STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
JOSEPH H. MURASKIN AND HARRY S. TAUBENFELD	:	DETERMINATION DTA NOS. 809050 AND 809055
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioners, Joseph H. Muraskin and Harry S. Taubenfeld, 575 Chestnut Street, Cedarhurst, New York 11516-2223, filed petitions for revision of determinations or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 5, 1992 at 9:15 A.M., with all briefs to be submitted by September 29, 1992. Petitioners appeared by Zuckerbrod & Taubenfeld, Esqs. (Martin Zuckerbrod, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly imposed gains tax on the sale, by petitioners, of cooperative apartment 15G at 200 East 36th Street, New York, New York or, in the alternative, whether such transfer was exempt therefrom.

II. Whether reasonable cause exists for waiver or abatement of penalty imposed herein.

FINDINGS OF FACT

On November 30, 1988, a Statement of Proposed Audit Adjustment was issued by the Division of Taxation ("Division") to petitioners, Joseph H. Muraskin and Harry S. Taubenfeld, which asserted real property transfer gains tax ("gains tax") due in the amount of $28,958.00, plus penalty of $4,054.12 and interest of $649.64, for a total amount due of $33,661.76 for the

transfer of apartment 15G at 200 East 36th Street in New York City. The amount of gains tax due was based upon gross consideration for the sale of the apartment ($562,000.00), less broker's fee ($29,100.00) and adjusted original purchase price ($243,320.00) for a gain subject to tax of $289,580.00 (tax imposed at 10% = $28,958.00).[1]

On February 16, 1989, the Division issued to each petitioner a Notice of Determination asserting gains tax due in the amount of $14,479.00, plus penalty and interest, for a total amount due of $17,547.84 for the period ended September 30, 1988.

On November 25, 1985, petitioners entered into a contract with Tamby Associates (the sponsor) to purchase 10,054 shares of 200 East 36th Owners Corp. by which they acquired 30 cooperative apartments at 200 East 36th Street in New York City for the purchase price of $1,900,000.00. Petitioners' representative, Martin Zuckerbrod, was a director of 200 East 36th Owners Corp., but unlike the other officers and directors, he was not a

tenant-shareholder. Mr. Zuckerbrod was also a partner, with petitioner Harry S. Taubenfeld, in the law firm of Zuckerbrod & Taubenfeld. The contract provided that $25,000.00 be paid as a downpayment, $275,000.00 would be paid at closing and the balance would be paid in accordance with a promissory note and security agreement. Paragraph 22 of the contract provided as follows:

> "The parties hereto agree that purchasers may assign this agreement to a tenancy in common or, at the purchasers' election and after the purchasers have obtained and furnished seller with a copy of a favorable letter ruling from the Internal Revenue Service stating that the assignment to a partnership or co-partnership would not violate §216 of the Internal Revenue Code, then purchasers may assign to a partnership or co-partnership of which purchasers are principals."

A favorable ruling was subsequently obtained.

---

[1]The Statement of Proposed Audit Adjustment disallowed, as expenses constituting original purchase price ("OPP"), $400.00 in transfer fees, $6,895.00 in New York City Real Property Transfer Tax and $2,629.00 in advertising fees, for a total of disallowed expenses in the amount of $9,924.00, thereby reducing OPP from $253,244.00 to $243,320.00. No issue as to the propriety of such disallownces has been raised herein.

A Certificate of Limited Partnership was filed with the office of the Nassau County Clerk on March 27, 1986. The relevant portions of the certificate appear as follows:

"1. The name of the partnership is MURRAY HILL-36TH ST. ASSOCIATES.

"2. The purpose of the partnership is to acquire 30 cooperative apartments at 200 East 36th Street, New York, NY for investment, appreciation and profit with all of the rights of ownership thereof, including the right of the partners to occupy the property for dwelling purposes, or to rent, lease, mortgage, improve, sell, transfer, exchange, and in general to do all things consistent with ownership to carry out the purposes of the partnership.

"3. The principal place of business of the partnership is at 575 Chestnut Street, P.O. Box 501, Cedarhurst, NY 11516.

"4. The name and place of residence of each General Partner interested in the partnership are as follows:

Name	Place of Residence
Harry S. Taubenfeld	288 Leroy Avenue Cedarhurst, NY 11516
Martin Zuckerbrod	585 Park Avenue Cedarhurst, NY 11516
Joseph H. Muraksin	8 Alden Road Larchmont, NY 10538

"The name and place of residence of each Limited Partner in the partnership are as follows:

Name	Place of Residence
Martin Zuckerbrod	585 Park Avenue Cedarhurst, NY 11516

"The partnership has the right to add additional Limited Partners pursuant to the terms of the Partnership Agreement."

By an agreement dated April 3, 1986, petitioners assigned to the New York limited partnership, Murray Hill 36th Street Associates ("Murray Hill") all of their right, title and interest in the contract with Tamby Associates (see, Finding of Fact "3") to purchase 9,149 shares of 200 East 36th Owners Corp., together with the proprietary leases to all of the apartments except apartment 15G (there were 905 shares for apartment 15G; therefore, since apartment 15G was retained by petitioners, only 9,149 [10,054 - 905 = 9,149] shares were assigned to Murray Hill).

By an agreement dated April 4, 1986 between petitioners and Martin Zuckerbrod, as general partners, and certain individuals who would later execute the agreement, as limited partners, a limited partnership (Murray Hill) was formed for the purpose of acquiring 28 cooperative apartments located at 200 East 36th Street in New York City.

Pursuant to Article 2 of the agreement, the general partners were to contribute $157,500.00 to the capital of the partnership and were to own a 25% interest in the partnership. A limited partner was to contribute $150,000.00 for each whole unit of the partnership. Article 3 provided that the allocation of profits and losses would be in the ratio of 75% for the limited partners and 25% for the general partners.

Article 7 of the agreement stated that the management and control of the partnership and its business and affairs rested exclusively with the general partners. Article 9 provided that no limited partner would take part in the management of the business or transact any business for or on behalf of the partnership and no limited partner would have the power to sign for or otherwise bind the partnership.

The subscription agreements, signed by the limited partners, provided with respect to the general partners:

> "You [the general partners] shall have the sole responsibility for the supervision and management in these apartments and will make all decisions with respect thereto, including but not limited to, the selection of a professsional [sic] agent to manage the apartments, the terms and conditions of sales, payments of expenses and obligations, the amount of further capital contributions required and choice of professionals, etc. and you shall be entitled to receive an annual fee of $30,000 as compensation for the above services."

A Certificate of Amendment of Limited Partnership, dated December 27, 1988, was filed in the office of the Clerk of the County of Nassau which, among other things, set forth the interest of each general and limited partner of Murray Hill. Pursuant thereto, each general partner (Messrs. Muraskin, Taubenfeld and Zuckerbrod) contributed $57,500.00 and the limited partners (13) contributed amounts ranging from $37,500.00 to $150,000.00. Messrs. Muraskin, Taubenfeld and Zuckerbrod were each listed as a limited partner with each having contributed $37,500.00 to Murray Hill.

By letter dated April 4, 1986, a joint venture agreement among Messrs. Muraskin, Taubenfeld and Zuckerbrod was entered into, providing as follows:

> "1. The three of us have purchased co-op Apartment 15G at 200 East 36 Street, New York, NY on April 4, 1986, taking title for convenience in the names of Joseph H. Muraskin and Harry S. Taubenfeld, as tenants in common.
>
> "2. It is agreed that the three of us shall be liable for and shall contribute equally all funds whenever required to cover the cost of said apartment and any deficit between the aggregate monthly maintenance and rent received therefrom, as well as interest charges, if any, and all other expenses necessarily incurred in connection therewith.
>
> "3. We shall hold said apartment for investment for our mutual benefit and shall sell and dispose of same when we deem it advisable.
>
> "4. It is agreed that we will share equally all profits, losses and other benefits incurred.
>
> "5. We may, if and when we deem it advisable, form a partnership consisting of the three of us entitled MTZ ASSOCIATES, or similar name, for the purpose of carrying out this joint venture and for any additional business purposes agreeable to us."

On November 17, 1986, a Business Certificate for Partners, on behalf of MTZ Associates was filed in the office of the Clerk of the County of Nassau.

On April 4, 1986, the 30 apartments at 200 East 36th Street in New York City were purchased in two separate transactions for a total purchase price of $1,900,000.00. Pursuant to the contract (see, Finding of Fact "3"), $25,000.00 was paid down on November 25, 1985 by petitioners. The balance was paid as follows:

a. $275,000.00 paid by check of Zuckerbrod & Taubenfeld, Murray Hill Associates;

b. Promissory note from petitioners in the sum of $144,022.28;

c. Promissory note from Murray Hill in the sum of $1,455,977.72.

Petitioners entered into a Security Agreement, dated April 1, 1986, with Tamby Associates with respect to their purchase of 905 shares of capital stock of 200 East 36th Owners Corp. (representing apartment 15G). On the same date, Tamby Associates executed an Assignment of Proprietary Lease whereby its lease from the lessor corporation (200 East 36th Owners Corp.) for apartment 15G was assigned to petitioners. A promissory note, dated April 1, 1986, was executed whereby petitioners agreed to pay Tamby Associates the sum of

$144,022.28 in monthly payments through April 1, 2011.

Also on April 1, 1986, Tamby Associates and Murray Hill entered into a Security Agreement with respect to Murray Hill's purchase of 9,149 shares of 200 East 36th Owners Corp. (representing 29 apartments at 200 East 36th Street).

Petitioner Joseph H. Muraskin testified that, shortly after Murray Hill took title to the 29 apartments, a tenant of one of the apartments (10G) indicated that he would like to purchase the apartment. Mr. Muraskin stated that, at that time, Murray Hill really had no investors since it was still in the formation stage, so the tenant was given a favorable price and the apartment was sold.

The closing statement and other relevant documents (Exhibit "Y") associated with the sale of apartment 10G indicate that the closing took place on October 8, 1986. The contract of sale, dated June 20, 1986, indicates that the seller was Murray Hill, c/o Joseph H. Muraskin, Esq., and the purchaser was Richard Mincheff. The purchase price was $125,000.00. The gains tax transferor questionnaire, signed by Mr. Muraskin on January 10, 1989, listed the transferors as Joseph H. Muraskin and Harry S. Taubenfeld. The transferee questionnaire indicates that the transferor was Murray Hill 36 Associates, c/o Zuckerbrod & Taubenfeld.

At the hearing, petitioners produced a stock certificate, dated April 1, 1986, which indicated that they were the owners of 905 shares of 200 East 36th Street Owners Corp., representing apartment 15G. Subsequent to the hearing, stock certificates were submitted for 27 apartments (8,585 shares) indicating that Murray Hill was the owner thereof. Stock certificates for 24 apartments (7,610 shares) were dated April 1, 1986. The remaining certificates (3 apartments -- 975 shares) were dated "June".[2]

---

[2]According to the contract of sale (Exhibit "K") between Tamby Associates and petitioners, dated November 25, 1985, 10,054 shares of 200 East 36th Owners Corp., representing 30 apartments (including 15G) were to be sold. Pursuant to the Eighth Amendment to Offering Plan (Exhibit "J"), dated August 22, 1986, 9,575 shares representing 31 apartments were sold to Murray Hill and the shares for apartment 15G were sold to petitioners. The Eighth Amendment to Offering Plan included apartments 8A (250 shares) and 2J (176 shares) which were not included in the contract of sale.

With respect to apartment 15G, petitioners submitted checks (Exhibits "14" and "15"), drawn on the account of MTZ Associates, for months from December 1987 through June 1988, payable to Tamby Associates for mortgage payments and to Alexander Wolf & Co., Inc. for shortfall. The term "shortfall" was defined by Mr. Muraskin as the difference between what the owners were required to pay under the proprietary lease and the amount of rent which could be collected.

At the hearing, petitioner Joseph H. Muraskin testified that it was the original intention of petitioners to syndicate all 30 of the apartments. In their memorandum of law, it was stated that Messrs. Muraskin, Taubenfeld and Zuckerbrod are attorneys who, in addition to their law practice, have independently and together for the past ten years, engaged in the business of syndicating and/or investing in real property. This was accomplished by the principals (Muraskin, Taubenfeld and Zuckerbrod) entering into a contract to purchase the property and then assigning the same or a portion thereof to a partnership or group created by them. The partnership would then sell partnership interests to investors in order to raise the capital required to complete the purchase of that portion of the property assigned

to the limited partnership. In each case, the principals retained an interest in the partnership.

However, apartment 15G (this apartment was actually a combination of 15F and G, thereby making it a seven-room apartment) was the largest and the maintenance payments ($1,700.00 per month) were the largest. Mr. Muraskin stated that there was a $600.00 shortfall (difference between required payments and rent collected). Because investors could not deduct passive losses, inclusion of this apartment made the sale of limited partnership interests in Murray Hill very difficult. In addition, more money would have to have been raised to cover the shortfall and it was unclear whether the tenant planned to stay on. Therefore, Messrs. Muraskin, Taubenfeld and Zuckerbrod decided to form a separate partnership to hold and subsequently sell apartment 15G.

MTZ Associates hired AOI Construction, Inc. to perform certain renovations for

apartment 15G. Payment thereof, totalling $61,468.00, was made to AOI Construction, Inc. by checks drawn on an account of MTZ Associates and issued from November 1987 through April 1988.

By an agreement (contract of sale) dated August 22, 1988, petitioners sold 905 shares of 200 East 36th Owners Corp., allocated to apartment 15G located at 200 East 36th Street in New York City, to Simon and Greta Hemus for the price of $562,000.00. The closing took place on September 28, 1988. According to the closing statement (Exhibit "20"), the sellers received the sum of $384,648.62 (a check from Chase Home Mortgage Corporation, in the amount of $151,818.07, was issued to petitioners). The closing statement also indicated that, from the proceeds received by the sellers, the amount of $204,648.26 was paid to MTZ Associates.

For each of the years 1986 through 1991, Murray Hill filed Federal and State partnership returns. The schedules K-1 (Partner's Share of Income, Credits, Deductions, Etc.) indicate that, for the years 1987 through 1991, each petitioner was a general partner with an 8.333333% interest and was also a limited partner with a 2.777778% interest in the partnership (for 1986, each petitioner's limited partnership percentage was 3.703703%).

For the same years (1986 through 1991), MTZ Associates also filed Federal and State partnership returns which indicated that each petitioner and Martin Zuckerbrod were general partners with a 33.33% interest therein.

By letter dated March 21, 1986, the Division's real property gains tax unit advised petitioners, in pertinent part, as follows:

> "It is our understanding that you have purchased 10,054 shares in the 200 East 36th Owners Corp. for the purposes of resale. This letter is to inform you that you are subject to the filing requirements imposed by Article 31-B of the Tax Law on your resale of these cooperative shares.
>
> "On you sale of each unit, Transferor and Transferee Questionnaires (forms TP-580 & 581) along with the contract of sale must be filed with this Department. The Gains Tax Affidavit (form TP-584) may not be used to satisfy your filing requirements, because, on its face, the affidavit is not applicable to transfers pursuant to a cooperative plan.
>
> "If the aggregate total consideration you will receive on all of the sales exceeds $1 Million, all of the transfers will be subject to tax."

The Division received a form TP-580, transferor questionnaire, sworn to by petitioners on August 23, 1988, and a transferee questionnaire, form TP-581, sworn to by the purchasers on August 19, 1988. There is no indication in the record as to the date on which these documents were received.

On November 18, 1988, the Division received a form DTF-701, transferor questionnaire, from Murray Hill relative to 28 apartments. On the same date, a form DTF-701 was received from MTZ Associates with respect to the sale of apartment 15G. A covering letter to the Division, dated November 14, 1988 and signed by petitioner Harry S. Taubenfeld, objected to the aggregation of the apartments transferred by Murray Hill with the apartment transferred by MTZ Associates.

On January 17, 1989, the Division received from Joel E. Sammet & Co., Certified Public Accountants, form TP-580, transferor's questionnaire, for the sale of apartment 10G. The questionnaire indicated that the transferors were Joseph H. Muraskin and Harry S. Taubenfeld, the transferee was Richard Mincheff, the date of anticipated transfer was October 8, 1986 and that the selling price was $125,000.00. A transferee questionnaire, signed by Mr. Mincheff on October 8, 1986, indicated that the transferor was Murray Hill. A contract of sale for this apartment, dated June 20, 1986, listed the seller as Murray Hill.

Mr. Muraskin testified that at the time of the transfer of apartment 10G, a transferee questionnaire was obtained from the purchaser. However, since it was not clear to the principals whether this transaction was subject to tax, they did not file a transferor questionnaire until "a good many months later."

SUMMARY OF THE PARTIES' POSITIONS

The position of petitioners may be summarized as follows:

(a) Clear and convincing evidence has been introduced to substantiate that apartment 15G was owned by Messrs. Muraskin, Taubenfeld and Zuckerbrod (and not by Murray Hill), to wit:

(1) Stock was separately issued to petitioners for apartment 15G and to Murray

Hill for the remaining apartments;

(2) Separate bank accounts were maintained by petitioners for the ownership of 15G and by Murray Hill for the remaining apartments;

(3) Separate notes and security agreements were executed; and

(4) Payments for mortgages, shortfall and repairs were made by petitioners (MTZ) for 15G.

(b) Petitioners each owned an 11% interest in Murray Hill, clearly not a controlling interest. Sufficient mutuality of ownership is, therefore absent.

(c) The ownership of apartment 15G by petitioners was not used for a common or related purpose with the apartments owned by Murray Hill.

(d) The "look-through" principle, which the Division contends is applicable, should not, in fact, apply because it would have to work both ways, i.e., it would be manifestly unfair to impose tax liability on the ten limited partners of Murray Hill on the sale of apartment 15G which was never owned by the partnership.

(e) To apply the "look-through" principle, it must be shown that the properties are contiguous, that the properties were held for a common purpose and that there was sufficient mutuality of ownership and control of both entities. A "controlling interest" means a 50% or more beneficial interest in an entity (Tax Law § 1440[2]).

The Division's position is as follows:

(a) Petitioners bear the burden to show entitlement to the $1,000,000.00 exemption as set forth in Tax Law § 1443(1) and petitioners herein have failed to sustain their burden.

(b) Citing the "look-through" principle, the Division contends that the sale of apartment 15G must be aggregated with the sale of the other apartments and further contends that, to apply this principle, it is not necessary to show that petitioners had a beneficial interest of 50% in Murray Hill.

(c) The consideration received by petitioners was not confined to apartment 15G, but also included the sale of other units, i.e., apartment 10G.

(d) Reasonable cause for the waiver of penalties has not been established because petitioners failed to comply with the pre-transfer filing procedures with respect to their transfer of apartment 15G.

(e) Citing Matter of Brooks (Tax Appeals Tribunal, September 24, 1992), the Division contends that the "look-through" principle applies to situations where, despite not owning a controlling interest, an individual was a "controlling force" in an entity.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. Tax Law § 1443(1) provides that a partial or total exemption shall be allowed if the consideration is less than $1,000,000.00.

B. It is a general rule that statutes which provide for exemptions from tax must be strictly construed and the taxpayer must clearly demonstrate entitlement to the exemption (see, Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158; Matter of Sanjaylyn Co. v. State Tax Commn., 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55).

C. The term "transfer of real property" is defined in the first sentence of Tax Law § 1440(7) as follows:

> "'Transfer of real property' means the transfer or transfers of any interest in real property by any 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 transfer or acquisition of a controlling interest in any entity with an interest in real property."

Inclusion of the term "transfers" indicates that "the sale of more than one parcel may be treated as a single transaction" (Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, 235, lv denied 73 NY2d 708, 540 NYS2d 1003).

The third sentence of Tax Law § 1440(7), the so-called "aggregation clause", provides:

> "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 . . . ."

Pursuant to this clause, the proceeds from transfers treated as a single transfer are aggregated to determine the applicability of the $1,000,000.00 exemption.

D. 20 NYCRR 590.40 provides, in pertinent part, as follows:

> "Question: In the case of transfers pursuant to a cooperative plan, how does the aggregation clause of section 1440(7) of the Tax Law and, accordingly, the $1 million exemption apply to the following transfers?
>
> * * *
>
> "(b) The transfer of shares by investors?
>
> "Answer: The transfers of shares by an investor who acquired his shares in a transaction that did require payment of tax, as described in section 590.35 of this Part, are not aggregated with the transfers by the realty transferor, for purposes of applying the $1 million exemption to the transfers by the investor. All transfers of shares by a single investor are aggregated for purposes of applying the $1 million exemption.
>
> "If there are two or more investors, the transfers by each investor will be separately subjected to the $1 million exemption." (Emphasis added.)

In the present matter, the Division seeks, through application of the "look-through" principle, to aggregate the sale by petitioners of apartment 15G with the sale, by Murray Hill, of the remaining 28 apartments, in essence, by deeming all of the sales as having been made by one investor. The primary contention of petitioners is, however, that since they did not own a controlling interest in Murray Hill, application of the aggregation clause of Tax Law § 1440(7) is unwarranted.

E. In Matter of Von-Mar Realty Co. (Tax Appeals Tribunal, December 19, 1991, confirmed ___ AD2d ___ [3d Dept 1993]), the Tribunal summarized the application of the "look-through" principle by stating:

> "The 'look-through' principle, i.e., looking through an entity which owns real property to determine the beneficial owners of the real property, has been applied to the gains tax statutory scheme where adjacent or contiguous properties are transferred by two or more entities under common ownership to determine whether a taxable 'transfer of real property' has occurred (Matter of 307 McKibbon St. Realty Corp., supra). The 'look through principle' was also applied where a taxpayer and an entity in which it owns a 'controlling interest' transfer their interests in a single building with the result that the sales are aggregated to determine whether the $1 million exemption has been exceeded (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 552 NYS2d 972). As we noted in these earlier decisions, the focus of the gains tax through entities pervades the entire statutory scheme imposing the tax (Matter of Howes, supra;

> Matter of 307 McKibbon St. Realty Corp., supra; see also, Bredero Vast Goed, N.V. v. Tax Commn. of the State of New York, 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105 [where the court sustained looking through two tiers of entities to find a transfer of real property])."

In the instance where the entity is the transferor, as is the case in the present matter where a limited partnership, Murray Hill, was the transferor of the 28 apartments with which the Division seeks to aggregate petitioners' transfer, the Tribunal stated:

> "This exemption which looks through entities to exempt transfers based on beneficial ownership must necessarily be coupled with a similar look through the entity to determine beneficial ownership where, as here, an entity is selling real property. If not, the tax would be rendered a nullity through transactions structured in two steps, with the first step designed to benefit from the section 1443.5 exemption and the second from the less than $1 million exemption. For example, an individual or entity intending to sell a parcel of real property for more than $1 million to a third party could make intermediate transfers to entities it wholly owns. Such transfers would be entirely exempt from gains tax pursuant to the section 1443.5 exemption. If the commonly owned entities subsequently transferred to the intended transferee each for less than $1 million, the entire transaction would escape gains tax. Surely this was not a result intended by the Legislature. Accordingly, in the transaction at issue, the beneficial ownership of the interests in real property being transferred must be determined." (Matter of Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972.)

As clearly noted by petitioners, the definition of "controlling interest", with respect to a partnership, means 50 percent or more of the capital, profits or beneficial interest in such partnership (Tax Law § 1440[2][ii]). Applying this definition, petitioners cannot be found to have had a "controlling interest" in Murray Hill (see, Findings of Fact "6" and "12"). However, in Matter of Brooks (supra), the Tribunal stated:

> "[W]here contiguous properties are beneficially owned by the same individual through wholly owned corporations (see, Matter of 307 McKibbon St. Realty Corp., supra), or where one transferor is controlling the acts of another transferor, such transferors are not separate transferors and are not intended to be treated as such by the regulations. To interpret the regulations as petitioners urge would provide a loophole which would effectively nullify the gains tax law."

In Matter of Brooks (supra), the Tribunal found aggregation of certain transfers to be warranted, despite the lack of a "controlling interest" as defined in Tax Law § 1440(2)(ii), based upon the fact that B. V. Brooks was the controlling force behind them. An examination of the facts in the present matter leads to the same conclusion, i.e., that petitioners were the controlling force behind all of the transfers of the apartments at issue. Such facts include:

(1) Petitioners entered into the contract with Tamby Associates to purchase 30 apartments at 200 East 36th Street.

(2) Petitioners and Martin Zuckerbrod were the general partners of Murray Hill and, pursuant to the partnership agreement, management and control of the partnership and its business and affairs rested exclusively with the general partners. The agreement also provided that no limited partner could take part in the management of the business or transact any business on behalf of the partnership or have the power to sign for or otherwise bind the partnership.

(3) All decisions with respect to selection of a managing agent and terms and conditions of sales, payment of expenses and obligations, amount of further capital contributions and choice of professionals for Murray Hill's apartments rested with petitioners and Mr. Zuckerbrod. In addition, compensation of $30,000.00 per year was paid to them for such services.

(4) Petitioner Joseph H. Muraskin testified that it was the original intention of petitioners to syndicate all 30 apartments, but due to certain extenuating circumstances (see, Finding of Fact "10"), primarily financial in nature, apartment 15G was retained by petitioners and Mr. Zuckerbrod (subsequently MTZ Associates was formed to manage and sell this apartment).

(5) The sale of the 30 apartments took place on the same date, i.e., April 4, 1986.

(6) At the time Murray Hill took title to the 29 apartments, there were no other investors.

(7) Petitioners and Mr. Zuckerbrod were in the business of syndicating and/or investing in real property. The method employed herein, i.e., forming partnerships, was standard operating procedure (see, Finding of Fact "10").

Based upon the foregoing, it is clear that petitioners were the controlling force behind Murray Hill and, by application of the standards for the "look-through" principle as set forth in Matter of Brooks (supra), it must be found that the Division properly aggregated the transfer, by

petitioners, of apartment 15G with the transfers, by Murray Hill, of the remaining apartments. Accordingly, the $1,000,000.00 exemption was inapplicable and the transfer of apartment 15G was subject to the gains tax.

F. Tax Law § 1446(2) imposes penalty for failure to file a return or pay any tax within the time required by Article 31-B of the Tax Law. Pursuant to Tax Law former § 1442, in effect at the time of the transfer at issue herein, tax was due on the date of transfer. Other than Mr. Muraskin's statements concerning his (and the other principals') uncertainty as to the taxability of the transfer of apartments 10G and 15G, no other explanation was offered for the failure to timely file or pay tax due. Penalties imposed must, therefore, be sustained.

G. The petitions of Joseph H. Muraskin and Harry S. Taubenfeld are denied and the notices of determination issued to such petitioners on February 16, 1989 are sustained.

DATED: Troy, New York
April 29, 1993

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE