STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALLAN V. ROSE	:	DETERMINATION DTA NO. 810234
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner, Allan V. Rose, One Executive Boulevard, Yonkers, New York 10701, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 23, 1992 at 1:15 P.M., with all briefs to be submitted by November 10, 1992. Petitioner, appearing by Vicki G. Cheikes, Esq., submitted a brief on September 14, 1992. The Division of Taxation, appearing by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), submitted its responding brief on October 23, 1992. Petitioner submitted a reply brief on November 9, 1992.

ISSUES

I. Whether petitioner's original purchase price for certain real property should include the amount paid by a petitioner-controlled corporation to acquire from petitioner a part interest in the real property, which interest was subsequently transferred back to petitioner upon the controlled corporation's liquidation.

II. Whether petitioner has satisfactorily substantiated as an allowable "other acquisition cost" some or all of a claimed $400,000.00 brokerage commission.

III. Whether petitioner has established sufficient basis to warrant abatement of penalties.

FINDINGS OF FACT

Petitioner, Allan V. Rose, has been involved since approximately 1960 in the real estate

business. His activities have encompassed investment, development, construction, management and ownership of various properties, including purchasing tracts of land and building housing developments, shopping centers and offices.

On March 17, 1979, petitioner entered into a contract to purchase from Searingtown Corporation ("Searingtown") certain unimproved real property ("the property") located in the Village of North Hills, New York. As of the March 17, 1979 date of execution of the contract, the property was being used as a private 18-hole golf course and golf club. The contract purchase price for the property was $9,500,000.00. However, subsequent amendments to the contract, including purchase price changes both up and down, ultimately resulted in a $9,000,000.00 purchase price to be paid.

Petitioner's intent at the time of purchase was to build residential housing on the property. The contract provided that it was subject to the seller (Searingtown) being able to obtain a favorable tax ruling from the Internal Revenue Service with regard to the sale. In addition, petitioner was obligated, at his cost, to apply for a change of zoning so that the property could be used for a residential development.

In 1980, shortly after the contract was executed, the Village of North Hills enacted changes to its zoning regulations so as to reduce the allowable residential density for the property. By its action, the Village effectively reduced the number of residences which could be built on the property, therefore resulting in a reduction in the value of the property as a residential development. In response to this zoning action petitioner, together with Searingtown, commenced litigation against the Village. Petitioner believed that success in this litigation would result in a substantial increase to the value of the property.

At hearing, petitioner presented the testimony of one Robert Cheikes, Esq., regarding the subject property and certain income tax planning undertaken relative thereto. Mr. Cheikes had been petitioner's tax attorney since approximately 1961. He indicated that he knew of petitioner's contract to purchase the property, and also knew of the ongoing litigation concerning zoning of the property. He also understood that if petitioner prevailed in the

litigation and if residential subdivision approvals were obtained, the value of the property would greatly increase. In or about 1980, Mr. Cheikes advised petitioner that under then-existing Federal income tax law, if petitioner proceeded to build and sell residences, he would be treated as a "dealer" and taxation on the profits or gain from his development would be taxed at ordinary income rates. In an effort to minimize such income tax liability, Mr. Cheikes recommended a plan whereby petitioner could cause some of the gain on the property to be taxed at capital gain rates rather than at ordinary income rates. More specifically, Mr. Cheikes proposed the "sale" of a portion of the property to a corporation (created and) controlled by petitioner. Mr. Cheikes advised that the corporation could build and sell residences and that its profits would be taxable at ordinary income rates. However, by enabling the corporation to pay more for its portion of the property than petitioner was obligated to pay for that same portion under the contract of sale with Searingtown, the corporation would have a higher (stepped-up) cost basis in its property thereby reducing its ultimate profits and hence its ultimate income tax liability. In addition, if properly structured as a bona fide sale for income tax purposes, petitioner's gain on his transfer of a part interest in the property to a controlled corporation would be taxed as a capital gain reportable over time under the installment method of reporting.

In connection with this advice, Mr. Cheikes organized a corporation known as Parkwest Realty Corporation ("Parkwest") on December 23, 1981. Parkwest was organized solely for the purpose of taking title to a one-third interest (actually to a particularly specified [metes and bounds] portion) in the Searingtown contract property. Parkwest was at all times wholly owned and controlled by petitioner, Allan V. Rose.

As described above, the purpose for organizing the corporation and for allowing it to acquire a portion of the property was to permit petitioner to "sell" for income tax purposes a portion of the property to a controlled corporation at a price higher than he would be paying to Searingtown for the same portion of the property under the contract. As of the time that Parkwest was created, petitioner held the contract right to purchase the property but, because the zoning litigation was ongoing, closing had not occurred and petitioner did not hold title to the

property.

Offered in evidence in conjunction with Mr. Cheikes' testimony were two copies of a document entitled "Assignment and Assumption of Portion of Contract". The first such copy came from Mr. Cheikes' files. It indicates a date of December 23, 1981 and, as testified to by petitioner, contains the signature of Allan V. Rose in his own right and as president of Parkwest. The second such copy of the document (allegedly the original) also reflects, in addition to the foregoing date and signatures, a January 26, 1984 date of consent to the assignment by Searingtown.[1] The assignment document itself specifically allows the assignee (Parkwest) "to receive title to [a portion of the contract real estate]." The assignment document does not state among its terms any price or consideration to be paid by Parkwest, nor does it include any specific terms from which a price for the property interest being assigned could be determined.

Petitioner alleges that the above-described assignment was not to give Parkwest (an admittedly controlled entity) an interest without cost, but rather was to show, specifically for Federal income tax purposes, a sale of the interest from petitioner to Parkwest, thereby avoiding the application of then Internal Revenue Code ("IRC") § 351 and its carryover basis rules. However, in 1981, the zoning change litigation surrounding the property remained ongoing. Petitioner therefore maintains that he did not know when (or if) he would obtain title to the property, and did not know what value the property would have on the eventual closing date. In this regard, petitioner argues that he could not have set a price in 1981 and remain assured of obtaining the greatest possible income tax benefit from his planning or be assured of satisfying the Internal Revenue Service that a bona fide sale had occurred (i.e., one where the selling price was neither under nor, more importantly, over valued). Upon this basis, petitioner

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[1]The contract with Searingtown generally prohibited assignment thereof without Searingtown's consent. However, Searingtown had agreed under the contract that it would consent to any assignment where the assignee was a corporation controlled by petitioner (see Ex 6, ¶ 13).

argues that the parties (petitioner and Parkwest) understood and agreed that the price would be fair market value upon closing.

Petitioner was ultimately successful in the zoning litigation and, on February 8, 1984, transfer of title to the property occurred. Shortly before said date, and at Mr. Cheikes' recommendation, petitioner caused the property to be appraised. The appraiser valued the entire property at $22,000,000.00, and valued section one thereof (the portion covered by the purported assignment to Parkwest) at $8,000,000.00.[2]

On the February 8, 1984 date of closing, petitioner and Parkwest entered into a supplementary agreement (entitled "Modification of Assignment and Assumption of Portion of Contract") modifying the 1981 assignment and assumption agreement so as to spell out the price and payment terms not specified in the 1981 assignment document. More specifically, this modification agreement states that "[a]t the time of said assignment it was agreed that the consideration to be paid . . . would be the fair market value at the time of closing . . . ." The modification document goes on to provide that petitioner would pay Searingtown two-thirds of the contract price (or $6,000,000.00) and Parkwest would pay Searingtown the balance of the $9,000,000.00 contract price (i.e., $3,000,000.00). In addition, Parkwest would pay petitioner $5,000,000.00 for the section one interest in the property, such amount being the difference between the $8,000,000.00 appraised value of section one and the $3,000,000.00 Parkwest was paying to

Searingtown. This $5,000,000.00 payment was made on February 8, 1984 by execution and delivery of Parkwest's negotiable five-year promissory note to petitioner in the face amount of $5,000,000.00, carrying interest at the rate of 11% per annum with a maturity date of February 8, 1990. Amortization and payment of the note was structured in accordance with the

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[2]The appraisal was based on use of the property as a 225-unit condominium development with a nine-hole golf course. Development was envisioned in three sections, with section one (the portion assigned to Parkwest) including a clubhouse and recreational facilities.

anticipated development construction schedules such that as amounts came due under the note, Parkwest would (or hopefully should) have sufficient cash available to meet its payment obligations under the note.

At the February 8, 1984 closing of title, Searingtown executed and delivered a deed for section one of the property to Parkwest and a deed for the balance of the property to petitioner. These deeds were both duly recorded. Separate statements of no tax due with respect to Tax Law Article 31-B ("gains tax") were issued by the Division of Taxation ("Division") to petitioner (for the Searingtown to petitioner transfer) and to Parkwest (for the Searingtown to Parkwest transfer). Though unspecified, it appears undisputed that the March 17, 1979 contract between Searingtown and petitioner was not subject to gains tax pursuant to the "grandfather" exemption afforded under Tax Law § 1443.6. However, the Division has asserted that it has no record of transferee and transferor questionnaires having been filed with respect to the 1984 modification agreement between petitioner and Parkwest, or otherwise with regard to the assignment from petitioner to Parkwest. The record contains no evidence to show that such filings were made. By contrast, petitioner maintains that the assignment was executed in 1981 and since the gains tax was not then enacted no filing was required.

Shortly after the February 8, 1984 closing on the property, Parkwest changed its corporate name to Links Development Corp. ("Links"). This change was made to reflect the fact that the property, as developed, would be known as "The Links at North Hills".

From 1984 through 1986, Links paid petitioner the interest due pursuant to the note. Links carried its section of the property on its books at an $8,000,000.00 cost. In 1986, the IRC was revised such that, among other things, ordinary income tax rates were reduced to a maximum of 28% and the difference in tax rates between ordinary income and capital gains was eliminated. In addition, other IRC changes served to repeal those provisions which had enabled corporations to be liquidated without adverse tax consequences. Accordingly, in December 1986, Links paid petitioner in full the $5,000,000.00 principal due on account of the note, Links was liquidated pursuant to IRC § 333, and its interest in the property (its sole asset) was

distributed to petitioner.

At or about the same time (late 1986 and early 1987), petitioner embarked on an acquisition of some 40 hotels located in various states at a cost of approximately $200,000,000.00. Petitioner also obtained final subdivision approval for The Links at North Hills, and apparently as a consequence began receiving many unsolicited offers to purchase the property. As petitioner described in testimony, one offer became too good to refuse. Consequently, in December 1986, petitioner executed a contract to sell the property to Rabco Links Development Company ("Rabco") at a price of $49,000,000.00. It is the proper measure of gains tax due on this December 1986 contract of sale, consummated in 1987, which is at issue herein.

For the years 1984 and 1985, Links filed Federal and New York State corporation tax returns and reports under subchapter S which show Links' purchase price (cost basis) for section one of the property as $8,000,000.00 and also reflect its interest payments to petitioner on account of the $5,000,000.00 note. Links also filed final 1986 Federal and New York State corporation tax returns and reports showing its liquidation. Petitioner, in turn, reported the full $5,000,000.00 gain on the liquidation of Links on his 1986 Federal and New York State personal income tax returns. By virtue of the liquidation of Links petitioner assumed, for income tax purposes, Links' $8,000,000.00 adjusted cost basis for section one of the property, and also became the 100% owner of the property in his own name.

In connection with the 1987 sale of the property, transferor and transferee questionnaires (Forms TP-580 and TP-581) were filed. On these questionnaires, petitioner claimed an original purchase price for the property of $14,000,000.00, which amount includes Links' purchase price for its interest in the property ($8,000,000.00 as carried over to petitioner for income tax purposes), plus petitioner's purchase price for his interest in the property ($6,000,000.00).[3] In

[3]In fact, the original purchase price reported was $14,021,247.00, which amount includes allowable closing costs. As the closing cost items are not in dispute, for purpose of clarity the claimed original purchase price shall be referred to herein as $14,000,000.00. Similarly, Parkwest/Links received title to a specifically described portion of the property from

simplest terms, the original purchase price issue presented herein is whether the $5,000,000.00 assignment price between Parkwest/Links and petitioner, which enabled a

step-up in basis for income tax purposes, may also be recognized for gains tax purposes.

Included with petitioner's pre-transfer gains tax filings on the 1987 sale was an affidavit describing the basis upon which the $14,000,000.00 claimed original purchase price was calculated. This affidavit describes the purported 1981 assignment to Parkwest/Links, the relationship between petitioner and Parkwest/Links, and the purchase price paid by Parkwest/Links. With minor adjustments not relevant hereto, the Division issued a tentative assessment in the amount of $3,110,055.00, substantially in conformance with the transferor and transferee questionnaires submitted in connection with the 1987 sale. This tentative assessment of tax was paid at the time of closing in 1987 and the deed to the property was recorded.

In or about 1989, the Division audited the 1987 transaction by which the property was sold. As a result of this audit, allowable capital improvement expenses were increased by $266,593.00. However, a claimed "other acquisition cost" of $400,000.00, representing specifically a claimed brokerage fee paid or payable to one Robert Lehrer, was disallowed pending substantiation of payment of such expense. In addition, petitioner's claimed original purchase price was reduced by $5,000,000.00 based upon disallowance of the increase resulting from the described transaction between petitioner and Parkwest/Links. Finally, penalties in the amount of $179,669.00 were imposed.

On July 26, 1990, the Division issued to petitioner a Notice of Determination of Gains Tax Due under Tax Law Article 31-B, assessing additional gains tax due in the amount of $513,340.00, plus penalty and interest, based upon the audit changes described above.

Searingtown, sometimes described herein as section one, while petitioner received from Searingtown sections two and three (the balance of the property). For ease of reference herein, the interest acquired by Parkwest/Links may be referred to as a one-third interest, while that received by petitioner may be referred to as a two-thirds interest.

With respect to the brokerage commission, petitioner has submitted a July 8, 1991 letter from one Alan Glass, CPA, who was Links' controller, stating that as of such date Links had paid a total of $150,000.00 to Robert Lehrer as broker. In addition, petitioner submitted a July 10, 1991 letter from Mr. Lehrer confirming that $150,000.00 had been received as of such date. Petitioner also submitted copies of cancelled checks totalling $45,000.00 paid in the amounts of $25,000.00 on April 11, 1991 and $20,000.00 on November 8, 1991. Finally, petitioner submitted two additional letters from Alan Glass, dated July 16, 1992 and July 21, 1992, respectively. The first of such letters lists brokerage commissions totalling $170,000.00, paid in the amounts of $100,000.00 in 1988, $25,000.00 in 1990 and $45,000.00 in 1991. The second letter specifically references the $25,000.00 paid in 1990 as having been paid by check, and notes further that the cancelled check itself is in storage among petitioner's (voluminous) records. Adding the $20,000.00 payment made by check dated November 8, 1991 to the $150,000.00 amount claimed and confirmed by the July 8, 1991 (Glass) letter and July 10, 1991 (Lehrer) letter, totals and reconciles the $170,000.00 amount claimed as paid by the July 16, 1992 (Glass) letter. At hearing, petitioner testified that the remainder of the commission amount was admittedly due and owing but that, for business reasons allegedly unrelated to the Links property, full payment had not yet been made to Mr. Lehrer. While no brokerage agreement or contract was submitted in evidence, petitioner did offer a letter from Long Island Realty Co. (Robert Lehrer) dated March 17, 1979, signed by Mr. Lehrer and (as agreed to) by Searingtown. By this letter, Mr. Lehrer agrees to look to the purchaser and not Searingtown for payment of any commission due.

CONCLUSIONS OF LAW

A. The main issue in this case centers around the concept of original purchase price ("OPP") which the Tax Law defines, in pertinent part, as "the consideration paid or required to be paid by the transferor . . . to acquire the interest in real property . . ." (Tax Law § 1440[5][a]).

Petitioner here claims an OPP of $14,000,000.00 consisting of a) $9,000,000.00 paid under the purchase contract with Searington, plus b) $5,000,000.00 paid to petitioner by his

controlled corporation Parkwest/ Links pursuant to an assignment agreement by which Parkwest/Links obtained the right to acquire, and in fact did acquire, a one-third ownership interest in the property. Petitioner claims the $5,000,000.00 as part of his OPP by virtue of having acquired Parkwest/Links' ownership interest in the property upon that entity's complete liquidation in 1986, at which time petitioner received the property interest in exchange for his Parkwest/Links stock. No challenge is raised as to including the $9,000,000.00 Searington contract price in OPP. Rather, the Division challenges petitioner's inclusion of the $5,000,000.00 amount.

B. Petitioner's claim proceeds from the position that on December 23, 1981 a binding assignment of the one-third property interest was made by petitioner to his then-created wholly-owned corporation Parkwest. As described, petitioner testified that he executed the assignment document on December 23, 1981 on behalf of himself and Parkwest. Petitioner goes on to argue that since the assignment took place in 1981, which date falls prior to the March 28, 1983 effective date of the gains tax, the assignment to Parkwest was "grandfathered" for gains tax purposes per Tax Law § 1443.6. Petitioner then apparently argues that since the assignment was grandfathered and since the Searingtown contract was grandfathered, both the $5,000,000.00 paid to petitioner by Parkwest and the $3,000,000.00 paid to Searingtown by Parkwest would not be subject to gains tax, that such amounts constituted Parkwest's OPP for its interest in the property, and should be carried over to petitioner as his OPP in such interest as acquired from Parkwest upon its liquidation. Combining such amounts with the $6,000,000.00 petitioner paid to Searingtown for the remaining two-thirds interest in the property accounts for petitioner's claimed $14,000,000.00 OPP upon his subsequent transfer of the property to Rabco in 1987.

C. Petitioner's position is rejected for several reasons. First, and setting aside for the moment the issues of (a) whether petitioner's one-third property interest assignment to a wholly-owned and controlled corporation constituted a mere change of identity which one should "look through" for gains tax purposes and, (b) whether 1984 modifications to the assignment

document to specify price and payment terms were substantial modifications which would negate possible "grandfathered" status to the 1981 assignment document, it remains that petitioner has offered no objective, verifiable, independent evidence from which it could be concluded that the purported assignment document was in fact executed in 1981 as claimed. Casting no aspersions on petitioner's testimony that he executed the document in 1981, it remains that such testimony from an interested witness (here a party to the transaction) is not independent evidence of execution as required per Tax Law § 1443.6 (see, Matter of Old Nut Co. v. State Tax Commn., 126 AD2d 869, 511 NYS2d 161, lv denied 69 NY2d 609, 516 NYS2d 1025; Matter of Yanovicz v. Dept. of Taxation and Fin., 140 AD2d 866, 528 NYS2d 906; Matter of American Express Co. and American Express Intl. Banking Corp., Tax Appeals Tribunal, April 23, 1992). In the same manner, testimony by petitioner's tax attorney who recommended the assignment as part of an overall income tax plan, as described, but who neither drew the assignment document nor witnessed its execution, is not sufficient to establish execution in 1981 (id.). Further, the fact that the assignment document was certainly an integral part of the overall income tax plan does not establish that such document was executed in 1981 or at any other time before the effective date of Tax Law Article 31-B. On this score, it is noted that consent from Searingtown was required on any assignment. While Searingtown was, in turn, obligated to consent to an assignment to any entity controlled by petitioner, it remains that Searingtown's date of consent was not given until January 26, 1984, just shortly before the February 8, 1984 date on which the assignment document was modified and on which closing occurred. Furthermore, the Searingtown contract was amended a number of times, including four times after the alleged December 23, 1981 date of assignment execution. However, none of the amendments mention, by reference or otherwise, assignment to Parkwest. Given these facts and bearing in mind that the assignment was from petitioner to his controlled corporation leaves it at least equally (if not more) plausible to accept that the assignment was simply executed when needed, i.e., at or about the time of closing in early 1984. In any event, the evidence falls short of establishing execution on or before March 28, 1983 and thus the

assignment is not entitled to the grandfather exemption.[4]

D. Having concluded that the 1981 document did not constitute a grandfathered document by which transfer occurred, leads to the 1984 transaction(s). With regard to Searingtown, two-thirds of the property was transferred to petitioner, while one-third of the property was transferred to Parkwest by virtue of its right to take title as assigned by petitioner. Separate deeds were executed and recorded and separate statements of no tax due were issued by the Division, presumably upon the basis that the 1979 Searingtown contract was grandfathered. However, a statement of no tax due has not been introduced regarding the petitioner-to-Parkwest assignment, nor is there any evidence of any gains tax filing with regard thereto. Since an assignment of a contractual right to acquire property constitutes the transfer of an interest in real property for gains tax purposes (Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557) and since Parkwest paid petitioner $5,000,000.00 for this right, such transaction

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[4]The foregoing discussion has focused on the date of execution of the assignment document. However, even if execution in 1981 were established, petitioner would face a difficult hurdle vis-a-vis the 1984 modifications. On this issue, the Division notes that any change in price constitutes a substantial modification serving to eliminate grandfather exemption (20 NYCRR 590.21). Here, the purported 1981 assignment document failed to include any price or payment terms. It would seem the insertion of price and payment terms where none existed is at least as substantial as changing an existing price. Petitioner's argument that (as recited in the 1984 modification) the parties always understood and agreed that the price would be fair market value, and that this is consistent with the structure and aim of the income tax planning, must be viewed in light of the fact that the parties in interest were one and the same, i.e., petitioner and his controlled corporation. If the price was so clearly understood to be fair market value, since such price would produce the greatest allowable income tax benefit, it is curious why the document did not simply specify "price to be fair market value as appraised at the time of closing." Given petitioner's aim of maximizing his income tax benefit, and the fact that petitioner controlled the transaction, the price could have been set at whatever level petitioner needed or wanted within the bounds of income tax rules. It is not difficult to envision circumstances where ancillary factors might cause some price other than independently appraised fair market value to result in the greatest overall tax benefit to petitioner (i.e., not simply the greatest tax benefit on this transaction). Thus, petitioner's failure to set any price in the assignment document weighs heavily against concluding that the 1984 modifications were not substantial changes which would void grandfathered status.

would appear on its face to have gains tax consequences and petitioner would presumably seek any exemption available. It appears petitioner made no filing with respect to the assignment, perhaps assuming the grandfather exemption applied.[5] As described above, the assignment was not entitled to the grandfather exemption. However, the assignment would appear to have been entitled to exemption as a "mere change of identity" with "no change in beneficial interest" (Tax Law § 1443[5]). That is, petitioner transferred (assigned) an interest in real property (the contractual right to acquire a one-third property interest) to a corporation of which he was the sole shareholder. It is well established that the focus of the gains tax is to "look through" entities to determine the beneficial ownership in property. As the Tax Appeals Tribunal has repeatedly held:

> "The focus of the gains tax through entities to determine the beneficial ownership of real property is evidenced both by the imposition provisions of the statute and by its exemptions" (Matter of 307 McKibbon Street Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972; see also Matter of Brooks, Tax Appeals Tribunal, September 24, 1992; cf. Matter of Von-Mar Realty Co. v. Tax Appeals Tribunal, ___ AD2d ___ [3d Dept 1993]).

The principle of focusing on the economic reality of a transaction has been accepted and applied to corporate entities (see, Matter of Bredero Vast Goed v. Tax Commn., 138 Misc 2d 27, 523 NYS2d 754, affd 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105).

E. In this case, both transfers of the one-third property interest occurring between petitioner and Parkwest/Links represented merely changes of ownership identity with no change of beneficial interest. Although title to the property was split in name, the party in interest (petitioner) never changed from 1979 onward and petitioner was at all times the beneficial owner of the entire property. As discussed above, the 1984 assignment was in fact a mere

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[5]In fact, since neither the assignment document nor the note appear to have been recorded and since no deed passed between petitioner and Parkwest in 1984, petitioner may have seen no need to seek a Statement of No Tax Due with regard to the assignment.

change notwithstanding the absence of a gains tax filing. In turn, neither party questions that the 1986 transfer back from Parkwest/Links to petitioner upon the former's dissolution was not subject to gains tax because the same represented a mere change of identity. Hence, pursuant to Tax Law § 1440(5) and 20 NYCRR 590.14; 590.19 and 590.49 petitioner, as the beneficial party in interest at all times, would retain a carryover OPP in the property. Therefore, in fact, the OPP for the property for gains tax purposes remains the $9,000,000.00 paid to Searingtown, together with such allowable expenses as were substantiated, and petitioner is not entitled to a step-up in OPP based upon the $5,000,000.00 paid for the assignment between petitioner and Parkwest/Links in 1984 (Matter of Schrier, Tax Appeals Tribunal, July 16, 1992; Matter of LoScalzo, Tax Appeals Tribunal, January 21, 1993). To conclude otherwise would serve to carve an exception to the gains tax entirely inconsistent with its provisions. Specifically, one or more intermediate transfers could be made to wholly-owned entities, followed by transfer to the ultimate purchaser. Exempting such intermediate transfers from gains tax as mere changes of identity while allowing OPP step up(s) on such transfers would not only be inconsistent but would enable a transferor to greatly diminish if not avoid altogether any gain upon ultimate transfer (Matter of LoScalzo, supra, citing Matter of Schrier, supra).

F. The conclusion reached hereinabove in no way impugns the validity of the transaction or the results obtained by petitioner for Federal (or State) income tax purposes. Rather, the same only indicates that the focus of the gains tax differs from that of income tax, and that income tax concepts of gain, loss, etc. are not relevant for gains tax purposes (see, Matter of SKS Associates, Tax Appeals Tribunal, September 12, 1991). Furthermore, insofar as relevant, petitioner's claim for cancellation based on the statute of limitations is denied. Specifically, there is no acceptable evidence as described establishing that the purported assignment in 1981 was in fact executed in 1981 or that said assignment document had any validity for gains tax purposes until at least 1984, nor is there evidence that gains tax reporting was made with regard

to the assignment in 1984.[6]

G. Petitioner is entitled to include in OPP as an other acquisition cost (Tax Law § 1440[5][a]), any brokerage commission expense paid. The Division admits as much by its brief, arguing only that petitioner is required to substantiate the amount(s) of such commissions paid. In turn, the evidence as detailed in Finding of Fact "21" establishes that petitioner has paid only $170,000.00 of the brokerage commission, but not the full $400,000.00 allegedly due. Although afforded the opportunity to submit

cancelled checks, post-hearing, to substantiate any additional amounts paid, no such checks were produced.

H. With regard to the issue of penalties, it is clear that petitioner specifically disclosed his position regarding OPP to the Division by a very detailed affidavit submitted with his gains tax filings prior to transfer in 1987. Petitioner's position, well established as viable for Federal income tax purposes, was initially accepted by the Division and was not disallowed until nearly three years later upon audit. There is no dispute that the Division is within its rights to disallow claimed items upon full audit and said rights are specifically preserved under Article 31-B of the Tax Law. However, giving cognizance to the complexity of the transaction and noting specifically petitioner's full disclosure thereof, allows the conclusion that abatement of penalties is warranted under these circumstances.

I. The petition of Allan V. Rose is granted to the extent indicated in Conclusions of Law "G" and "H", such that commission amounts shall be allowed to the extent of $170,000.00 and penalties shall be abated, but is otherwise denied, and the Notice of Determination dated

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[6]Theoretically, petitioner could be entitled to a step-up in OPP if he had reported the transaction for gains tax purposes in 1984 and had paid gains tax with respect to the transaction between himself and Parkwest/ Links. However, such treatment would not likely have been afforded petitioner in view of the fact that said transaction clearly represented a mere change of identity without any change in beneficial ownership interest.

July 26, 1990, as modified in accordance herewith, is sustained.

DATED: Troy, New York
April 29, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE