STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TAFT PARTNERS DEVELOPMENT GROUP	:	DECISION DTA NO. 817465
for Revision of a Determination or for Refund of Tax on Gains Derived from Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner Taft Partners Development Group, c/o Jacques Catafago, Catafago & Lonergan, 350 5th Avenue, Suite 4810, New York, New York 10118, filed an exception to the determination of the Administrative Law Judge issued on November 8, 2001. Petitioner appeared by Philips, Lytle, Hitchcock, Blaine & Huber, LLP (Gary J. Gleba, Esq. and Edward M. Griffith, Jr., Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on July 10, 2002 in Troy, New York.

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

ISSUES

I. Whether petitioner properly raised the issue of its status as a transferee before the Administrative Law Judge.

II. Whether petitioner was the transferee of the 35% partnership interest transferred by Sholom Drizin in 1984.

III. Whether the stipulation of settlement entered into by the representatives of Sholom Drizin and the Attorney General's Office included the Notice of Determination issued to Taft Partners Development Group relating to the same transfer.

IV. Whether the General Obligations Law is applicable to the stipulation of settlement such that it disposes of the Notice of Determination issued to Taft Partners Development Group.

FINDINGS OF FACT

On May 15, 1997, the Tax Appeals Tribunal issued a decision in ***Matter of Drizin*** (Tax Appeals Tribunal, May 15, 1997). There is no dispute between the parties that the transfer of an interest in real property which gave rise to Sholom Drizin's tax liability therein is the same transfer of an interest in real property for which the Division of Taxation (hereinafter the "Division") has asserted gains tax liability against petitioner in the present proceeding. In order to fully establish the events preceding the transfer at issue herein, we take judicial notice of the findings of fact and conclusions of law contained in the ***Drizin*** decision and incorporate certain of those facts herein.

We have deleted findings of fact "1," "2," "4," "7" and "8" of the Administrative Law Judge's determination since such statements are not facts corroborated by the record of this proceeding. We have modified finding of fact "3" based on our judicial notice of the facts contained in ***Matter of Drizin*** (***supra***). Furthermore, we have modified findings of fact "5," "9" and "10" to more accurately reflect the record. The modified facts as well as the remaining facts as found by the Administrative Law Judge are set forth below.

We modify finding of fact "3" to read as follows:

> On March 1, 1984, Sholom Drizin entered into an Agreement of Assignment, as assignor, with Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher collectively listed as the assignee, "having a place of business c/o Goodstein Management, Inc. . . ." as assignees, whereby Sholom Drizin, owner of a 100% interest, agreed to assign to the assignees a 50% interest in an agreement for sale and purchase of premises located at 761-779 Seventh Avenue, New York, New York (Taft Hotel), dated January 5, 1984, which he had with Royale Towers Associates. In addition, Sholom Drizin and the assignees were to enter into a limited partnership agreement and the partnership was to acquire title to the premises.
>
> On March 7, 1984, Drizin and the assignees entered into an Agreement of Limited Partnership of Taft Partners Development Group ("Taft Partners"). The general partners held the following percentage interests in the partnership: Sholom Drizin - 50%; Arthur Cohen - 20%; Steven Goldstein - 8.5%; Martin Goodstein - 2%; and Jacob Sopher - 10%. The remaining 9.5% interest was held by the limited partners.[1]

We modify finding of fact "5" to read as follows:

> On March 7, 1984, Sholom Drizin ("seller") and Steven Goodstein ("purchaser") entered into a Partnership Interest Acquisition Agreement ("acquisition agreement") whereby Mr. Drizin agreed to sell to Steven Goodstein an additional 35% interest in a partnership known as "Taft Partners Development Group" for $8,320,000.00. Drizin retained a 15% interest in the partnership and became a limited partner. This sale was consummated on September 24, 1984.[2]

According to the terms of the acquisition agreement, Mr. Drizin, simultaneously with the receipt of a $1,600,000.00 down payment and a 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

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[1]We modified finding of fact "3" based on judicial notice taken of ***Matter of Drizin*** (***supra***).

[2]We modified finding of fact "5" to more clearly reflect the record.

Interest to Purchaser or his assignee(s) or designee(s)." In addition, Mr. Drizin 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 Mr. Drizin 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.

We modify finding of fact "9" to read as follows:

> Taft Partners acquired a 100% fee interest and developed the property identified as the "Taft Hotel" and converted it to condominium status. In connection with this development, petitioner filed transferor questionnaires, reporting its gain in connection with the disposition of condominium units in accordance with the regulations established by the Division requiring periodic updates of estimates of consideration and of costs. In these tax returns, petitioner sought to claim the cost of

> the acquisition of the 35% partnership interest transferred by Sholom Drizin to Steven Goodstein as part of its original purchase price. During the audit of these returns, the Division discovered that the transfer of this 35% interest had never been reported for gains tax purposes and issued a notice of determination to Mr. Drizin for the gains tax due on such transfer.[3]

We modify finding of fact "10" to read as follows:

> Sholom Drizin petitioned the notice of determination and was found liable for gains tax in the amount of $623,541.00, plus penalty and interest by decision of the Tax Appeals Tribunal dated May 15, 1997.
>
> Mr. Drizin then commenced an Article 78 proceeding in the Appellate Division, Third Department. As Mr. Drizin had failed to pay the amount due or file a bond, Assistant Attorney General Julie Mereson made a motion to dismiss the proceeding which was granted.[4]

Following the dismissal of the Article 78 proceeding, settlement discussions began between Ms. Mereson and representatives of Mr. Drizin: Jeremy Heisler, David Eisig, Judge Fusco and David Jaroslawicz. The only matter discussed during these negotiations was the assessment issued to Mr. Drizin, assessment number L-005583137. During the negotiations, Ms. Mereson referred to a computation of tax, penalty and interest due which indicated a balance due of $980,010.00, including the application of the refund which is at issue in this matter. The representatives of Mr. Drizin drafted a stipulation of settlement which Ms. Mereson reviewed, made some changes to and then executed along with David Jaroslawicz. The stipulation provides as follows:

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[3]We modified finding of fact "9" to more clearly reflect the record.

[4]We modified finding of fact "10" to more clearly reflect the record.

> IT IS HEREBY STIPULATED BY AND AGREED, by and between the taxpayer, Sholom Drizin, and the State of New York Department of Taxation and Finance, that the above matter and claim of the Department of Taxation and Finance for taxes, penalties and interest under assessment number L-005582137 is settled against Sholom Drizin for the amount of Eight Hundred Fifty Thousand ($850,000.00) Dollars, to be paid by check drawn on a New York bank on or before July 31, 1998.
>
> IT IS FURTHER AGREED, that all appeals and proceedings will be withdrawn as part of the settlement.

The stipulation is dated July 7, 1998.

During 1991 petitioner filed a Claim for Refund of Real Property Transfer Gains Tax in the amount of $533,273.51. The refund claim is based upon gains tax paid as part of the Taft Hotel project. Following an audit by the Division, the amount of the refund was reduced to $529,873.00.

On July 31, 1995, the Division issued to petitioner a Notice of Determination under Gains Tax Law, number GT-95073101, which indicated that petitioner was liable as a transferee for its purchase of the 35% partnership interest from Sholom Drizin. The notice provided that petitioner was being assessed tax due of $623,541.00, plus penalty and interest, and also indicated that overpayment relating to the condominium development in the amount of $529,873.00 had been applied to the amount due.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge rejected petitioner's argument that the stipulation of settlement between Sholom Drizin and the Attorney General's Office also resolved the dispute between petitioner and the Division. The stipulation of settlement was between

Mr. Drizin and the Division and stated that the assessment issued to Mr. Drizin was settled. The Administrative Law Judge stated that it mentioned no other parties, DTA numbers or assessments.

The Administrative Law Judge found that the Drizin stipulation was unambiguous, and since there was no allegation of fraud, accident or mistake, the parol evidence rule prohibited resort to extrinsic evidence to alter or explain the meaning of a contract when the language of the contract was clear on its face. Thus, the Administrative Law Judge concluded that it was proper to exclude the oral testimony presented by petitioner which was at variance with the language contained in the stipulation.

The Administrative Law Judge noted provisions of Tax Law former Article 31-B which imposed personal liability for the gains tax on a transferee when the transferee failed to file the required transferee questionnaire. The Administrative Law Judge concluded that upon petitioner's failure to file the required transferee questionnaire, petitioner became personally liable for the tax due as a result of the partnership transfer, and, thus, petitioner's liability was joint and several with that of the transferor.

Noting that the Division may collect any amount due from either the transferor or transferee up to the total amount due, the Administrative Law Judge determined that the Division initially collected from petitioner the refund due on the Taft Hotel condominium project. It then settled the remaining amount due with the transferor, properly reducing the amount owed by the transferor with the amount of petitioner's refund, so as not to collect the amount of tax due twice. The Administrative Law Judge held that if the State were to refund the amount claimed

by petitioner, the Division would be denied full payment of the tax to which it is entitled under former Article 31-B.

The Administrative Law Judge also found that petitioner alleged for the first time in its brief that it was not the transferee in the partnership interest transfer. The Administrative Law Judge concluded that the Division did not have the opportunity to factually develop this issue at the hearing and would, therefore, be prejudiced if such issue was addressed in the determination.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge erred in finding that petitioner raised the issue of whether or not it was a transferee for the first time in its post-hearing brief. Petitioner believes that this factual issue was raised on cross-examination of a witness presented by the Division and discussed in petitioner's closing argument. Petitioner then raised the legal issue of whether, if it were not the transferee, it could be held liable for payment of the gains tax in its post-hearing brief. Further, petitioner believes that the Administrative Law Judge erred by refusing to consider whether petitioner was the transferee for purposes of being required to file a gains tax return with respect to the 1984 transfer of Sholom Drizin's 35% interest in petitioner to Steven Goodstein.

Petitioner maintains that the stipulation of settlement entered into by Sholom Drizin and the New York State Attorney General disposed of the notice of determination issued to petitioner as a result of that same transfer. Petitioner asserts that the Administrative Law Judge incorrectly concluded that petitioner was jointly and severally liable for the gains tax arising from that transfer. As a result, petitioner believes that the Division should be estopped from applying the

gains tax refund due to petitioner against the liability arising out of the 1984 transfer at issue, which liability was fully satisfied and settled by the stipulation of settlement.

In opposition, the Division argues that petitioner should be estopped from asserting that it was not the transferee in this matter. The Division maintains that this issue was never properly raised in this proceeding and, as a result, the Division had no notice concerning it. The Division believes that petitioner, through its representative, stipulated at the outset of the hearing that it was the transferee. However, even if the issue had been properly raised, the Division argues that petitioner was the transferee in this transaction. Based on the "look through" doctrine, the Division maintains that the economic reality of the transaction dictates that the partners are the alter egos of petitioner. This, states the Division, is what allows petitioner, the partnership, to claim a step-up in its original purchase price of the real property to reflect the amount paid to acquire the 35% interest.

The Division believes that petitioner is jointly and severally liable, as a transferee, with Sholom Drizin for the gains tax due as a result of the transfer of Drizin's 35% interest in petitioner. By petitioner's failure to timely file the required transferee questionnaire, petitioner became primarily liable for the tax due on the transfer. The Division argues that despite the Division's settlement with Drizin, petitioner remains liable for the balance owing on the assessment arising from the transfer.

OPINION

Pursuant to Tax Law former § 1441, a tax was imposed at a rate of ten percent on gains derived from the transfer of real property within New York (i.e., "gains tax"). Tax Law former

§ 1440(7) defined "transfer of real property" to include an "acquisition of a controlling interest in any entity with an interest in real property." A "controlling interest" was defined in Tax Law former § 1440(2) to mean, in the case of a partnership, "fifty percent or more of the capital, profits or beneficial interest in such partnership."

Pursuant to Tax Law former § 1447(1), the Commissioner of Taxation and Finance was authorized to prescribe forms that both the transferor and the transferee were to complete and file concerning each transfer of real property. Former section 1447(3)(a) of Article 31-B of the Tax Law states in part:

> "[i]n 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 tax under this article."

The Division has asserted transferee liability against petitioner as the result of the 1984 transfer of the 35% interest held by Sholom Drizin in Taft Partners Development Group. Thus, our first inquiry must be whether or not petitioner was the transferee of that 35% interest.

We reject the Division's argument that this issue had been resolved by stipulation at hearing or that it was raised for the first time in petitioner's post-hearing brief. Petitioner's representative made statements at the outset of the hearing which can only be considered ambiguous as to whether petitioner believed that it was, in fact, the transferee in this transaction or whether petitioner merely sought to identify itself as such for purposes of clarity within the context of the present proceeding.

In any event, the issue of whether or not petitioner was actually the transferee in the transaction was clearly the topic of extended questioning by petitioner's representative. From

pages 59 through 64 of the hearing transcript, the questions posed by petitioner's representative and the responses made by the Division's witness on cross-examination indicate that petitioner did not believe itself to be the transferee in this transaction and was attempting to elicit a distinction between itself and Steven Goodstein as the purchaser of the 35% partnership interest from Sholom Drizin. There was no concession by petitioner's representative that petitioner was the transferee in this transaction. After reaching an impasse in obtaining a satisfactory response from the Division's witness as to the identity of the actual transferee in the transaction, petitioner's representative stated "why don't we let the argument of law occur in its place and we will go on" (Hearing Tr. p. 64).

Further, in petitioner's closing remarks at the hearing, his representative stated:

> Second possibility, which we think is the correct result on the law against the Gains Tax law, is that the petitioner in this case was not jointly and severally liable with respect to the Drizin tax, because it was not the "transferee and [sic] the transaction." It had no obligation to file. The statute and regulations imposed personal liability on the transferee only when it fails to file the transferee forms. The transferee in this case, was not the petitioner . . . (Hearing Tr., pp. 127-128).

Therefore, we find that, contrary to the determination of the Administrative Law Judge, the issue of whether or not petitioner was the transferee in this transaction was properly raised at the hearing by petitioner.

In order to have the benefit of the Administrative Law Judge's analysis on this issue, we remand this case to the Administrative Law Judge for a determination of whether or not petitioner was the transferee in this transaction. A remand will allow the issue to be fully developed through the two stages of our tax appeals process.

> The fullest possible development of an issue occurs in our two-stage hearing/exception process when the Administrative Law Judge renders a determination on an issue stating a complete

> rationale for the conclusion and the litigants debate the correctness of the Administrative Law Judge's rationale and conclusion on exception. This two-stage process gives the Tribunal, and ultimately the courts, the benefit of the Administrative Law Judge's research and analysis as well as the parties' research and analysis in response to the Administrative Law Judge's determination. To the extent that an Administrative Law Judge does not address an issue explicitly raised by the parties in the proceeding or does not state a rationale for a conclusion that is reached, we are either deprived of this benefit or we must remand the case to obtain the Administrative Law Judge's opinion and the parties' responses to it (***see, e.g., Matter of Plymouth Tower Assocs***., Tax Appeals Tribunal, December 27, 1991; ***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, September 12, 1991). In either case, the hearing/exception process does not perform in its most effective and efficient manner (***Matter of United States Life Ins. Co. in the City of New York***, Tax Appeals Tribunal, March 24, 1994).

As we stated in ***Matter of Air Flex Custom Furniture*** (***supra***):

> If the matter returns for our review, we will have the benefit of the Administrative Law Judge's analysis as well as the parties' responses to the Administrative Law Judge and to each other. Although we believe it is important to allow the two-stage process to perform this function, we are also concerned that the remand will delay the resolution of this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this case be remanded to the Administrative Law Judge in order for a determination to be rendered on the issue of whether or not petitioner was the transferee in the transaction which is the subject of this proceeding. Such determination shall be issued within 90 days from the date of this remand. However, if in the discretion of the Administrative Law Judge additional time is needed in order to accept additional evidence into the record or to allow the parties to file additional briefs, such time limit may be extended, but shall not exceed a period of six months from the date hereof. Upon issuance of such determination, the full record shall be returned to the Tax Appeals Tribunal for

a decision on the issues raised on the present exception and on any exception that may be taken by either of the parties to the determination of the Administrative Law Judge on remand.

DATED: Troy, New York
January 23, 2003

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

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