STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
ESTATE OF MORTON J. GOLDMAN	:	**DECISION**
for Revision of Determinations or for Refunds of Real Estate Transfer Tax under Article 31 of the Tax Law and Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	DTA Nos. 813420 through 813423

Petitioner Estate of Morton J. Goldman, c/o Elise R. Goldman, Executrix, 339 Carolina Meadows-Villa, Chapel Hill, North Carolina 27514-7519, filed an exception to the determination of the Administrative Law Judge issued on March 21, 1996. Petitioner appeared by Gruber & Gruber, P.C. (Irving M. Gruber, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Paul A. Lefebvre, Esq., of counsel).

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

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Administrative Law Judge properly determined that real estate transfer tax, imposed pursuant to the provisions of Article 31 of the Tax Law, was due upon petitioner's sales of its shares of stock in two corporations, each of which owned an interest in New York real property.

II. Whether the Administrative Law Judge properly determined that tax on gains derived from certain real property transfers ("gains tax"), imposedpursuant to the provisions of Article 31-B of the Tax Law, was due upon petitioner's sales of its shares of stock in two corporations, each of which owned an interest in New York real property.

III. Whether the imposition of these taxes by the Division of Taxation, under the facts and circumstances presented herein, violates the Equal Protection Clause and the Due Process Clause of the United States Constitution and the New York State Constitution.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "2," "18," "20," "22" and "24" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

The representatives of petitioner and the Division of Taxation ("Division") entered into a written stipulation of facts the relevant portions of which are incorporated herein.

We modify findings of fact "1" and "2" of the Administrative Law Judge's determination to read as follows:

> Prior to April 3, 1990, the capital stock of GKKS, Inc., an entity which owned an interest in real property located on Old Tarrytown Road, White Plains, New York, was owned by three shareholders: Morton J. Goldman ("Goldman"), Joseph Kruger ("Kruger") and Stephen M. Schainman ("Schainman"). Each shareholder owned one-third of the shares of capital stock of GKKS, Inc.
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> Prior to April 3, 1990, the capital stock of Mohawk Country-Home School, Inc. ("Mohawk"), an entity which owned an interest in real property located on Old Tarrytown Road, White Plains, New York, was owned by three shareholders: Goldman, Kruger and Schainman. Each shareholder owned one- third of the shares of capital stock of Mohawk. Each of the shareholders acquired their shares prior to 1983.
>
> Goldman died on April 3, 1990.

Elise R. Goldman, Executrix of the Estate of Goldman ("the executrix"), was issued Letters Testamentary on April 18, 1990.

On November 1, 1990, the Estate of Morton J. Goldman ("petitioner"), by its executrix, sold Goldman's shares of stock in GKKS, Inc. to GKKS, Inc. After the sale, the two remaining shareholders, Kruger and Schainman, each owned 50 percent of the outstanding shares of GKKS, Inc.

Neither Kruger nor Schainman acquired control of GKKS, Inc. as a result of the sale of petitioner's shares of GKKS, Inc. to it.

A 1989 agreement to which GKKS, Inc., Mohawk and the three equal shareholders of each were parties ("1989 shareholders' agreement") made the sale of the GKKS, Inc. shares by petitioner mandatory on Goldman's death.

On May 1, 1991, Schainman sold all of his shares of GKKS, Inc. to GKKS, Inc.

After the sale by Schainman, Kruger owned 100 percent of the outstanding shares of GKKS, Inc. and, thus, controlled GKKS, Inc.

The 1989 shareholders' agreement required GKKS, Inc. to buy its shares tendered by Schainman.

On November 1, 1990, petitioner, by its executrix, sold Goldman's shares of stock in Mohawk to Mohawk. After the sale, the two remaining shareholders, Kruger and Schainman, each owned 50 percent of the outstanding shares of Mohawk.

Neither Kruger nor Schainman acquired control of Mohawk as a result of the sale of petitioner's shares of Mohawk to it.

The 1989 shareholders' agreement made the sale of the Mohawk shares by petitioner mandatory on Goldman's death.

On May 1, 1991, Schainman sold all of his shares of Mohawk to Mohawk.

After the sale by Schainman, Kruger owned 100 percent of the outstanding shares of Mohawk and, thus, controlled Mohawk.

The 1989 shareholders' agreement required Mohawk to buy its shares tendered by Schainman.

After an audit, the Division, on April 16, 1993, issued a Statement of Proposed Audit Changes which asserted a real estate transfer tax liability, relating to petitioner's sale of the GKKS, Inc. stock, in the amount of $1,400.00, plus interest, for a total amount due of $1,647.84. The Statement of Proposed Audit Changes explained, in part, as follows:

> "Pursuant to Section 575.6(d) of the Real Estate Transfer Tax Regulations, 'where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a controlling interest has occurred.' As a result of stock redemptions on 11/1/90 and 5/1/91, Joseph L. Kruger effectively acquired a 66 2/3% controlling interest in GKKS, Inc.
>
> "Regulation Section 575.1(d)(4) states that 'in the case of a transfer or acquisition of a controlling interest in any entity that owns real property, consideration means the fair market value of the real property or interest therein, apportioned based on the percentage of the ownership interest transferred or acquired in the entity'. "Since the arms length shareholders' agreement, dated 5/16/89, has established consideration for a 33 1/3% interest to be $700,000, it has been determined that a 16 2/3% interest has a fair market value of $350,000.
>
> "Tax determined to be due under Article 31, Real Estate Transfer Tax Law, on the acquisition of the Goldman Estate's interest in GKKS, Inc. was calculated as follows:
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> | | |
> |---|---|
> | "Consideration: | $350,000. |
> | "Tax Due ($2.00 per every $500, or fractional part thereof, of the consideration amount) | 1,400. |
>
> "Interest has been assessed in accordance with Section 1416 of the Tax Law, for

the period beginning May 17, 1991, for failure to pay the tax within the time frame allowed."

We modify finding of fact "18" of the Administrative Law Judge's determination to read as follows:

> On May 27, 1993, the Division issued a Notice of Determination to petitioner in the amount of $1,400.00 (real estate transfer tax), plus interest, for a total amount due of $1,660.85. Petitioner paid the tax and interest determined to be due pursuant to the Notice of Determination and, therefore, requests a refund of monies paid.

After an audit, the Division, on April 16, 1993, issued a Statement of Proposed Audit Changes to petitioner relating to its sale of Mohawk stock which contained an explanation nearly identical to the one set forth in the statement issued for the sale of the GKKS, Inc. stock.

We modify finding of fact "20" of the Administrative Law Judge's determination to read as follows:

> On May 27, 1993, the Division issued another Notice of Determination to petitioner in the amount of $1,400.00, plus interest, for a total amount due of $1,660.85 (the same amount of real estate transfer tax assessed for the sale of the GKKS, Inc. stock). Petitioner paid the tax and interest determined to be due pursuant to the Notice of Determination and, therefore, requests a refund of monies paid.

After an audit, the Division, on April 16, 1993, issued a Statement of Proposed Audit Changes to petitioner, relating to its sale of the GKKS, Inc. stock, asserting additional gains tax of $34,160.97, plus interest, for a total amount due of $40,208.49. The Statement of Proposed Audit Changes explained, in part, as follows:

> "In accordance with Regulation Section 590.45(c) and (d), 'interests acquired after March 23, 1983, are added together for purposes of determining whether an acquisition of a controlling interest has occurred.' This includes all interests acquired within a three year period. Since the statute looks to the acquisition, it is the act of the transferee which triggers the tax (Emphasis added).

"Your tax liability is a result of Joseph L. Kruger's acquisition of a 66 2/3% interest within a three year period. Pursuant to the stock redemptions by GKKS, Inc. of the shares held by the Estate of Morton Goldman and Stephen Schainman, on 11/1/90 and 5/1/90, [sic] respectively, a controlling interest was acquired by Mr. Kruger on 5/1/91. Your liability is to the extent of the interest that was transferred to Joseph L. Kruger by the Estate of Morton Goldman.

"Tax determined to be due under Article 31-B was calculated as follows:

Consideration* ($2,100,000. x 16.67%) = $350,000.00

Less Original Purchase Price ($50,332 x 16.67%) = 8,390.34
Gain subject to tax $341,609.66

Tax determined to be due (10%) $ 34,160.97

*Since the arms length shareholder's agreement, dated 5/16/89, establishes the fair market value of a 33 1/3% interest to be $700,000., the fair market value of a 16 2/3% interest is determined to be $350,000.00.

"In addition, interest was assessed for the period beginning May 17, 1991, pursuant to Section 1446(1) of the Tax Law, which provides, in part, that 'if the tax commission determines that there has been an underpayment of tax, the transferor shall pay interest to the commission on the amount of tax not paid'."

We modify finding of fact "22" of the Administrative Law Judge's determination to read as follows:

On May 27, 1993, the Division issued a Notice of Determination to petitioner assessing gains tax in the amount of $34,160.97, plus interest, for a total amount due of $40,525.87 for petitioner's sale of the GKKS, Inc. stock. Petitioner paid the tax and interest determined to be due pursuant to the Notice of Determination and now requests a refund of the monies paid.

After an audit, the Division issued a Statement of Proposed Audit Changes to petitioner asserting additional gains tax due, relating to its sale of the Mohawk stock, in the amount of $3,521.31, plus interest, for a total amount due of $4,144.69. The Statement of Proposed Audit Changes contained an explanation similar to the notice which asserted additional gains tax due

on petitioner's sale of the GKKS, Inc. stock. The notice computed the additional tax due as follows:

"Tax determined to be due under Article 31-B was calculated as follows:

Consideration* ($2,100,000. x 16.67%) = $350,000.00

Less Original Purchase Price
($1,888,344. x 16.67%) = $314,786.94
Gain subject to tax $ 35,213.06

Tax due (10% of gain) $ 3,521.31

*Since the arms length shareholder's agreement, dated 5/16/89, establishes the fair market value of a 33 1/3%interest to be $700,000, the fair market value of a 16 2/3% interest is determined to be $350,000.00.

"In addition, interest was assessed for the period beginning May 17, 1991, pursuant to Section 1446(1) of the Tax Law, which provides, in part, that 'if the tax commission determines that there has been and [sic] underpayment of tax, the transferor shall pay interest to the commission on the amount of tax not paid'."

We modify finding of fact "24" of the Administrative Law Judge's determination to read as follows:

On May 27, 1993, the Division issued a Notice of Determination to petitioner assessing gains tax, relating to petitioner's sale of the Mohawk stock, in the amount of $3,521.31, plus interest, for a total amount due of $4,177.41. Petitioner paid the tax and interest determined to be due pursuant to the Notice of Determination and is, therefore, requesting a refund of the monies paid.

Subsequent to the issuance of the notices of determination which assessed gains tax on petitioner's transfers of stock in the two corporations, the Division issued two notices of assessment resolution in response to information received from petitioner's representative. These documents, which contained identical explanations, stated, in part, as follows:

"You cite the aggregation clause of Tax Law Section 1440.7 as the basis for your disagreement. The aggregation clause of Section 1440.7 (20 NYCRR 590.43), however, does not apply for purposes of determining whether an acquisition of a controlling interest was acquired or for purposes of computing

consideration in the case of an acquisition of a controlling interest in an entity with an interest in real property. The aggregation clause of Tax Law Section 1440.7 applies only in the case of successive transfers by one transferor of contiguous or adjacent parcels of real property. It does not apply in the case of successive acquisitions by one transferee of ownership interests in an entity which owns a single parcel of real property.

"The statutory authority for aggregating successive acquisitions of stock in an entity with an interest in real property is found in the regulatory interpretation of Tax Law Section 1440(2), wherein Section 590.45 specifically requires that all ownership interests acquired by one transferee within a 3 year period be added together for purposes of determining whether an acquisition of a controlling interest has occurred.

"Further, for purposes of computing consideration in the case of an acquisition of a controlling interest in an entity which owns an interest in real property, Tax Law Section 1440.1(c) requires that there be an apportionment of the fair market value of the interest in real property to the controlling interest ACQUIRED. If the fair market value of the property apportioned to the percentage interest acquired is $1 million or more, each transferor is subject to tax based upon his/her pro rata interest transferred. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax (20 NYCRR 590.44)."

The affidavit of petitioner's executrix, Elise R. Goldman, attached to the written stipulation of facts (as Stipulation Exhibit "B") stated, in pertinent part, as follows:

"As executrix of the estate of Morton J. Goldman, I sold stock in each of the corporations to the respective corporations. My sale was made on 11/1/90. The sale on 5/1/91 was of stock owned by Stephen Schainman. He and I did not act in concert. The facts here make absolutely clear that the transfers were independent of each other.

"The estate's stock was tendered pursuant to a stockholders' agreement entered into May 16, 1989, a copy of which is attached hereto, and made part hereof. Paragraph 2 thereof made it mandatory that I, as executor of my husband's estate, sell all his shares in the two corporations herein involved, namely GKKS, Inc. and Mohawk Country-Home School, Inc., upon his death.

* * *

"My husband died April 3, 1990. Accordingly, pursuant to the mandatory provisions of the contract, the shares owned by the estate in each of those corporations were sold on November 1, 1990.

"There was no plan that either of the two remaining shareholders would subsequently sell his stock to the corporation. Mr. Schainman did not consult me with regard to the sale of his shares.

"Indeed, that sale by Mr. Schainman was detrimental to the estate. Paragraph 3 of the agreement provides that over 70% of the sale price for the estate's shares would be paid in 20 consecutive semi-annual installments represented by notes. However, paragraph 3(c) of the agreement provides that in the event of a second sale, then one-half of the principal amount of each installment thereafter payable is deferred until the date of the last installment payable to the estate. Thus, the result of Mr. Schainman's sale of his stock was that the estate is receiving only one-half the original amount of each note due it and will receive the deferred amount only after 10 years from the date of sale by the estate."

The shareholders' agreement, entered into on May 16, 1989 among Goldman, Kruger, Schainman, GKKS, Inc., Mohawk and a third corporation, Mohawk-White Plains, provided, in paragraphs 1 and 2 thereof, as follows:

"1. Lifetime Sale of Stock.

"Goldman, Kruger and Schainman each hereby agrees that he will not sell, transfer, pledge or otherwise encumber any of his shares of stock of the Corporations, except as provided in this Agreement. Should any of them during his lifetime desire to sell his shares, he shall give to each of the Corporations not less than six months written notice, by certified or registered mail, prior to a stated date of sale, which shall be on a subsequent May 1 or November 1 of any year, and shall state in such notice that he desires to sell all of his shares in all three of the Corporations at the prices and on the terms hereinafter specified in paragraph 3. At the same time that such notice shall be given, the selling shareholder shall also send copies of such written notice, by certified or registered mail, to each of the other individual shareholders. Each of the Corporations hereby agrees to purchase its shares from the selling shareholder on the stated date of sale at the price and on the terms set forth below in paragraph 3."

"2. Sale of Stock on Death.

"Goldman, Kruger and Schainman each hereby agrees that, upon his death, the executors or administrators of his estate shall sell all of his shares in all three Corporations for purchase by their respective treasuries at the prices and on the terms hereinafter specified in paragraph 3. Each of the Corporations hereby agrees to purchase its shares from the estate of the deceased shareholder at the

price and on the terms set forth below in paragraph 3. The date of such sale shall be the May 1 or November 1 next succeeding the date of death, whichever shall first occur more than six months following the date of death."

The affidavit of Joseph Kruger, sworn to the 25th day of April 1994, establishes the following facts:

"I did not intend to acquire control of the corporations by their purchases of the Goldman shares.

"At the time of Morton Goldman's death, I did not know that Stephen Schainman would subsequently tender his shares in each of the corporations to that corporation, which, under the May 16, 1989 agreement, each corporation was required to buy the tendered shares.

"I did not acquire control of the corporations by acting in concert at any time with Mr. Schainman. Such control was not acquired by reason of the mandatory purchase by the corporations of their respective shares from the Goldman estate. Control was acquired only as a result of Mr. Schainman's subsequent unilateral decision to tender his shares in the corporations."

Petitioner submitted the affidavit of Stephen M. Schainman, sworn to the 12th day of June 1995, to establish the following facts:

"Prior to the death of Morton Goldman, he, Joseph Kruger and I each owned one-third of the shares of GKKS, Inc. and of Mohawk Country-Home School, Inc.

"A stockholders' agreement provided that each corporation had to buy its own shares when a stockholder offered them. Accordingly, when I offered my shares to the corporations, each corporation bought its shares on May 1, 1991.

"I did not consult Elise Goldman, the executrix of Morton Goldman's estate, in connection with my offer to sell, or sale of my shares of the two corporations. I did not act in concert at any time with her. I made my own independent decision to sell my shares in the two corporations. I did not make any agreement with her or have any plan with her that I would sell my shares in the two corporations."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded, in relevant part, that: i) Kruger acquired a controlling interest in each corporation by virtue of the transfers by petitioner and by Schainman to the two corporations pursuant to 20 NYCRR 575.6(d); ii) petitioner's argument that there is no provision in Article 31 of the Tax Law permitting aggregation of successive sale of shares of stock by different transferors to determine whether there has been a transfer or acquisition of a controlling interest is without merit; iii) the real property transfer tax is imposed by Tax Law § 1402, not the regulation (20 NYCRR 575.6[d]); and iv) the transfer tax here was only imposed once (conclusion of law "C").

The Administrative Law Judge also concluded with respect to the gains tax that: i) our decision in Matter of Harris (Tax Appeals Tribunal, December 30, 1993) is controlling in this matter and the aggregation clause of Tax Law former § 1440(7) is not applicable in determining whether an acquisition of a controlling interest has occurred; ii) the intent of the transferors was immaterial to the determination of whether there was an acquisition of a controlling interest; iii) it is the acts of transferees acting in concert that are looked to in determining whether there has been an acquisition of a controlling interest; iv) Kruger, as the only transferee, could not act in concert with himself, so his intent too, is irrelevant; v) petitioner's argument, that Chapter 170 of the Laws of 1994 provides that successive transfers before June 9, 1994 should not be aggregated under the law and rules in effect immediately prior to June 9, 1994, lacks merit (conclusions of law "F" and "G"); vi) petitioner was not deprived of due process and equal protection (conclusion of law "I"); vii) petitioner failed to show any specific facts that would support its claim that the subject regulations (20 NYCRR 575.6[a], [c] and [d] [relating to real property transfer tax] and 590.44[a] and 590.45[c] and [d] [relating to the gains tax]) violate its due process or equal

protection rights facially or as applied (conclusion of law "J"); and viii) the notices of determination issued on May 27, 1993 were proper and he sustained them (conclusion of law "K").

ARGUMENTS ON EXCEPTION

Petitioner takes exception to each of the above conclusions of law of the Administrative Law Judge. Petitioner also makes proposed modifications to the findings of fact of the Administrative Law Judge. We have incorporated petitioner's proposed changes in the findings of fact above.

Petitioner argues, as it did below, that gains tax is not due under Article 31-B of the Tax Law. Petitioner urges that Matter of Harris (supra) is not controlling here. It is petitioner's contention that the affidavits of Elise Goldman, Schainman and Kruger show that there was no plan or agreement to effectuate a transfer or acquisition of a controlling interest. Petitioner also claims that the Department's regulation (i.e., 20 NYCRR 575.6[e]) exempts petitioner from the transfer tax. Further, petitioner maintains that the amendments to the gains tax statutes made by Chapter 170 of the Laws of 1994 demonstrate that the Division's interpretation of the statutes as they existed in 1990 was erroneous.

Petitioner also contends that transfer tax is not due under Article 31 of the Tax Law. This is true, petitioner argues, because it did not sell a controlling interest. In addition, petitioner contends that there is no provision in Article 31 (while there is such a provision in Article 31-B) which permits aggregation of successive shares of stock. In particular, petitioner argues that the transactions involved here are not governed by 20 NYCRR 575.6(d) because there was no transfer of a controlling interest by a single document. Further, petitioner urges that, under 20 NYCRR 575.6(e), the transfer tax can only be imposed once. Imposing the tax on both petitioner

and Schainman, it argues, is to impose the tax twice.

Petitioner also maintains that the regulations, not the statutes, impose the transfer and/or gains taxes on the subject transactions. Therefore, petitioner asserts that, to the extent that it is the regulations and not the statutes which impose these taxes, the taxes are unlawful.

Petitioner also argues that the Administrative Law Judge erred in rejecting petitioner's argument that Articles 31 and 31-B of the Tax Law and the corresponding regulations, as applied to these transactions, are unconstitutional and violate the Equal Protection and the Due Process Clauses of the New York State Constitution and the United States Constitution.

The Division counters that petitioner's transfers are properly subject to the imposition of gains tax because, as a result of the transfers of their shares by petitioner and Schainman to the two corporations within a three-year period, Kruger acquired a controlling interest in the corporations. Moreover, the Division argues, petitioner's reliance on the aggregation clause provision of Tax Law former § 1440(7) is misplaced since we held in Matter of Harris (supra) that the aggregation clause was inapplicable in determining whether an acquisition of a controlling interest has occurred. The decision in Harris, the Division argues, also held that the transferor's intent does not determine whether there has been a taxable transaction. As to petitioner's contentions that the 1994 amendments to the statute show that the Division's interpretations are erroneous, the Division states that such amendments dealt solely with the aggregation clause which is not applicable in determining whether a taxable transaction occurred.

With regard to the transfer tax, the Division argues that Article 31 plainly imposes the tax upon the acquisition of a controlling interest in an entity owning an interest in real property. The Division states that, contrary to petitioner's contentions, the language of Articles 31 and 31-B are identical with respect to the definition of transfer or conveyance of real property in that both

include the transfer or acquisition of a controlling interest in an entity with an interest in real property. The Division rejects the claim that the transfer tax has been imposed twice and argues that 20 NYCRR 575.6(d) deals directly with the type of situation which is at issue herein.

With regard to the issue of the constitutionality of the application of the taxing statutes, the Division urges that petitioner is, in fact, challenging the facial constitutionality of the statutes. In the alternative, if we decide that petitioner is challenging the statutes as applied, the Division states petitioner's arguments are still without merit. With respect to petitioner's due process argument, the Division contends that the State of New York has a sufficient link to the transaction which it is taxing. As to petitioner's equal protection contentions, the Division maintains that the statutes do not differentiate between those who make sales of non- controlling interests and those who make identical sales of non- controlling interests together with later, independent sales of controlling interests by others. This is true, the Division states, because the tax is imposed only on the acquisition of a controlling interest. The Division asserts that all transfers within a three-year period are aggregated to determine whether a taxable acquisition of a controlling interest has occurred.

OPINION

As to petitioner's claims with respect to the transfer tax, Tax Law former § 1402 imposed a real estate transfer tax on each conveyance of real property or interest therein "when the consideration . . . exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof . . . ." Tax Law § 1404(a) provided, in relevant part, that the real estate transfer tax shall be paid by the grantor.

Tax Law § 1401(e) defines a "conveyance" of real property, for purposes of the transfer tax, to include, among other things, the "transfer or acquisition of a controlling interest in any

entity with an interest in real property."

Tax Law § 1401(b) defines "controlling interest," as pertains to a corporation, to mean: "either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation . . . ."

20 NYCRR 575.6(a) provides, in pertinent part, that:

> "In the case of a corporation which has an interest in real property, the transfer or acquisition of a controlling interest in the corporation, as defined in section 575.1(b) of this Part, occurs when a person, or group of persons acting in concert, transfers or acquires a total of 50 percent or more of the voting stock in such corporation."

20 NYCRR 575.6(c) states, in pertinent part, that:

> "[f]or purposes of determining whether a controlling interest is transferred or acquired, only transfers or acquisitions of interests occurring on or after July 1, 1989 are added together."

20 NYCRR 575.6(d) provides, in pertinent part, as follows:

> "Where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a transfer or acquisition of a controlling interest has occurred. Where there is a transfer or acquisition of a controlling interest in an entity on or after July 1, 1989, and the real estate transfer tax is paid on that transfer or acquisition and there is a subsequent transfer or acquisition of an additional interest in the same entity, it is considered that a second transfer or acquisition of a controlling interest has occurred which is subject to the real estate transfer tax. No transfer or acquisition of an interest in an entity that has an interest in real property will be added to another transfer or acquisition of a interest in the same entity if they occur more than three years apart, unless the transfers or acquisitions were so timed as part of a plan to avoid the real estate transfer tax."

There is no dispute that petitioner's transfers of the stock of both corporations on November 1, 1990 did not constitute transfers or acquisitions of controlling interests in entities

owning an interest in real property. While it is true that after the transfer of petitioner's shares the remaining shareholders (Kruger and Schainman) each owned 50 percent of the stock in each of the corporations, the shares transferred by petitioner were not added to the shares already owned by Kruger and Schainman since 20 NYCRR 575.6(c) provides that, for purposes of determining whether a controlling interest is transferred or acquired, only transfers or acquisitions occurring on or after July 1, 1989 are added together. All of these shareholders had acquired their shares prior to July 1, 1989.

However, upon the transfer of Schainman's shares in the two corporations on May 1, 1991, the sole remaining shareholder, Kruger, acquired a controlling interest in each, i.e., by virtue of the transfers by petitioner and by Schainman, he acquired a 66 2/3% interest in GKKS, Inc. and in Mohawk. Despite petitioner's contentions to the contrary, the Administrative Law Judge correctly concluded that the provisions of 20 NYCRR 575.6(d), relating to the transfer tax, is on point with the facts here.

Petitioner next claims that, unlike Article 31-B of the Tax Law, there is no provision in Article 31 which permits an aggregation of successive sales of shares of stock by different transferors to determine whether there has been a transfer or acquisition of a controlling interest. Petitioner's argument is without merit. The definition of a transfer or conveyance of real property in Articles 31 and 31-B and the definition (in those articles) of a transfer or acquisition of a controlling interest in an entity with an interest in real property were identical. Petitioner further contends that it is the regulation (20 NYCRR 575.6[d]), and not the statute, upon which the Division relies to impose the transfer tax upon petitioner's sales of shares. If the statute does not impose the tax, the Division, by means of a regulation, cannot do so. This argument, too, is rejected.

When reviewing an administrative determination, the construction given statutes and regulations by the agency which is responsible for their administration will, if not irrational or unreasonable, be upheld (Mobil Intl. Fin. Corp. v. State Tax Commn., 117 AD2d 103, 501 NYS2d 947).

In Blue Spruce Farms v. State Tax Commn. (99 AD2d 867, 472 NYS2d 744, 745, affd 64 NY2d 682, 485 NYS2d 526), the court stated:

> "To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction (see, Matter of Lakeland Farms v. State Tax Comm., 40 AD2d 15, 18, 336 NYS2d 972). Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute (Matter of Slattery Assoc. v. Tully, 79 AD2d 761, 434 NYS2d 788 [affd 54 NY2d 711, 442 NYS2d 978]) or erroneous (Matter of Kroner v. Procaccino, 39 NY2d 258, 383 NYS2d 295), it should be upheld."

It is not the regulation (20 NYCRR 575.6[d]) which imposes the transfer tax. The first words appearing in Tax Law former § 1402 were "[a] tax is hereby imposed" upon each conveyance of real property or interest therein. The term "conveyance" includes, by definition, "the transfer or acquisition of a controlling interest in any entity with an interest in real property" (see, Tax Law § 1401[e]). The statute, by its express terms, imposes the transfer tax. The regulation merely sets forth the manner in which it is determined whether a transfer or acquisition of "a controlling interest" has occurred. As such, this regulation does not extend beyond the permissible limits of the statute.

Petitioner next contends that: i) to tax petitioner as well as Schainman would be to impose the tax twice; and ii) the Department's regulation (20 NYCRR 575.6[e]) actually exempts petitioner from tax because the regulation states that "[t]he tax is only imposed once when there is both a transfer and an acquisition of a controlling interest in the same conveyance." Petitioner

argues that there were two conveyances here (petitioner's and Schainman's), so the controlling interest was not conveyed in a single document.

We address petitioner's last claim first. The transfer of petitioner's shares of both corporations did not result in the transfer or acquisition of a controlling interest and did not result in the imposition of real estate transfer tax against petitioner. It was only upon Schainman's transfers of his stock that Kruger acquired a controlling interest in the corporations. The sale of Schainman's shares of each corporation resulted in the acquisition of a controlling interest by Kruger in a single conveyance. There was only one conveyance that resulted in a transfer or acquisition of a controlling interest, i.e. Schainman's. Thus, 20 NYCRR 575.6(e) does not exempt petitioner from tax. Petitioner's claim that the tax is being imposed twice is similarly rejected. Petitioner was assessed tax only upon the consideration received for its shares. To the extent the transfer tax was also imposed upon Schainman, it would only have been imposed upon the consideration he received for his shares. The tax is imposed once, but each transferor is paying his respective share of the total.

We now address petitioner's claims with respect to the gains tax.

Tax Law former § 1441 imposed a 10 percent tax on gains derived from the transfer of real property within New York State.

Tax Law former § 1440(7), in effect during the period at issue, provided, in pertinent part, as follows:

> "'[t]ransfer of real property' means the transfer or transfers of any interest in real property by any method, including . . . acquisition of a controlling interest in any entity with an interest in real property.
>
> * * *
>
> "Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers

are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article . . . ."

Tax Law former § 1440(2)(i) defined "controlling interest" to mean:

"in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation."

20 NYCRR former 590.44(a) provided, in pertinent part, as follows:

"Question: How is the phrase 'acquisition of a controlling interest in an entity with an interest in real property' applied?

"Answer: The term 'controlling interest' is defined in section 1440(2) of the Tax Law to mean:

'(i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.'

"Thus, for purposes of the gains tax, in the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the voting stock in such corporation . . . . Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax" (emphasis added).

20 NYCRR former 590.45(c) and (d) provided as follows:

"(c) Question: If a shareholder owned a 20- percent interest in a corporation prior to March 28, 1983 and acquires an additional 35 percent on July 10, 1984, has there been an acquisition of a controlling interest?

"Answer: No. For purposes of determining whether a controlling interest is acquired, only acquisitions of interests occurring after March 28, 1983 are added together.

"(d) Question: If a shareholder acquires a 50-percent interest in a corporation and gains tax is paid on the transfer, and one year later the same shareholder acquires an additional 20 percent, is there a second acquisition of a controlling interest?

"Answer: Yes. The 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. An example of this would be if T acquired 80 percent of the stock and simultaneously contracted for the purchase of the remaining 20 percent in three years and one day."

Petitioner again argues that each of its sales of corporate stock was exempt from the imposition of gains tax because it was not a transfer or acquisition of a controlling interest and that the tax was imposed solely by virtue of Schainman's subsequent sales of his stock in the corporations. Petitioner is correct that its transfers alone did not constitute a transfer or acquisition of a controlling interest. It is also true that it was by virtue of Schainman's subsequent sale of his shares that a transfer or acquisition of a controlling interest occurred and tax became due.

Petitioner also points to the provisions of Tax Law former § 1440(7) which exempted partial or successive transfers wherein the transferors furnish a sworn statement that the transfers were not pursuant to an agreement or plan. Petitioner points out that it has provided such sworn statements in the form of affidavits of the executrix, Elise Goldman, and also from Messrs. Kruger and Schainman.

Petitioner's reliance on the "aggregation clause" portion of Tax Law former § 1440(7) is misplaced. As the Administrative Law Judge noted, we rejected a similar contention in Matter of Harris (supra). In Harris, the petitioner also argued that the aggregation clause was applicable in determining whether an acquisition of a controlling interest had occurred. We stated in Harris that:

"At the time of this transaction, the first sentence of section 1440(7) of the Tax Law defined 'transfer of real property' to mean:

'the transfer or transfers of any interest in real property by an [sic] method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property.'

"The structure of this sentence is significant because it switches from the term 'transfer' to the term 'acquisition' when describing a taxable entity transaction, i.e., a transaction involving an ownership interest in an entity that owns real property, rather than a direct ownership interest in real property (see, Matter of Bredero Vast Goed, N.V. v. Tax Commn. of State of New York, 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). We agree with the Division that the use of the word 'acquisition' rather than 'transfer' reflects a legislative decision to impose tax in entity transactions based on the acts of the transferee or transferees rather than on the acts of the transferors.

* * *

"We conclude that these regulations (20 NYCRR 590.44 and 590.45) are a correct interpretation of section 1440(7) of the Tax Law because they are consistent with the Legislature's choice of the word 'acquisition.'

* * *

"With respect to petitioner's contention that the aggregation clause must be applied to determine whether a taxable acquisition has occurred, we agree with the Division that the so-called aggregation clause is not applicable. The aggregation clause is a separate sentence in the section 1440(7) definition of transfer of real property which expands upon the basic definition included in the first sentence of section 1440(7) by stating that the '[t]ransfer of real property shall also include partial or successive transfers' (citation omitted). Petitioner's construction would turn the statutory scheme on its head by applying the aggregation clause as a limitation on the basic definition of transfer of real property" (emphasis added).

Therefore, the aggregation clause is not applicable to the facts in this case and the intent of the transferors, i.e., petitioner and Schainman, is not germane to the outcome. Petitioner asserts that, if the aggregation clause does not apply here, it is unclear what situation would trigger its application. It is clear that Tax Law former § 1440(7) provided for aggregation of the consideration of certain transfers of real property to determine whether the total consideration exceeds the $1,000,000.00 threshold for imposition of the gains tax. In this case, the issue of the

$1,000,000.00 exemption is not before us.

Petitioner next points to that part of the our decision in Matter of Harris (supra) wherein we stated:

> "[a]s the record reveals no information about the intent of the transferees, we conclude that petitioner has not established that the transferees were not acting in concert in acquiring 100% of the stock (see, 20 NYCRR 590.44[a])."

In the present matter, petitioner maintains that the Kruger affidavit clearly proves that he had no intention of acquiring control of the corporations by the two corporations' purchases of the Goldman stock.

The Administrative Law Judge rejected this argument stating that, while we noted in Harris the importance of determining the intent of the transferees, in the matter at issue there was a single transferee, Kruger. As previously indicated, 20 NYCRR former 590.44(a) states that:

> ". . . for purposes of the gains tax, in the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the voting stock in such corporation."

The Administrative Law Judge concluded that since one person cannot act in concert, it follows that when a single transferee (such as Kruger in the present matter) acquires a controlling interest as he did upon acquiring the shares of Goldman and Schainman, his intent is entirely irrelevant.

We affirm the Administrative Law Judge on this issue.

When there was an acquisition of a controlling interest, it was the act of the transferee(s) which triggered the tax (20 NYCRR former 590.45[a]). If there were multiple transferees, then it had to be determined if they were acting in concert (20 NYCRR former 590.46[b]). The regulation specifically addressed when a group of persons was acting in concert, focusing on whether persons were "acting in concert," not whether they meant to acquire a controlling interest

(20 NYCRR former 590.46[b]). With regard to the latter, the regulation stated that a transfer or acquisition of a controlling interest in an entity with an interest in real property occurred when a person (or persons acting in concert) transferred or acquired 50% or more of the voting stock (20 NYCRR former 590.45[a]). In the instant matter, it was the act of the acquisition of a controlling interest by Mr. Kruger which triggered the tax, not whether he meant to acquire a controlling interest. Arguably, the only time an analysis of intent arose out of the acquisition of a controlling interest was when transferees were said to have acted in concert and were considered to have acted as a single entity. In the instant matter, there was one transferee and we do not reach the analysis attending circumstances with multiple transferees.

In Harris, we made the statement, in dicta, that "in entity transactions the activities and intent of the transferee or transferees determine whether there is a taxable event, not those of the transferor or transferors" (Matter of Harris, supra). This statement was made in the decision immediately after we disagreed with both the Administrative Law Judge and the petitioner that the intent of the transferor needed to be established before the tax was triggered in a controlling interest acquisition and immediately before we cited the regulation at 20 NYCRR former 590.44, which stated that in controlling interest acquisitions it was the act of the transferee which triggered the tax. The discussion of intent was necessary therein because the petitioner had argued that her transfer was not pursuant to a plan, a concept found in the regulations at 20 NYCRR former 590.44(a), which related to the

aggregation of partial or successive transfers such that they are deemed a single transfer of real property. We decided that the correct analysis in controlling interest acquisitions was to determine the act of the transferees (actual acquisition of a controlling interest) (20 NYCRR former 590.45[a]) and whether the transferees' interests could be aggregated because they had

acted in concert pursuant to 20 NYCRR former 590.45(b). Since no evidence was offered to disprove their acting in concert, the imposition of the tax was sustained.

The use of the word "intent" in Harris was unfortunate because it did not accurately characterize the plain meaning of 20 NYCRR former 590.44 or 590.45, which explicitly stated that it was the acts of the transferee(s) which triggered the tax and, if multiple transferees, their interests were aggregated if they were determined to have been acting in concert. The enumeration of some of the factors indicative of acting in concert, although inferring intent, was not meant to impose an "intent" standard on the act of the acquisition of a controlling interest when there was no provision or authority for doing so in the statute or regulations.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Estate of Morton J. Goldman is denied;

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

3. The petitions of Estate of Morton J. Goldman are denied;

4. The two notices of determination, dated May 27, 1993, asserting gains tax of $34,160.97 each, plus interest, are sustained; and

5. The two notices of determination, dated May 27, 1993, asserting real estate transfer tax in the amount of $1,400.00 each, plus interest, are sustained.

DATED: Troy, New York
August 14, 1997

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Donald C. DeWitt
President

_____
Carroll R. Jenkins
Commissioner

_____
Joseph W. Pinto, Jr.
Commissioner