STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
R.A.F. GENERAL PARTNERSHIP AND EDEX GENERAL PARTNERSHIP	:	DETERMINATION
	:	DTA NOS. 811274 AND 811545
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, R.A.F. General Partnership and Edex General Partnership, One Juniper Drive, Delmar, New York 12054, 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 consolidated hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 3, 1993 at 1:15 P.M., with all briefs submitted by March 21, 1994. Petitioners, represented by Edward R. Feinberg, Esq., submitted a brief on February 3, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel), submitted a responding brief on March 7, 1994. Petitioners submitted a reply brief on March 21, 1994.

ISSUES

I. Whether transfers of three parcels of property known as 397 State Street, 395 State Street and 92 Spring Street were properly subjected to real property transfer gains tax by the Division of Taxation.

II. Whether the Division of Taxation properly disallowed a step-up in original purchase price for the buyout of a partner's 10% interest in R.A.F. General Partnership.

III. Whether the Division of Taxation properly disallowed fees paid to Greystone Properties, Inc. as not constituting customary brokerage fees related to the transfer.

IV. Whether the Division of Taxation properly disallowed as part of original purchase price expenses incurred in the purchase of microwave ovens.

V. Whether petitioners' request for an adjournment based upon the pendency of an Article 78 proceeding commenced in the Supreme Court, Appellate Division for the Third Judicial Department which sought to nullify the R.A.F. General Partnership proceeding was improperly denied.

VI. Whether claimed irregularities in the hearing process deprived petitioners of a fair and impartial hearing.

VII. Whether petitioners have established that penalties assessed for failure to timely file certain returns and failure to timely remit tax due should be abated.

FINDINGS OF FACT

On July 13, 1990, the Division of Taxation ("Division") issued to petitioner Edex General Partnership ("Edex") a Revised Statement of Proposed Audit Adjustment. The statement indicates that the Division proposed to impose real property transfer gains tax on Edex's property located at 397 State Street ("397 State"), being contiguous to the 94 Spring Street ("94 Spring") property and the 395 State Street ("395 State") property. The properties are located in Albany, New York. This statement revised an earlier Statement of Proposed Audit Adjustment issued on May 7, 1990 to Edex relating to the same property.

The Statement of Proposed Audit Adjustment provides the following calculation of tax, penalty and interest with respect to the 397 State property:

Consideration	$550,000.00
Brokerage	(22,000.00)
Total taxable consideration	$528,000.00
Less: Original Purchase Price	(40,000.00)
Other Acquisition Costs	(4,642.00)
Capital Improvements	(204,116.00)
Less: 1989 Capital Improvements	(20,923.30)
Total Gain on Project	$258,318.70
10% Tax Due on Gains	$ 25,831.87
Interest: 3/15/89-8/12/90	4,249.61
Penalty at 35%	9,041.05
Total Tax, Penalty and Interest Due	~~$ 39,122.53~~

On October 25, 1990, the Division issued to Edex a Notice of Determination of Real Property Transfer Gains Tax Due under Tax Law Article 31-B ("gains tax") assessing tax due in the amount of $25,831.87, plus penalty and interest. The date of transfer indicated was March 15, 1989.

On October 16, 1992, the Bureau of Conciliation and Mediation Services ("BCMS") issued its Conciliation Order which showed tax due of $17,851.09, plus penalty and interest at the applicable rate. The date of transfer was indicated as June 26, 1989. The tax due was computed as follows:

Total gain on project per taxpayer	$124,038.32
Add: Brokerage (Greystone)	50,000.00
Microwaves	4,472.60
Total Gain	$178,510.92
Tax at 10%	$ 17,851.09

On May 7, 1990 and July 13, 1990, the Division issued to R.A.F. General Partnership ("RAF") two statements of proposed audit adjustment for properties located at 395 State and 94 Spring, respectively. The statements indicate that the properties are contiguous.

The statements of proposed audit adjustment provide the following calculations of tax, penalty and interest with respect to the 395 State and 94 Spring properties:

	395 State	94 Spring
Consideration	$499,999.00	$1,300,000.00
Brokerage	-0-	(78,000.00)
Total Taxable Consideration	$499,999.00	$1,222,000.00
Less: Original Purchase Price	(165,000.00)	(766,000.00)
Acquisition Costs	(3,708.00)	(12,545.00)
Capital Improvements	(7,607.00)	(81,354.00)
Selling Expenses	-0-	(11,900.00)
Less: Adjustment for Escrow	-0-	(78,000.00)
Total Gain on Project	$323,684.00	$ 272,201.00
10% Tax Due on Gain	$ 32,368.40	$ 27,220.10
Taxes Previously Paid	-0-	(26,258.00)
Tax Outstanding and Owing	$ 32,368.40	$ 962.10
Interest: 5/15/89-5/30/90	3,870.69	139.35
Penalty at 34%	11,005.12	-0-
Total Due	~~$ 47,244.21~~	~~$ 1,101.45~~

On November 13, 1990, the Division issued to RAF a Notice of Determination of Real

Property Transfer Gains Tax Due under Tax Law Article 31-B assessing tax due in the amount of $32,368.40, plus penalty and interest. The date of transfer indicated on the notice was May 15, 1989 and related to RAF's sale of the property located at 395 State.

On the same date, the Division issued a second Notice of Determination of Real Property Transfer Gains Tax Due under the gains tax law assessing tax due in the amount of $962.10, plus interest. The notice indicated the date of transfer to be May 15, 1989 and related to RAF's sale of the 94 Spring property.

On July 24, 1992, BCMS issued a conciliation order to RAF indicating tax due of $30,214.61, plus penalty and interest, on the 395 State property and a tax credit of $2,236.08, plus interest, on the 94 Spring property.

On February 17, 1984, Edex was formed as a joint venture by Edward R. Feinberg and Rex S. Ruthman. The agreement provided that the profits and losses of the joint venture were to be allocated 50% to Feinberg and 50% to Ruthman. The purpose of the joint venture was to acquire, improve, renovate, manage and develop the 397 State property. On the same date, Mr. Feinberg and Mr. Ruthman executed a Business Certificate for Partners which stated that they were transacting and conducting business as partners under the name Edex General Partnership. The Business Certificate was filed with the Albany County Clerk's Office on April 20, 1984. Edex acquired title to 397 State from Konstanty M. Naider and Zofia Dolinska by deed dated April 30, 1984.

On the same April 30, 1984 date, Edex entered into a building loan agreement with The Schenectady Trust Company. The loan agreement provided that Edex would renovate the property in accordance with the requirements of all governmental authorities having jurisdiction over the premises. Included within such construction was the installation of microwaves as the main cooking device so as not to have to enlarge the cooking areas to accommodate larger cooking appliances. The cost of the installation of the microwaves into all of the apartments of 397 State was $4,472.60. The 397 State property was subsequently improved and developed into a 3-story, 14-unit apartment structure.

RAF was originally formed as a joint venture by Edward R. Feinberg, Rex S. Ruthman and William D. Alexander by agreement dated February 20, 1984. The purpose of the joint venture was to acquire, improve, manage and develop the 94 Spring property. The profits and losses of the joint venture were to be allocated 45% to Mr. Feinberg, 45% to Mr. Ruthman and 10% to Mr. Alexander. The agreement was amended by Addendum dated May 1, 1984 and further amended by Addendum dated May 20, 1985, by adding the properties located at 395 State and 28-30 Robin Street, Albany, New York, respectively, to the properties covered by the agreement.

On September 1, 1986, Messrs. Feinberg, Ruthman and Alexander entered into a Re-State R.A.F. General Partnership Agreement to clarify the intent of the original agreement as it defined the legal relationships which existed and which would continue to exist between the parties, which was to form a general partnership. The respective interests of the partners remained the same. The purpose of the re-stated agreement was to assure the officials of Citibank, from whom RAF sought refinancing of certain properties, that RAF was in fact a partnership and not a joint venture.

By agreement dated January 11, 1989, Mr. Alexander transferred his entire partnership interest in RAF to Messrs. Feinberg and Ruthman. This transfer resulted in Messrs. Feinberg and Ruthman each having a 50% interest in the partnership. The remaining partners filed, on July 11, 1989, a Certificate of Continuing Business under Partnership Name after Withdrawal of Partner with the Clerk's Office of the County of Albany.

RAF acquired title to 94 Spring by deed dated April 30, 1984 from Konstanty M. Naider and Zofia Dolinska. The 395 State property was conveyed on June 29, 1984 from Willard B. Warring, as executor of the estate of Cora P. Zeh, to Edward Feinberg, Rex S. Ruthman and William Alexander, individually and d/b/a RAF. The 94 Spring premises were subsequently improved and developed into a 13-story, 97-unit apartment structure, while 395 State was subsequently improved and developed into a 4-story, 10-unit apartment structure. Included in the 395 State property is an adjacent parking lot located at 92 Spring Street ("92 Spring").

The 395 State and 92 Spring parcel of property is contiguous and/or adjacent to the 397 State property.

The 395 State and 92 Spring parcel of property is contiguous and/or adjacent to the 94 Spring property.

The 94 Spring property is contiguous and/or adjacent to the 397 State property.

All property at issue was held by petitioners to generate rental income and were all managed by the 397 State Street Management Co., Inc.

On or about January 11, 1989, Edex entered into an agreement for the sale of the 397 State property to John Culpo. The contract price for the sale of the property was $550,000.00. On June 26, 1989, Edex executed a deed conveying 397 State to John and Madeline Culpo pursuant to the terms of the contract. Gains tax questionnaires (Forms TP-580 and TP-581) were filed by petitioner Edex, as transferor, and by John Culpo, as transferee. In response, the Division issued a Tentative Assessment and Return, dated March 24, 1989, to Edex indicating no gains tax due.

Also on or about January 11, 1989, petitioner RAF entered into a contract for the sale of the 94 Spring property to John Culpo. The contract price for the sale of 94 Spring was $1,300,000.00. On June 26, 1989, RAF executed a deed conveying 94 Spring to John and Madeline Culpo pursuant to the terms of the contract. Real property transfer gains tax was paid in the sum of $26,258.00, based on consideration of $1,300,000.00. Gains tax questionnaires were filed by RAF, as transferor, and John Culpo, as transferee, reporting the transfer.

In December 1988, petitioner RAF entered into a contract for the sale of the 395 State property to John Culpo. The contract price for the sale of 395 State and 92 Spring was $499,999.00. On June 26, 1989, RAF executed a deed conveying 395 State and 92 Spring to John and Madeline Culpo pursuant to the terms of the contract. Gains tax questionnaires were not filed by RAF, as transferor, and John Culpo, as transferee, as it was felt that the transfer was exempt from the gains tax.

On June 26, 1989, Edward R. Feinberg and Rex S. Ruthman were the sole partners of

Edex and RAF.

Greystone Properties, Inc. ("Greystone") was a licensed real estate broker in 1989. By check dated April 7, 1989, Roberts Real Estate paid out of escrow funds $100,000.00 to Greystone. In a letter dated December 1, 1989, Greystone explained the basis for the $100,000.00 fee. Greystone stated that it performed the services of: assisting RAF in resolving certain cash flow problems and internal management concerns and assisting RAF in marketing its properties, including 28-30 Robin Street, and in finding property suitable for Internal Revenue Code § 1031 exchange status with the State Street properties. RAF retained Roberts Real Estate to do the marketing of its properties but agreed to pay to Greystone an equal amount to what Roberts was to receive if RAF was successful in resolving the difficulties that had made it seek restructuring -- sale of any of its properties, restructuring of the partnership, acquisition of suitable replacement properties -- which would leave RAF with sufficient cash to satisfy the needs which prompted this activity. The letter concluded as follows:

> "During the latter part of 1988, Greystone assisted R.A.F. in negotiating agreements with several prospective purchasers brought to R.A.F. by Roberts Real Estate. An arrangement between R.A.F. and John Culpo was finally arrived at in late 1988 with the aid of Greystone. At the same time, the partners agreed to an internal reorganization, Mr. Alexander departed in consideration of the remaining partners assuming his obligations, including the obligations still inherent in the condition of 28-30 Robin Street which was not involved in any sale. Finally, Greystone assisted in finding several suitable exchange properties and assisted in placing them under contract. Roberts agreed to receive its fee of $100,000 from the sales of 94 Spring Street and 397 State Street. Hence, Greystone's fee would arise from 395 State Street although there are not agreements between Roberts and Greystone to this affect. When the contingencies to the sale between R.A.F. and Culpo lapsed, Greystone received its monies contingent on R.A.F. completing an exchange. As R.A.F. completed an exchange within the statutory framework, the monies are now earned.
>
> "Hopefully this explains the basis for Greystone's fee."

Edex entered into an exclusive right to sell listing agreement, dated September 16, 1988, with Roberts Real Estate for the 397 State premises. The period of the agreement was September 16, 1988 through September 16, 1989. On the same date and by the same person, Mr. Feinberg, RAF entered into an exclusive right to sell listing agreement with Roberts Real Estate for the 94 Spring property. The period of the agreement was September 16, 1988

through September 16, 1989. The brokerage agreement statement for the 94 Spring property indicates that RAF paid Roberts Real Estate a total commission of $78,000.00 on the sale of the property.

Prior to the scheduling of these matters for hearing, various correspondence passed between Mr. Feinberg, as representative of petitioner RAF, and the Division of Tax Appeals. The correspondence and related events are as follows:

a) On April 22, 1993, the Division of Tax Appeals issued an Order in the Matter of the Petition of R.A.F. General Partnership denying petitioner's motion for an order striking the answer and granting a default determination in its favor due to the late-filed answer and, alternatively, dismissing the proceedings in the instant matter on the grounds that the Division of Tax Appeals lacks subject matter jurisdiction over the transaction which the Division claims as the basis of its assessment due to an incorrect date of transaction on the Notice of Determination.

(b) RAF filed a Petition for Judicial Review of the Order dated April 22, 1993 with the Appellate Division of the Supreme Court for the Third Judicial Department on August 16, 1993.

(c) The Division of Tax Appeals wrote Mr. Feinberg on October 1, 1993 asking whether RAF should be scheduled in February or March 1994.

(d) The Division's motion to dismiss this petition was denied by the court on October 14, 1993.

(e) On October 25, 1993, RAF requested that the instant matter be adjourned without date until after the decision of the court on the pending Article 78 proceeding. Otherwise, the hearing should be scheduled in March 1994.

(f) On the same date, RAF (and Edex) were informed that a hearing had been scheduled for December 3, 1993.

(g) In a letter dated October 29, 1993, the Division's representative put forth his reasons why the two matters should be scheduled together.

(h) On November 1, 1993, the Division of Tax Appeals, after considering the arguments of both parties, indicated that the two matters would proceed together.

(i) On December 3, 1993, the matters of Edex and RAF were heard together.

(j) During the hearing on December 3, 1993, Mr. Feinberg stated that he would not be prejudiced by proceeding at that time rather than waiting until February/March 1994.

(k) On July 7, 1994, the Appellate Division issued its decision in R.A.F. General Partnership v. Division of Tax Appeals dismissing RAF's petition for failure to exhaust its administrative remedies.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. However, 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. The term "transfer of real property" is defined in Tax Law § 1440(7), which provides, in part, 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 . . ." (emphasis added).

The third sentence of Tax Law § 1440(7) 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 . . ." (emphasis added).

This is known as the "aggregation clause". The aggregation clause affects the application of the $1,000,000.00 exemption because the consideration from multiple transfers may be aggregated to determine whether the $1,000,000.00 threshold has been met (see, Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, appeal dismissed 75 NY2d 946, 555 NYS2d 692; Cove Hollow Farm v. State of New York Tax Commn., 146 AD2d 49, 539 NYS2d 127). Case law interpreting Tax Law § 1440(7) has made it clear that transfers of more than one parcel may be treated as a single transaction (Matter of Sanjaylyn Co. v. State Tax Commn. of

the State of New York, 141 AD2d 916, 528 NYS2d 948, appeal dismissed 72 NY2d 950, 533 NYS2d 55; Matter of Bombart v. Tax Commn. of the State of New York, 132 AD2d 745, 516 NYS2d 989).

C. Petitioner Edex would have this matter decided in its favor based upon a literal reading of 20 NYCRR 590.43(b). This regulation, put forth in question and answer form, provides, in relevant part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
>
> * * *
>
> "(b) Several transferors, each owning a separate parcel of land, each parcel contiguous with or adjacent to the others, one transferee?
>
> "Answer: The consideration is not aggregated even if there is a clause in each contract that conditions the sale of each parcel on the ability of the transferee to acquire the other contiguous or adjacent parcels. The consideration paid to each transferor is not aggregated even in the case of one contract between the transferee and the several transferors."

Petitioners argue, in essence, that the Division may not ignore the fact that each petitioner separately held title to the respective parcels transferred. Petitioners assert the independent status of each petitioner as the basis for maintaining that aggregation is not proper under the above-quoted regulation. In response, the Division argues that this regulation was intended to afford exemption in cases of multiple individual transfers of contiguous or adjacent parcels by separate transferors to a common transferee, where such transferors were separate in fact and were not acting in concert.

D. This case appears, at first glance, to fit within the above regulation. That is, each petitioner alone held the title to separate albeit adjacent parcels. In fact, petitioners argue that this case is stronger than the regulation in that the partnership transferees were also separate and independent entities. However, upon examination of the facts and circumstances, it becomes apparent that petitioners, though legally statused as separate owners, cannot be considered separate and independent with respect to the subject transfers.

Pursuant to Tax Law § 1440(7) and its interpretation as formulated in 20 NYCRR 590.42,

"the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property" (20 NYCRR 590.42). Thus, consideration received by a transferor for the transfer of contiguous or adjacent parcels of property to one transferee are added together for purposes of applying the $1,000,000.00 exemption (20 NYCRR 590.42).

The Tribunal has stated, in Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), that the interpretation set forth at 20 NYCRR 590.42 is "well within the statutory language of the first sentence of section 1440.7" (see also, Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003). 20 NYCRR 590.42 addresses transactions which involve a single transferor and one transferee. In the instant matter, it is undisputed that there was only one transferee in all of the real property transfers at issue. While on their face the transactions would lead one to believe that there were multiple transferors (i.e., RAF and Edex), the "look through" principle rooted in the language of the gains tax requires an examination of the entities to determine their beneficial owners. Such examination leads to the conclusion that there was the same transferor in each real property transfer at issue.

E. The "look through" principle is derived from the language of the Tax Law. For example, Tax Law § 1443(5) provides an exemption "[i]f a transfer of real property, however effected, consists of a mere change of identify or form of ownership or organization, where there is no change in beneficial interest." The focus of the gains tax through entities pervades the entire statutory scheme imposing the tax (Matter of Von-Mar Realty Co. v. Tax Appeals Tribunal, 191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803). The focus of the gains tax is to look through entities to determine the beneficial ownership of real property, and to focus on the economic realty of the transaction (Matter of Bredero Vast Goed, N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791; Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972). The

necessity of the "look through" principle is obvious. In fact, the Tribunal has noted that absent the ability to look through entities the gains tax would be rendered a nullity through transactions structured in two steps, with the first step designed to benefit from the Tax Law § 1443(5) exemption and the second from the $1,000,000.00 exemption (see, Matter of Schrier, Tax Appeals Tribunal, July 16, 1992, confirmed 194 AD2d 273, 606 NYS2d 384; Matter of LoScalzo, Tax Appeals Tribunal, January 21, 1993, confirmed ___AD2d___, 610 NYS2d 100).

Looking through RAF and Edex it is clear that the beneficial ownership of the subject properties was held by the same individuals. At the time of RAF's transfers to the Culpos, the equal partners of RAF were Rex S. Ruthman and Edward R. Feinberg. When Edex transferred the 397 State property, its equal partners were also Rex S. Ruthman and Edward R. Feinberg. Using "look through", there was in essence one transferor of all the properties in question.

The consideration received on the transfer of the 397 State property should be aggregated with the consideration received on the transfer of the 94 Spring and 92 Spring/395 State properties. The three properties were contiguous and/or adjacent, there was one transferee (the Culpos) and there was one transferor (consisting of Rex Ruthman and Edward Feinberg). Aggregating the consideration received in the three transfers results in total consideration in excess of $1,000,000.00 and, therefore, the Tax Law § 1143(1) exemption does not apply.

F. Pursuant to 20 NYCRR 590.42, consideration will not be aggregated if the transferor establishes that "the only correlation between the properties is the contiguity or adjacency itself and the properties were not used for a common or related purpose." The transferor has the burden of establishing that the consideration should not be aggregated. In Matter of Iveli v. Tax Appeals Tribunal (supra), the properties were physically contiguous, but each property was otherwise separate from the other. The properties were totally independent and self-contained with each property held for the purpose of generating rental income. The court found that there was a common or related purpose where the "buildings on each parcel were held for investment purposes" and, therefore, the parcels were properly aggregated. In Matter of Bombart v. Tax Commn. of the State of New York (132 AD2d 745, 516 NYS2d 989), the court found that the

parcels were used for a common or related purpose where "petitioner operated them through a single management company for the same income-producing purpose, i.e., rental of residential apartment units" and were properly aggregated.

Petitioners have failed to establish that the only correlation between the subject properties was their contiguity or adjacency. Nor have petitioners established that the properties were not used for a common or related purpose. As noted above, the mere fact that the properties are used to generate rental income is a common or related purpose (Matter of Iveli v. Tax Appeals Tribunal, supra; Matter of Bombart v. Tax Commn. of the State of New York, supra). In this matter, all of the parcels that were transferred were held by petitioners as rental income property. The parcels were all transferred to a single purchaser on the same day. Furthermore, the properties were all managed by a single manager, 397 State Street Management Co., Inc. It must be concluded that the subject properties were used for a common or related purpose.

G. Petitioners are seeking a step-up in original purchase price as a result of their buyout of William Alexander's 10% partnership interest in RAF on January 11, 1989. Petitioners acquired their original interest in RAF upon its formation in 1984. 20 NYCRR 590.49(b) provides as follows:

> "Question: Is the original purchase price of the real property as held by the entity stepped-up upon the acquisition of a controlling interest?
>
> "Answer: Yes. In the case of an acquisition of a controlling interest, where the mere change exemption was not applied, the original purchase price in the real property as held by the entity may be stepped-up to reflect the consideration recognized on the transfer of the ownership interest.
>
> "If less than a controlling interest were acquired, the entity may not step-up its original purchase price in the property" (20 NYCRR 590.49).

To determine the applicability of this regulation, a review of the definition of "controlling interest" is necessary. The term "controlling interest" means "(ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership. . .or other entity" (Tax Law § 1440[2]). When Mr. Alexander's partnership interest in RAF was bought out, the other two partners each acquired only a 5% partnership interest. The partners argue that they be permitted to aggregate this 5% interest acquired in

1989 with their original 45% interest acquired in 1984. However, this is an incorrect application of 20 NYCRR 590.45(d).

The partners may not aggregate their interests because 20 NYCRR 590.45(d) states, in part:

> "Interests acquired after March 28, 1983 are added together in determining whether an acquisition of a controlling interest has occurred. No acquisition of stock will be added to another acquisition of stock if they occur more than three years apart, unless the acquisitions were so timed as part of a plan to avoid the gains tax" (20 NYCRR 590.45[d]; emphasis added).

William Alexander's 10% interest was purchased in 1989, more than three years after the partners had acquired their original interest; therefore, there was no acquisition of a controlling interest and no step-up can be allowed. As the Tribunal stated in Matter of SKS Associates (Tax Appeals Tribunal, September 12, 1991):

> "in the absence of a taxable event (i.e., acquisition of a controlling interest), the regulation in 20 NYCRR 590.49(b) explicitly disallows the entity a step-up in its original purchase price in the real property."

H. Petitioners argue that the amount of gain should be reduced by the $100,000.00 paid to Greystone as brokerage commissions. Tax Law § 1440.1(a) defines "consideration" as the "price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor . . . ." Thus, under the statute, the transferor is entitled to reduce the gain by any customary brokerage fees related to the transfer.

The fee paid of $100,000.00 was the result of various services provided to petitioners by Greystone, such as: assisting RAF in resolving certain cash flow problems and internal management concerns; assisting RAF to market properties; finding property suitable for exchange status with the State Street properties; and assisting RAF in negotiating agreements with several prospective purchasers brought to RAF by Roberts Real Estate. Greystone was to receive the $100,000.00 if RAF was successful in resolving the difficulties that had made it seek restructuring -- sale of any of its properties, restructuring the partnership, acquisition of suitable replacement properties -- which were the purposes behind RAF hiring Greystone. It is noted that if RAF did not have the cash available, Greystone would receive little or no money

from the transactions.

It is apparent that Greystone provided RAF with a management study and received its fee based upon the success of its recommendations. As the fee was not a customary brokerage fee, it is not allowable pursuant to Tax Law § 1440(1).

I. Petitioners seek an increase in original purchase price of $4,472.60 for the cost of purchasing microwave ovens. Original purchase price includes the cost of any capital improvements (Tax Law § 1440[5]). A capital improvement is generally an addition made to real property which is intended to be permanently affixed to the real property and has a useful life substantially beyond the year following installation (20 NYCRR 590.16[a]). It is also provided by 20 NYCRR 590.16(b) that the cost of built-in appliances is allowable as a cost of capital improvements made to real property for purposes of determining original purchase price. In the present matter, petitioners have presented no evidence that the microwave ovens were intended to be permanently affixed to the property or that they were "built-in" appliances. Therefore, petitioners have not established that the purchase and installation of the microwave ovens were capital improvements includible in original purchase price.

J. Petitioner RAF challenges the denial of its request for an adjournment of its matter pending the outcome of an Article 78 proceeding commenced in the Supreme Court, Appellate Division for the Third Judicial Department which sought to nullify the RAF proceedings. It is RAF's position that if the courts grant the relief requested, the Tribunal would cease to have jurisdiction and the matter would be moot. Therefore, the appropriate remedy would be to stay all aspects of the proceedings until resolution by the courts.

As the Supreme Court, Appellate Division for the Third Judicial Department has dismissed RAF's petition on July 7, 1994 for failure to exhaust its administrative remedies, this issue is moot.

K. Petitioners allege that four aspects of the proceedings, when taken together, violate due process standards:

(1) the statutory notices failed to give accurate notice of the date or dates of the

transactions upon which such notices were based;

(2) the Division failed to file a timely answer to the petition;

(3) during the BCMS conference, ex parte communications occurred between the conferee and the Division's representative. In addition, petitioners' representative was denied the opportunity to be heard on the matters relevant to the proceedings; and

(4) the Division scheduled the Edex and RAF matters together rather than separately as originally planned.

The first two issues raised herein have been previously addressed in an Order issued by Timothy J. Alston, Administrative Law Judge, on April 22, 1993, and therefore will not be further addressed herein. The Order found in favor of the Division with regard to both issues.

Petitioner RAF was afforded its opportunity for a hearing prior to a final decision concerning liability for the tax assessed and therefore cannot complain about being denied due process of law at the conference level. The requirement for due process is fully met when a forum exists in which an aggrieved person or entity after notice has the right to be heard (Snyder v. Massachusetts, 291 US 97, 78 L Ed 674; Twinning v. State of New Jersey, 211 US 78, 53 L Ed 97; Metallic Flowers v. New York, 4 AD2d 292, 164 NYS2d 227, mod on other grounds 5 NY2d 246, 183 NYS2d 801, remittitur denied 6 NY2d 997, 191 NYS2d 976). In addition, the order of the conferee was not final, as petitioner RAF had the opportunity to petition for a hearing and except to the Tax Appeals Tribunal. There is no due process right to a hearing (or conference) before an agency whose orders will affect property rights where the agency's order is not a final one (City of Newburgh v. Park Filling Station, 273 App Div 24, 75 NYS2d 439, affd 298 NY 649).

As to the scheduling of the RAF case, petitioner's representative stated that the earlier scheduling of the matter on December 3, 1993 rather than in February/March 1994 in no way prejudiced RAF. According to the representative, there was nothing he would do in February/March 1994 that he could not do on December 3, 1993. As petitioner RAF was given a full opportunity to be heard and was not prejudiced by the earlier scheduling of the hearing,

there is no denial of due process.

L. Tax Law former § 1446.2(a) provided that:

> "[a]ny transferor failing to file a return or to pay any tax within the time period required by this article shall be subject to a penalty . . . . If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

Petitioners' position that reasonable cause exists for their failure to file certain returns and pay the gains tax due is that their positions were valid and supported by reasonable interpretations of the statutes and regulations.

It is uncontested that petitioners failed to file certain returns and failed to pay the tax due. Therefore, the question is whether the failure in filing and paying the tax may be considered reasonable.

In determining reasonable cause, all of the actions of a taxpayer are considered relevant (Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121). The review of these actions must be made in light of information available at that time (Matter of 1230 Park Assoc. v. Commr. of Taxation & Fin. of the State of New York, Tax Appeals Tribunal, July 27, 1989, confirmed 170 AD2d 842, 566 NYS2d 957, lv denied 78 NY2d 859, 575 NYS2d 455; Matter of 61 East 86th Street Equities Group, Tax Appeals Tribunal, January 21, 1993). In addition, the reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy (Matter of Birchwood Assoc., Tax Appeals Tribunal, July 27, 1989; Matter of Copley Plaza Co., Tax Appeals Tribunal, June 8, 1989).

In August 1983, the Division issued Publication 588, "Questions and Answers - Gains Tax on Real Property Transfers." Question and answer 21 provided an explanation of the application of the aggregation principle to transfers of real property under the gains tax law. In November 1984, the Division issued a revised Publication 588 which, again, provided an explanation of the application of the aggregation principle to transfers of real property under the gains tax law. These guidelines were adopted as regulations on September 24, 1985

(20 NYCRR 590.33).

Furthermore, on January 7, 1988, the trial court's decision in Bredero Vast Goed, N.V. v. Tax Commn. was issued upholding the Division's position that the focus of the gains tax through two tiers of entities was appropriate. On April 6, 1989, the Appellate Division affirmed the trial court's decision (Matter of Bredero Vast Goed, N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791). The Tax Appeals Tribunal held, in two matters, that the focus of the gains tax is to look through entities to determine the beneficial ownership of real property (Matter of 307 McKibbon St. Realty Corp., Tax Appeals Tribunal, October 14, 1988; Matter of Howes, Tax Appeals Tribunal, September 22, 1988, confirmed 159 AD2d 813, 552 NYS2d 972), and to focus on the economic realty of the transaction.

Petitioners argue that their positions were valid and supported by reasonable interpretations of the statutes and regulations.

Prior to the date of transfer, the State's Appellate Division and the Tax Appeals Tribunal had held that the focus of the gains tax was to look through entities to determine the beneficial ownership of the real property at issue. However, petitioners did not pay the taxes determined to be due. In light of the court and Tribunal decisions, petitioners could have at least inquired of the Division as to the taxable status of the transactions at issue. Therefore, based on the Division's articulated policy, as upheld by the courts, as well as petitioners' failure to remit tax, despite the clear authority to the contrary, it is concluded that petitioners have not established reasonable cause (Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commr. of Taxation & Fin., 191 AD2d 80, 598 NYS2d 829; Felix Industries v. State of New York Tax Appeals Tribunal, 183 AD2d 203, 589 NYS2d 641; Matter of Aire Bon Associates, Tax Appeals Tribunal, April 18, 1991).

M. The petitions of Edex General Partnership and R.A.F. General Partnership are denied, and the notices of determination are sustained.

DATED: Troy, New York
September 29, 1994

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE