STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ROSE ROITER :

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. :

DETERMINATION
DTA NOS.
811214
AND 811920

In the Matter of the Petition :

of :

ESTATE OF ABRAHAM MARGOLIS :

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 Rose Roiter, 1530 52nd Street, Brooklyn, New York 11219, 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.

Petitioner Estate of Abraham Margolis, c/o Jay Waxenberg, Esq., 1585 Broadway, New York, New York 10036, 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 consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street,

Troy, New York, on June 8, 1994 at 1:15 P.M. Petitioners' briefs were due on September 26, 1994 and petitioners timely filed their respective briefs accordingly. TheDivision of Taxation timely filed its brief on December 2, 1994. The due date for petitioners' reply briefs was December 30, 1994 and petitioners timely filed their respective reply briefs accordingly. Certain documents were submitted with the reply brief of petitioner Roiter. By letter dated January 3, 1995, the Division of Taxation objected to the receipt of such documents into the record herein. At the same time, the Division of Taxation requested that certain factual statements made in the reply brief be accepted into the record. By letter dated February 6, 1995, petitioner Roiter requested that such documents be received in evidence. By letter dated February 9, 1995, the Administrative Law Judge advised the parties that the documents submitted with petitioner Roiter's reply brief would not be received in evidence in this matter and that any factual statements made in a brief which were unsupported by the evidence would not be considered by the Administrative Law Judge in his determination. February 9, 1995 thus commenced the six-month period for the issuance of this determination pursuant to Tax Law § 2010(3). Petitioner Rose Roiter appeared by Andrew R. Berman, Esq. Petitioner Estate of Margolis appeared by Elliot S. Gross, Esq. The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

ISSUES

I. Whether, pursuant to Tax Law § 1440(former [7]), the

consideration paid in respect of two separate transfers of tenant-in-common interests in a single property must be aggregated regardless of whether the transfers were separate and independent transfers of each transferor's respective one-half undivided interest and regardless of whether the transfers were pursuant to any plan or agreement.

II. Whether, alternatively, under the facts herein, the two transferees should be deemed a single transferee thereby rendering the transfers at issue subject to aggregation pursuant to 20 NYCRR former 590.43(d).

III. Whether the transfers of the tenant-in-common interests herein constituted transfers of a controlling interest in an entity with an interest in real property.

IV. Whether, under the facts herein, the transfers at issue are properly deemed to be transfers from one transferor to one transferee.

V. Whether the $210,000.00 paid by Abraham Friedman to petitioner Rose Roiter pursuant to an agreement entitled "Assignment of Claims" should properly be deemed additional consideration for petitioner Roiter's interest in real property.

VI. Whether the Division of Taxation improperly failed to afford petitioner Estate of Abraham Margolis an opportunity to submit a sworn statement as provided in Tax Law § 1440(former [7]).

VII. Whether, with respect to petitioner Roiter, the conciliation conferee erred in failing to provide this petitioner with legal analysis and factual determinations to

support the Conciliation Order issued to this petitioner.

FINDINGS OF FACT

On July 1, 1969, Sol Roiter and Abraham Margolis acquired as tenants in common real property located at 48-50-52 Orchard Street, New York, New York ("the subject property"). This property consisted of four retail stores and was held by Roiter and Margolis for the purpose of renting as commercial space.

At some point subsequent to their purchase of the property, Roiter and Margolis formed a partnership called A & S Management Co., the purpose of which was to collect rents and pay expenses on the subject property.

Sol Roiter was a watchmaker by trade and was a passive investor in the subject property. Upon his death in 1985, his interest in the property passed to his wife, petitioner Rose Roiter.

Abraham Margolis' business was real estate and he managed the property (i.e., collected the rents and paid the expenses) until his death in or about February 1987. Following Mr. Margolis' death, his interest in the property passed to his estate and the management of the property was undertaken by Meyer Kimmel, Esq. Mr. Kimmel had represented Mr. Margolis in various matters over the course of 20 years prior to Mr. Margolis' death. The co-executrices of the Margolis estate, Nili Cohen and Rachel Ostrowitz, requested that Mr. Kimmel manage the property and he did so until approximately May of 1989.

A Federal income tax return (Form 1065) was filed on

behalf of the partnership, A & S Management Co., for the year 1986.

By contract of sale dated April 5, 1988, the Estate of Abraham Margolis agreed to sell its one-half undivided interest in the subject property to Abraham Friedman for $999,000.00. Mr. Friedman was and had been a tenant on the subject property for several years. He was the principal of Pan Am Menswear Company, Inc. which operated a men's clothing store on the subject premises. Gains tax questionnaires filed in connection with this proposed transfer listed an anticipated closing date of May 7, 1988.

The above-mentioned sale was never completed and, pursuant to a contract of sale dated October 20, 1988 and a deed dated November 9, 1988, the Estate of Abraham Margolis transferred its undivided one-half interest in the subject property to Wolf Landau for a purchase price of $950,000.00. Mr. Landau took title to his interest in the property subject to a lis pendens filed by Abraham Friedman on November 4, 1988. Mr. Landau had been a tenant on the subject premises since September 1, 1986. He was principal of Imperial Sportswear, Inc. which operated a retail store on the subject premises. Mr. Landau's lease agreement required annual rental payments of $76,800.00.

The October 20, 1988 contract of sale stated that the sale of the Estate of Margolis' interest was being made "without the consent of the co-tenant", i.e., Rose Roiter. The contract further indicated that, to the best of the seller's knowledge, there were no agreements between the co-tenants with respect to

the premises. The contract also provided, at paragraph 51 thereof:

> "The parties acknowledge that neither Seller nor Purchaser has any control over the Co-Tenant and recognizes that depending on when and to whom Co-Tenant disposes of its half of the premises, the Seller may be retroactively subject to the New York State Transfer Gains Tax."

By contract of sale dated February 5, 1989 and deed dated April 7, 1989, Rose Roiter transferred her one-half undivided interest in the subject property to Abraham Friedman for a purchase price of $990,000.00.

Also on February 5, 1989, Rose Roiter and Abraham Friedman executed an "Assignment of Claims" under the terms of which Ms. Roiter assertedly assigned to Mr. Friedman her interest in certain claims for a purchase price of $210,000.00. The assignment stated that the claims assigned therein resulted from damages caused by "numerous defaults" under the lease by which Landau occupied space in the subject premises and by an unlawful occupancy by Landau of certain other space in the premises. The Assignment of Claims further provided that the purchase price was payable at the time and place of the closing on the contract of sale of the interest in real property.

As previously noted, Sol Roiter was a passive investor in the subject premises. He had little, if any, involvement in the management of the property, which was handled by Abraham Margolis. Their common interest in the subject premises appears to have been the extent of their business and personal relationship. The two did have a familial relationship. Specifically, Sol Roiter's father-in-law's sister was married to

Abraham Margolis. (Stated differently, Rose Roiter was the niece of Rose Margolis, Abraham Margolis' wife.) This familial relationship notwithstanding, the two did not have much in the way of a close personal relationship, nor were the Roiter and Margolis families close. The familial relationship between the Roiter and Margolis families terminated with the death of Rose Margolis in 1985.

While the record shows that Sol Roiter and Abraham Margolis were not close, the record does not reveal the existence of any mistrust or animosity between these two individuals. Following Sol Roiter's death, however, a level of mistrust did develop as Fay Fortgang, Sol and Rose Roiter's daughter, who had begun to act on her mother's behalf with respect to the property, believed that Abraham Margolis had improperly taken a management fee without disclosure to Rose Roiter. Additionally, Ms. Fortgang believed that Abraham Margolis had improperly failed to share with Rose Roiter insurance proceeds received by Margolis in 1986 as a result of a fire at the premises. Further, in a matter unrelated to the subject premises, Rose Roiter and her siblings commenced a lawsuit against the Estate of Rose Margolis. This action involved the existence and validity of a will which the Roiters believed had been executed by Rose Margolis and under which the Roiters were beneficiaries. Apparently, the Roiters were not beneficiaries under the will offered for probate. This litigation was ongoing at the time of the transfers at issue herein.

Sol Roiter did not provide for any member of the Margolis family in his will. Similarly, Abraham Margolis did not provide for any of the Roiters in his will.

In response to the failure of the April 5, 1988 contract of sale, Abraham Friedman filed suit against the Estate of Abraham Margolis on November 4, 1988 seeking specific performance of said contract. As noted previously, a lis pendens was also filed on November 4, 1988. The record herein does not indicate the reason for the failure of the April 5, 1988 contract. The complaint filed in connection with Abraham Friedman's suit indicates that the estate sought to declare Friedman in default under the April 5, 1988 contract on July 11, 1988, but does not indicate a reason for such a declaration.

The parties to the above-mentioned action subsequently executed a stipulation of discontinuance dated June 15, 1990. As may be observed, the stipulation of discontinuance was entered into subsequent to Mr. Friedman's purchase of an interest in the subject property from Rose Roiter.

At hearing, the Estate of Abraham Margolis introduced into the record an affidavit of Nili Cohen, co-executor of the Estate of Abraham Margolis, which stated, in part, as follows:

> "3. At the time of the sale by the Estate to WOLF LANDAU, I had no knowledge (and I know that my co-Executrix had no knowledge) as to the intentions of ROSE ROITER, Executrix of the Estate of SOL ROITER, to sell the one-half interest of the Roiter Estate in the same property.
>
> "4. I was subsequently informed that ROSE ROITER, acting in behalf of herself and the Roiter Estate sold the remaining one-half interest in the same property to ABRAHAM FRIEDMAN and that the transaction was consummated in April, 1989.

"5. The two transactions were completely unrelated, and were not consummated pursuant to an agreement or plan to effectuate by partial or successive transfers, a transfer which would otherwise have been taxable under Article 31-B of the Tax Law.

"6. After the Gains Tax authorities made a determination to aggregate the sales prices of the two transactions entered into by the Roiter Estate and Margolis Estate, I was not afforded an opportunity to furnish the sworn statement referred to in Section 1440(7) of Article 31-B of the Tax Law."

Also introduced in the record herein was an affidavit of Rose Roiter dated June 7, 1994 which stated, in part:

"4. The transfer of the Margolis Property was not made pursuant to any plan, agreement or arrangement with me or with my children. In fact, Paragraph 25 of the Contract of Sale for the Margolis Property specifically states that my consent was not obtained in connection with the sale of the Margolis Property.

"5. No part of the consideration received from the transfer of the Margolis Property was shared with me or with my children.

"6. On April 7, 1989, I transferred to Abraham Friedman all of my undivided one-half tenancy-in-common interest in the Property (the 'Roiter Property'). The Contract of Sale for the Roiter Property was executed on February 5, 1989.

"7. The transfer of the Roiter Property was not made pursuant to any plan, agreement or arrangement with the Estate of Abraham Margolis or with the children of Abraham and Rose Margolis.

"8. No part of the consideration received from the transfer of the Roiter Property was shared with the Estate of Abraham Margolis or with the children of Abraham and Rose Margolis.

* * *

"13. I had no knowledge of the sale of the Margolis Property to the transferee -- Wolf Landau -- until after the consummation of that sale.

* * *

"16. The transfer of the Roiter Property was not made pursuant to any plan or agreement to effectuate by

> partial or successive transfers a transfer which would otherwise be included in the coverage of Article 31-B of the Tax Law of the State of New York."

Neither Rose Roiter nor Fay Fortgang had any knowledge of the estate's sale of its interest to Landau until after such sale was completed. Roiter and Fortgang became aware of such sale following a telephone call from Abraham Spector, Mr. Landau's attorney, in January 1989.

After learning of Landau's purchase of the one-half interest in the property, Roiter was approached by Friedman seeking to purchase Roiter's interest in the property and decided to enter into negotiations with Friedman to sell her interest. Ms. Fortgang's low regard for Mr. Landau was a significant factor in Roiter's decision to sell her interest.

In the fall of 1987, the Estate of Abraham Margolis, through its attorney, Meyer Kimmel, Esq., communicated with prospective purchasers of the estate's interest in the subject property. By letter dated September 15, 1987, Mr. Kimmel inquired as to Rose Roiter's interest in acquiring the estate's interest in the property.

By letters dated October 30, 1987 and November 5, 1987 to the attorneys of Mr. Landau and Mr. Friedman, respectively, Mr. Kimmel inquired as to whether Landau or Friedman was interested in acquiring the estate's interest in the subject property.

In the letters to Landau's and Friedman's attorneys, Mr. Kimmel stated that the owner of the other half of the subject property, i.e., Rose Roiter, had a first refusal option to

purchase the property at the price that any third party would offer. Based on the testimony of Fay Fortgang, it appears that Rose Roiter believed that she had such a right. However, no such option was offered to Rose Roiter either at the time of the estate's contract with Friedman or at the time of the estate's sale to Landau, and no document purporting to confer such an option was entered into evidence herein.

Pursuant to a Notice of Petition Hold Over, dated June 8, 1988, petitioners Estate of Margolis and Rose Roiter, as landlords of the subject premises, commenced an action against Imperial Sportswear, Inc. in New York City Civil Court. As noted previously, Wolf Landau was the principal of Imperial Sportswear, Inc. The petition filed in connection with this civil action alleged that the tenant, Imperial Sportswear, Inc., had "squatted upon or intruded into [the subject property] without permission."

Following the two transfers at issue herein, Landau and Friedman hired Abraham Spector, Mr. Landau's attorney, to manage the property. This move was necessary because Landau and Friedman were not on good terms.

The record is unclear as to the disposition of the claim or claims which were the subject of the Assignment of Claims following the transfer of such claims. Mr. Landau testified that he did not recall whether Mr. Friedman had sued him in connection with such claims. Mr. Friedman was not present at the hearing and did not testify.

On September 16, 1991, the Division of Taxation

("Division") issued to petitioner Estate of Abraham Margolis a Notice of Determination which assessed $93,887.00 in real property transfer gains tax due, plus interest, in respect of the transfer of real property located at 48-52 Orchard Street, New York, New York.

On February 21, 1991, the Division issued to petitioner Rose Roiter a Statement of Proposed Audit Adjustment which asserted $90,888.06 in real property gains tax due, plus interest, in respect of the transfer of real property located at 48-52 Orchard Street, New York, New York. In response to this statement, petitioner Roiter paid under protest the asserted gains tax due plus accrued interest by check dated March 20, 1991.

The Notice of Determination and Statement of Proposed Audit Adjustment each had an "Attachment" which set forth the Division's rationale behind the issuance of such documents. Specifically, the attachments noted that the Division had received gains tax questionnaires and supporting documentation in respect of the transfers from Estate of Margolis to Landau and from Rose Roiter to Friedman. The attachments further noted that these transfers were properly aggregated under Tax Law § 1440(7) and that pursuant to this section the transfers were subject to gains tax.

At no point prior to the issuance of the Notice of Determination and the Statement of Proposed Audit Adjustment did the Division inform either petitioner herein of their right to furnish an affidavit or sworn statement to the effect that the

subject transfer "was 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" (see, Tax Law § 1440[former (7)]).

In its amended answer filed in respect of the petition of Rose Roiter, the Division asserted a greater deficiency than that set forth in the Statement of Proposed Audit Adjustment. Specifically, pursuant to Tax Law § 1444(3)(a)(2), the Division asserted that the $210,000.00 in consideration paid to petitioner Rose Roiter by Abraham Friedman pursuant to the Assignment of Claims constituted additional consideration for the transfer of Roiter's interest in the subject premises. The Division thus asserted a greater deficiency in the amount of $21,000.00, plus interest.

All parties retained and were represented by separate and independent counsel in the transfers at issue herein. Moreover, neither Rose Roiter nor the Estate of Abraham Margolis shared any part of the consideration each received in respect of the subject transfers.

CONCLUSIONS OF LAW

Issue I

A. Tax Law § 1441 imposes a tax on gains derived from the transfer of real property within New York State. Certain exemptions from the tax are provided for in Tax Law § 1443. One such exemption is that no tax shall be imposed if the consideration is less than $1,000,000.00 (Tax Law § 1443[1]). Generally, statutory exemptions from tax are strictly construed,

and the taxpayer must clearly establish that it is entitled to the claimed exemption (see, Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158).

B. During the period at issue, the term "transfer of real property" was defined in Tax Law § 1440(former [7]) which provided, in part, as follows:

> "'[t]ransfer of real property' means the transfer or transfers of any interest in real property by any method, including but not limited to sale . . ." (emphasis added).

C. The third sentence of Tax Law § 1440(former [7]) is known as the "aggregation clause". It provided:

> "[t]ransfer 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, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property."

D. The aggregation clause has a bearing upon the application of the $1,000,000.00 exemption because when the proceeds from the transfer are treated as a single transaction, they are aggregated in order to determine whether the exemption is applicable (see, Matter of Lee, Tax Appeals Tribunal, October 15, 1992, confirmed 202 AD2d 924, 610 NYS2d 330).

E. The pertinent portion of the aggregation clause is explained in the Commissioner's regulations at 20 NYCRR former 590.43(d) (renum 20 NYCRR 590.44[d]) which states:

"Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:

* * *

"(d) Several transferors, owning one parcel of land either as joint tenants, tenants in common, or as tenants by the entirety, one transferee?

"Answer: The statute specifically requires that the consideration paid to each such transferor be aggregated with the consideration paid to the other transferors in determining whether the consideration is $1 million or more. Once the million-dollar threshold is met, each transferor is liable for payment of tax based on the consideration he receives, less his original purchase price for the property" (emphasis added).

F. The Division asserts that the plain language of the statute, cited above, requires the aggregation of the transfers at issue. Supportive of the Division's argument is the following language of the Tax Appeals Tribunal:

"Tax Law § 1440(7) clearly requires that multiple transfers by joint tenants of a single parcel be treated as a single transfer for purposes of applying the gains tax . . . .

"Whether or not the aforementioned transfers were pursuant to a plan or agreement to avoid tax is of no significance because as discussed above, the consideration received by tenants in common upon the transfer of each tenant's respective interest is aggregated for purposes of determining the applicability of the one million dollar exemption without regard to the intention of the transferors" (Matter of Tomback, Tax Appeals Tribunal, September 1, 1994).

Additionally, in Matter of Ader (Tax Appeals Tribunal, September 15, 1994), the Tribunal stated:

"Tax Law [former] § 1440(7) and 20 NYCRR 590.43(d) [renum 590.44(d)] indicate that when applying the § 1443(1) exemption, individuals who hold property as tenants in common must aggregate consideration they receive for the transfer of one parcel of land held by the TIC [tenant in common]."

In contrast to the instant matter, however, both Tomback and Ader involved the transfer of multiple tenancy-in-common interests to a single transferee. Both cases thus fell squarely within the purview of 20 NYCRR 590.44(d). Moreover, inasmuch as the Tribunal was ruling, in both cases, on the taxability of transfers involving a single transferee, the language cited above must be regarded as obiter dicta as applied to the instant matter.

G. The issue presented is one of statutory construction. Specifically, did Tax Law § 1440(former [7]) require aggregation of consideration where separate and independent tenants in common transfer their respective interests in a parcel of real property in separate and independent transfers to separate and independent transferees, or was such aggregation conditioned upon a review of the specific facts and circumstances of each case in light of the general rules of aggregation applicable to other partial or successive transfers?

As with all matters of statutory construction, analysis must begin with a literal reading of the statute (see, McKinney's Cons Laws of NY, Book 1, Statutes § 94). In this case, the focus is on the third sentence of section 1440(former [7]) (see, Conclusion of Law "C"). The second clause of this sentence sets forth conditions under which partial or successive transfers will not be aggregated ("unless . . . article") and clearly refers to the clause which preceded it, i.e., "transfer of real property shall also include partial or successive transfers." In other words, partial or successive transfers are

conditionally subject to aggregation. Following this second clause, the list of various kinds of transfers included within the meaning of "transfer of real property" continues: "and the transfer of real property by tenants in common, joint tenants or tenants by the entirety." The second clause, i.e., "unless . . . article", does not refer to or modify the list of the three tenancy interests which follow. The tenancy interests listed are thus distinguished from other "partial or successive transfers" and are thus not subject to the conditional aggregation rules which are applicable to such other "partial or successive transfers".

Accordingly, pursuant to this analysis, Tax Law § 1440(former [7]) did require aggregation of multiple transfers by tenants in common of a single parcel to multiple transferees whether or not such transfers were pursuant to a plan or agreement. The Division's determination in the instant matter to aggregate the Estate of Margolis-Landau transfer and the Roiter-Friedman transfer was therefore proper.

H. Petitioners asserted that Tax Law § 1440(former [7]) did not require aggregation of multiple transfers of tenancy-in-common interests where, as here, such interests are transferred at different times from separate and independent transferors to separate and independent transferees. Petitioner Roiter asserted that section 1440(former [7]):

> "merely confirmed the Legislature's intention to treat transfers of tenancy in common interests similarly to other transfers of real property and to make such interests subject to the same principles of aggregation that would apply to other transfers of real property" (Petitioner Roiter's brief, pp. 7-8).

Petitioner Roiter further analyzed the legal nature of the tenancy-in- common interest, distinguished such interest from joint tenancy and tenancy by the entirety, and asserted that the tenancy-in-common interest was analytically similar to ownership of contiguous or adjacent parcels. Petitioner thus concluded that transfers of tenancy-in-common interests should be subject to the same principles of aggregation as are applicable to transfers of contiguous or adjacent parcels.

Petitioner Roiter's assertion that section 1440(former [7]) merely provides that transfers of tenancy-in-common interests are to be treated similarly to other transfers of real property and subject to the same rules of aggregation is rejected. As discussed above, the second clause of the third sentence of the section 1440(former [7]), which sets forth conditions under which aggregation will not be required, refers only to "partial or successive transfers" and not to "transfers by tenants in common", etc. Tenancy-in-common transfers are thus distinguished from other partial or successive transfers. Certainly, if the Legislature had intended to treat tenancy-in-common interest transfers in the same manner as other partial or successive transfers, the statute would not make this distinction. Moreover, this distinction between "partial or successive transfers" and "transfers by tenants in common" also results in the failure of petitioner Roiter's analogy between tenant-in-common transfers and transfers of contiguous and adjacent parcels since, under the statute, the latter may be aggregated under certain conditions (i.e., as "partial or

successive transfers") while the former must be aggregated.

It is noted that this distinction in the treatment of contiguous and adjacent parcels on the one hand and tenant-in-common transfers on the other may be justified, as the Division asserts, by the fact that, unlike transfers of contiguous and adjacent parcels, multiple tenant-in-common transfers necessarily involve the same parcel of property.

I. Petitioner Estate of Margolis also noted that 20 NYCRR 590.44(d) refers only to transfers involving a single transferee and asserted that implicit in such regulation is that transfers to multiple transferees should not be aggregated. The regulation in question states "[h]ow is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of . . ." and goes on to list various scenarios lettered (a) through (g). The regulation does not purport to be a complete and exhaustive list of all circumstances where the aggregation clause may or may not be applied. Accordingly, petitioner's contention is rejected.

J. Petitioner Roiter also asserted that section 1440(former [7]) dealt only with situations where multiple transferors jointly transfer their tenancy interests in what is really a single transaction. Petitioner noted that, unlike tenants in common, joint tenants and tenants by the entirety may not separately transfer their tenancy interests. Petitioner argued that since these three tenancy interests are treated together in section 1440(former [7]), it follows that this section only addresses the general situation of co-tenants jointly

transferring their interests.

This contention is rejected. Certainly, the Legislature was aware that tenants in common could separately transfer their interests, yet the statute places no qualifications on the type of tenant-in-common transfers addressed therein. It must be concluded, therefore, that all tenant-in-common transfers are included in its coverage.

K. Petitioner Roiter also asserted that the fact that the statute refers to transfers by tenant<u>s</u> in common indicates that section 1440(former [7]) did not cover the case of two tenants in common separately transferring their respective interests. This argument, too, is unpersuasive. The reference to tenant<u>s</u> in common would seem appropriate since such reference is made in a sentence dealing with the aggregation of consideration received in respect of multiple transfers. There would be no aggregation in the case of a single transfer.

L. Petitioner Margolis also noted, correctly, that an amendment to Tax Law § 1440(former [7]) took effect on June 9, 1994 and was applicable to transactions occurring on or after that date (<u>see</u>, L 1994, ch 170, § 94). New subparagraph (ii) to new paragraph (b) of section 1440(7) provides that "transfer of real property" shall include:

> "partial or successive transfers of interests in real property by tenants in common, joint tenants or tenants by the entirety of such real property to one or more transferees, if such transfers occur within a three-year period, without regard to the use of such real property or whether such transfers were pursuant to a plan or agreement . . . ."

Petitioner Margolis argued that since this amendment clearly

required aggregation of transfers of tenancy-in-common interests from multiple transferors to multiple transferees (so long as the transfers occur within a three-year period) and argued that if, as the Division argues herein, the statute required aggregation of transfers of tenancy-in-common interests before passage of the 1994 amendment, then what was the need for or purpose of this change?

In connection with the passage of the 1994 amendments to section 1440(7), former Commissioner of Taxation and Finance Wetzler submitted comments to former Governor Cuomo which explained such amendments, in relevant part, as follows:

> "Section 94 amends subdivision (7) of section 1440 of the Tax Law by subdividing its provisions into three separately lettered paragraphs . . . .
>
> "In new paragraph (b), the definition of 'transfer of real property' is amended to set forth all of the rules with respect to aggregation of consideration in the case of partial or successive transfers of real property.
>
> * * *
>
> "In new subparagraph (ii) of paragraph (b), the definition of 'transfer of real property' is amended to require the aggregation of consideration for all partial or successive transfers of interests in real property by tenants in common, joint tenants or tenants by the entirety of such real property to one or more transferees if such transfers occur within a three-year period and without regard to the use of such real property or whether such transfers were pursuant to a plan or agreement" (Letter, Commissioner James M. Wetzler to Governor Mario M. Cuomo, June 9, 1994).

Petitioner Margolis makes a valid point. It is maxim of statutory construction that "the Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law" (McKinney's Cons

Laws of NY, Book 1, Statutes § 193). It is also true, however, that "a mere change in the phraseology of a statute does not indicate a change in the construction of a statute" (id.). Here, the amendment in question appears to be more of a change in phraseology than a substantive change in the law. Prior to the amendment, as discussed previously, the statute included the transfer of real property by tenants in common within the meaning of "transfer of real property" and thereby required aggregation of such transfers. Following the amendment, the statute continued to require aggregation of the transfer of real property by tenants in common with the only difference being that the amended statute specifically noted, in the negative, the general rules of aggregation. Accordingly, it is concluded that the 1994 amendment to section 1440(former [7]) does not indicate that aggregation under circumstances such as those present herein was improper prior to the effective date of such amendment.

Issue II

M. The Division also asserted that Landau and Friedman "were related in a manner which demands that they should be treated as one transferee" for gains tax purposes.[1] If Landau and Friedman were deemed to be a single transferee, then the facts herein would fall squarely within 20 NYCRR 590.44(d) and within the facts of Matter of Tomback (supra). Under such

[1]Although Conclusion of Law "G" resolves the aggregation issue herein, the Division's alternate theories by which the transactions herein may be aggregated must be addressed as well (see, Matter of U.S. Life Ins. Co., Tax Appeals Tribunal, March 24, 1994).

circumstances, the consideration paid in respect to the subject transfers would clearly be subject to aggregation. Specifically, the Division contended that:

> "the gains tax concept of looking past the surface of the parties to determine where the beneficial interest lies is well-established, and has regularly led to groups of transferors/ transferees being treated as a single transferor/transferee for gains tax purposes" (Division's brief, p. 8).

In support of this proposition, the Division cited Matter of Lee (supra) and Matter of Brooks (Tax Appeals Tribunal, September 24, 1992, confirmed 196 AD2d 140, 608 NYS2d 714).

The Division's contention is rejected. The first factor alleged by the Division in support of its contention, that Landau and Friedman "knew each other", proves very little. Obviously, the fact that individuals know each other does not indicate that such persons are acting in concert. The second factor alleged by the Division as supportive of its contention, that Landau and Friedman had a "harmonious relationship", is unsupported by the record. Specifically, the record indicates that Friedman sued the Estate of Margolis for specific performance of his contract to purchase the estate's interest after the estate declared him in default and entered into a contract with Landau. Such circumstances do not seem conducive to the development of a

harmonious relationship. Furthermore, the record shows that following Friedman's purchase of his tenant-in-common interest in the subject property, it was decided that Mr. Spector be engaged to manage the property because Friedman and Landau did

not get along well enough to manage the property on their own. The Division points to a lack of evidence in the record regarding the disposition of the claims against Landau and surmises that Landau and Friedman "amicably" resolved these claims. On this point, it is true that the record in this matter is unclear regarding the claims against Landau (see, Finding of Fact "25"). However, even if one were to conclude that Landau and Friedman amicably disposed of such claims, such a circumstance is not indicative of collusion on the part of these two individuals any more than the out-of-court settlement of any civil litigation indicates collusion between the plaintiff and defendant. Finally, the cases cited by the Division in support of its position involved instances where the beneficial owner of a real property interest was different from the person or entity holding legal title (see, Matter of Lee, supra; Matter of Brooks, supra). Here, there is no evidence of a separation of legal and beneficial ownership of the respective tenancy-in-common interests.

Issue III

N. The Division also asserted, alternatively, that the subject transfers were subject to gains tax as an "acquisition of a controlling interest in [an] entity with an interest in real property" (Tax Law § 1440[former (7)]). Specifically, the Division contended that, in addition to the tenancy interests, Messrs. Margolis and Roiter created an entity, either a partnership or a joint venture. In support of this assertion, the Division noted that the subject property was utilized for

the purpose of renting commercial space; that both Margolis and Roiter acquired and maintained their interests for investment purposes; the continuation of the passive investor posture by Rose Roiter, Estate of Margolis, Landau and Friedman; the creation of A & S Management Co. to manage the property; the continuation of this arrangement after Sol Roiter's death; the continuation of a similar arrangement following the subject transfers; and the joint legal proceeding against Imperial Sportswear. According to the Division, this set of circumstances indicates the existence of an implicit or informal joint venture, if not a partnership. Therefore, the Division asserts, "the application of the gains tax entity theory is appropriate" (Division's brief, p. 14).

The Division goes on to argue that each of the transfers at issue constituted a transfer of a controlling interest in the "entity" since two 50% tenancy interests were transferred; profits from rental were equally divided; and the record contains no evidence to the contrary.

The Division's contention is rejected. Tax Law § 1440(7)(a) includes within the definition of "transfer of real property" transfers of a controlling interest in "any entity <u>with an interest in real property</u>" (emphasis added). The record herein clearly shows that title to the subject property at the time of the transfers was held by petitioners. The entity described by the Division, if it existed, did not have an "interest" in the

subject property as that term is defined in the Tax Law.[2]

Issue IV

O. The Division also argued that petitioners herein should be treated as a single transferor and that Landau and Friedman should be considered a single transferee for gains tax purposes. Obviously, under such circumstances, the two transfers at issue would be properly aggregated. In support of its single transferor theory, the Division noted what it characterized as the joint venture/partnership relationship between petitioners which may be summarized as the arrangement for the management of the property and the equal shares of any net rental received in respect of the property. The Division also noted the joint legal action initiated by petitioners against Imperial Sportswear as suggestive of a stronger tie between petitioners than the testimony herein would indicate. The Division also argued that the familial relationship between the Roiters and the Margolises supports the assertion that the two petitioners should be treated as one transferor. Finally, the Division asserts that Rose Roiter's failure to attempt to partition the premises supports its contention. With respect to

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[2]Tax Law § 1440(4) defines "interest" for gains tax purposes as follows:

> "'Interest' when used in connection with real property includes, but is not limited to, title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. Interest shall also include an option or contract to purchase real property."

this argument, the Division reasserted that Messrs. Landau and Friedman should be considered a single transferee as discussed and rejected previously herein (see, Conclusion of Law "M").

The Division's contention is rejected. The record in this matter clearly establishes that the respective petitioners separately and

independently sold their respective tenant-in-common interests in the subject property. Contrary to the Division's assertion, there does not appear to have been a joint venture/partnership relationship between petitioners. Certainly, the fact that the property generated rental income and that a third party managed the property does not constitute an implied agreement for a joint venture or a partnership (see, 24 NY Jur 2d, Cotenancy and Partition, § 3). The other factors relied upon by the Division in support of its argument are insignificant in light of the substantial evidence in the record establishing the separateness and independence of the transferors.

P. Also in connection with Issue IV, the Division asserted that the transferors and transferees were acting in concert within the meaning of 20 NYCRR 590.46(b) and that the transfers herein should be aggregated accordingly.

Inasmuch as this determination has previously found the transferors and transferees separate and independent, this contention is rejected.

Issue V

Q. The Division also asserted that the $210,000.00

purportedly paid as consideration for the Assignment of Claims was in fact additional consideration paid for petitioner Roiter's interest in the subject real property. Petitioner contended that the amount paid pursuant to the Assignment of Claims was simply that: an amount paid for petitioner Roiter's right, title and interest in certain claims against Landau. Petitioner further asserted that an Assignment of Claims is simply not a transfer of real property under the gains tax law.

Upon review of the record, it is clear that petitioner has failed to prove that the Assignment of Claims was an independent, bona fide transaction. First, the fact that both the assignment and the contract of sale of the real property interest between Roiter and Friedman were executed on the same date and closed on the same date indicates an interdependence between the two transactions. Second, despite references in the record to numerous claims, other than the claim related to the unlawful occupancy dispute (see, Finding of Fact "23"), the record contains no information regarding such unspecified claims nor does the record contain any information regarding how petitioner determined the value of the claim or claims. In other words, why was Friedman willing to pay and petitioner willing to accept $210,000.00 for such claims? What was the value of the unlawful occupancy claim and how was this value determined? Such questions are unanswered by the record. This lack of specifics in the record regarding Roiter's claim or claims against Landau indicates a lack of legitimacy and validity in the Assignment of Claims itself.

The lack of information in the record regarding the assignment extends to the disposition of the claim or claims following Friedman's acquisition thereof (see, Finding of Fact "25").

Moreover, an effort to value the assignment based on information contained in the record indicates that the assignment was grossly overpriced. Such a finding also weighs against petitioner's position herein. Specifically, the assignment refers to defaults under the lease and unlawful occupancy by Landau, who was occupying the premises pursuant to a lease which commenced on September 1, 1986. The dispute with respect to the unlawful occupancy was referred to in the testimony of both Ms. Fortgang and Mr. Landau and was the subject of the civil action brought by the estate and Rose Roiter against Landau's corporation (see, Finding of Fact "23"). While Ms. Fortgang stated in her testimony that Landau owed Rose Roiter back rent, other than this general statement the record does not indicate that Landau was in arrears on rent owed under the lease. Ms. Fortgang also referred to other claims against Landau, but gave no specifics regarding such claims. Accordingly, based on the record, it must be concluded that the claims referenced in the assignment relate solely to the unlawful occupancy claim against Landau. The assignment valued this claim at $210,000.00, yet Roiter's total interest in rent payable under the lease was less than $100,000.00.[3] In other

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[3]At the time of the assignment, i.e., February 5, 1989, Landau had been a lessee for 29 months. Landau's total annual rental under the lease was $76,800.00, or $6,400.00 per month (see, Finding of Fact "7"). Roiter's one-half interest in such rental was therefore $3,200.00 per

words, the Assignment of Claims values the damages suffered by Roiter by reason of Landau's unlawful occupancy of space at the premises at greater than twice the value of Roiter's total interest in all rent payable by Landau under the lease up to the date of the assignment. Such a valuation clearly appears to be excessive and, moreover, underscores petitioner's failure to prove that the Assignment of Claims was a bona fide transaction separate and independent from the transfer of Roiter's real property interest.

Accordingly, given the lack of evidence in the record regarding the Assignment of Claims and the negative inferences properly drawn from the evidence which is in the record, the Division's assertion of additional gains tax due from petitioner Roiter must be sustained.

Issue VI

R. Petitioner Estate of Margolis contended that the Notice of Determination issued against it cannot be sustained because the Division failed to afford this petitioner an opportunity to submit a sworn statement as provided for in Tax Law § 1440(former [7]). Petitioner contended that the Division was required to request such a statement prior to aggregating the two transactions at issue. Petitioner noted that the Estate of Margolis transfer occurred on November 9, 1988, while the contract in respect of the Roiter transfer was executed on

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month. Roiter's total interest in the rent payable under the lease as of the date of the assignment was therefore $92,800.00 (29 months x $3,200.00 per month).

February 5, 1989. Petitioner submitted that, given this sequence of events, it could not have been aware that the submission of a sworn statement was in order.

Petitioner Estate of Margolis' contention is rejected. The language of Tax Law § 1440(former [7]) clearly places the onus of providing such a statement upon the transferor, i.e., "unless the transferor or transferors furnish a sworn statement . . . ." Moreover, requiring the transferor to furnish such a statement is entirely consistent with the burden placed on a transferor, such as petitioner, to establish entitlement to an exemption from taxation (see, Conclusion of Law "A"). Furthermore, it is noteworthy that this petitioner has cited neither case law nor regulation in support of this contention, for it appears that no such support exists. Finally, it is noted that petitioner could have submitted an affidavit attesting to its lack of control over the co-tenant (Rose Roiter) and acknowledging the possibility of the co-tenant's future disposal of her interest. Indeed, the October 20, 1988 contract of sale between Estate of Margolis and Landau contains a similar provision (see, Finding of Fact "8"). Accordingly, petitioner's contention on this issue is without merit.

Issue VII

S. Petitioner Roiter contended that the conciliation conferee erred by failing to provide this petitioner with a "reasoned analysis of the law or any factual determinations to support the Conciliation Order" (Petitioner Roiter's brief, p. 7). Considering that neither the law (Tax Law § 170[3-a])

nor the regulations (20 NYCRR 4000.1 et seq.) require that conciliation orders contain factual determinations or legal analysis, and that conciliation orders may not be given any force or effect in any subsequent administrative proceeding (Tax Law § 170[3-a][f]), it becomes readily apparent that this contention is without merit.

T. The petition of Rose Roiter is in all respects denied, the Division's denial of petitioner's claim for refund is sustained, and the Division's assertion of additional tax due pursuant to Tax Law § 1444(3)(a)(2) is sustained.

U. The petition of Estate of Abraham Margolis is denied and the Notice of Determination dated September 16, 1991 is sustained.

DATED: Troy, New York
July 27, 1995

/s/ Timothy J. Alston

ADMINISTRATIVE LAW JUDGE