequent or prior transfers, might be examined in context. By not filing a return with the Division, petitioner was effectively concealing the true ownership interests in the partnership and preventing any review of the transaction -- something the statute specifically authorized the Division to do (Tax Law former § 1448[1]). In light of the contractual language, petitioner's argument that he acted reasonably in not filing is not persuasive. Petitioner's reliance on Matter of Rose (Tax Appeals Tribunal, June 30, 1994) is misplaced. There, the Tribunal abated penalty because of the complexity of the transaction, petitioner's full disclosure and the taxpayer's good-faith reliance on a tentative assessment as the Division's acceptance of his original purchase price. None of these factors discussed in Rose was a factor in this proceeding.

The record does not support the contention that petitioner had ample reason to assume that no tax was due and no filing was necessary. He filed a questionnaire on the first transfer and, given the statutes and Publication 588 in effect at the time of the second transfer, specifically, Tax Law former § 1440(2) and (7) and Questions 22, 23 and 24 (Publication 588, August 1983), he should have filed after the 35% transfer to Steven Goodstein. At the very least, these statutes and publication placed petitioner on notice that the Division would want the information surrounding the transfer of any interest in an entity with an interest in real property. Until the Division had the opportunity to examine the transaction, it was not proper for petitioner to assume that the transaction was not taxable and that no return needed to be filed or complete records kept pursuant to Tax Law former § 1448(2).

Further, petitioner's statement that he relied on the advice of counsel is not convincing. Reliance on the advice of counsel does not in itself establish reasonable cause (Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121). Petitioner has not shown that such reliance was in good faith or that it was reasonable for him to have relied upon such particular advice given to him (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557).

The reasonableness of petitioner's position can only be evaluated as that position is compared to the Division's articulated policy (see, Matter of Birchwood Assocs., Tax Appeals Tribunal, July 27, 1989). As discussed above, the context of this matter reveals that petitioner did not act in good faith vis-a-vis the Division given his acknowledgment that there was a possibility that gains tax may be payable, yet he chose to assume that the transaction was not taxable at the risk of future liability. Therefore, it is found that the imposition of penalties was appropriate.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Sholom Drizin is denied; and

4. The Notice of Determination, dated April 30, 1992, as modified by the Division's concession before the Administrative Law Judge below, is sustained.

DATED: Troy, New York
May 15, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner