STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ESTATE OF MORTON J. GOLDMAN	:	DETERMINATION DTA NOS. 813420
for Revision of Determinations or for Refunds of Real Estate Transfer Tax under Article 31 of the Tax Law and Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	THROUGH 813423

Petitioner, Estate of Morton J. Goldman, c/o Elise R. Goldman, Executrix, 339 Carolina Meadows-Villa, Chapel Hill, North Carolina 27514-7519, filed petitions for revision of determinations or for refunds of real estate transfer tax under Article 31 of the Tax Law and tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On May 8, 1995 and May 17, 1995, respectively, petitioner, by its representative, Gruber & Gruber, P.C. (Irving M. Gruber, Esq., of counsel), and the Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel), consented to have the controversy determined on submission without hearing, with all briefs to be submitted by October 2, 1995, which date began the six-month period for the issuance of this determination. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined that real estate transfer tax, imposed pursuant to the provisions of Article 31 of theTax Law, was due upon petitioner's sales of its shares of stock in two corporations, each of which owned an interest in New York real property.

II. Whether the Division of Taxation properly determined that tax on gains derived from certain real property transfers ("gains tax"), imposed pursuant to the provisions of Article 31-B

of the Tax Law, was due upon petitioner's sales of its shares of stock in two corporations, each of which owned an interest in New York real property.

III. Whether the imposition of these taxes by the Division, under the facts and circumstances presented herein, are in violation of the Equal Protection Clause and the Due Process Clause of the United States and the New York State Constitutions.

FINDINGS OF FACT

The representatives of petitioner and the Division of Taxation entered into a written stipulation of facts (see, Division's Exhibit "A"), including exhibits "A" through "H" attached thereto, the relevant portions of which are incorporated into the following Findings of Fact.

1. Prior to April 3, 1990, the capital stock of GKKS, Inc., an entity which owned an interest in real property located on Old Tarrytown Road, White Plains, New York, was owned by three shareholders: Morton J. Goldman ("Goldman"), Joseph Kruger ("Kruger") and Stephen M. Schainman ("Schainman"). Each shareholder owned one-third of the shares of capital stock of GKKS, Inc.

2. Prior to April 3, 1990, the capital stock of Mohawk Country-Home School, Inc. ("Mohawk"), an entity which owned an interest in real property located on Old Tarrytown Road, White Plains, New York, was owned by three shareholders: Goldman, Kruger and Schainman. Each shareholder owned one-third of the shares of capital stock of Mohawk.

3. Goldman died on April 3, 1990.

4. Elise R. Goldman, Executrix of the Estate of Goldman ("the executrix"), was issued Letters Testamentary on April 18, 1990.

5. On November 1, 1990, the Estate of Morton J. Goldman ("petitioner"), by its executrix, sold Goldman's shares of stock in GKKS, Inc. to GKKS, Inc. After the sale, the two remaining shareholders, Kruger and Schainman, each owned 50 percent of the outstanding shares of GKKS, Inc.

6. Neither Kruger nor Schainman acquired control of GKKS, Inc. as a result of the sale of petitioner's shares of GKKS, Inc. to it.

7. A 1989 agreement to which GKKS, Inc., Mohawk and the three equal shareholders of each were parties ("1989 shareholders agreement") made the sale of the GKKS, Inc. shares by petitioner mandatory on Goldman's death.

8. On May 1, 1991, Schainman sold all of his shares of GKKS, Inc. to GKKS, Inc.

9. After the sale by Schainman, Kruger owned 100 percent of the outstanding shares of GKKS, Inc. and thus controlled GKKS, Inc.

10. The 1989 shareholders agreement required GKKS, Inc. to buy its shares tendered by Schainman.

11. On November 1, 1990, petitioner, by its executrix, sold Goldman's shares of stock in Mohawk to Mohawk. After the sale, the two remaining shareholders, Kruger and Schainman, each owned 50 percent of the outstanding shares of Mohawk.

12. Neither Kruger nor Schainman acquired control of Mohawk as a result of the sale of petitioner's shares of Mohawk to it.

13. The 1989 shareholders agreement made the sale of the Mohawk shares by petitioner mandatory on Goldman's death.

14. On May 1, 1991, Schainman sold all of his shares of Mohawk to Mohawk.

15. After the sale by Schainman, Kruger owned 100 percent of the outstanding shares of Mohawk and thus controlled Mohawk.

16. The 1989 shareholders agreement required Mohawk to buy its shares tendered by Schainman.

17. After an audit, the Division, on April 16, 1993, issued a Statement of Proposed Audit Changes which asserted a real estate transfer tax liability, relating to petitioner's sale of the GKKS, Inc, stock, in the amount of $1,400.00, plus interest, for a total amount due of $1,647.84. The Statement of Proposed Audit Changes explained, in part, as follows:

> "Pursuant to Section 575.6(d) of the Real Estate Transfer Tax Regulations, 'where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a controlling interest has occurred.' As a

result of stock redemptions on 11/1/90 and 5/1/91, Joseph L. Kruger effectively acquired a 66 2/3% controlling interest in GKKS, Inc.

"Regulation Section 575.1(d)(4) states that 'in the case of a transfer or acquisition of a controlling interest in any entity that owns real property, consideration means the fair market value of the real property or interest therein, apportioned based on the percentage of the ownership interest transferred or acquired in the entity'.

"Since the arms length shareholders' agreement, dated 5/16/89, has established consideration for a 33 1/3% interest to be $700,000, it has been determined that a 16 2/3% interest has a fair market value of $350,000.

"Tax determined to be due under Article 31, Real Estate Transfer Tax Law, on the acquisition of the Goldman Estate's interest in GKKS, Inc. was calculated as follows:

"Consideration:	$350,000.
"Tax Due ($2.00 per every $500, or fractional part thereof, of the consideration amount)	1,400.

"Interest has been assessed in accordance with Section 1416 of the Tax Law, for the period beginning May 17, 1991, for failure to pay the tax within the time frame allowed."

18. On May 27, 1993, the Division issued a Notice of Determination to petitioner in the amount of $1,400.00 (real estate transfer tax), plus interest, for a total amount due of $1,660.85. Petitioner paid the tax determined to be due pursuant to the Notice of Determination and, therefore, requests a refund of monies paid.

19. After an audit, the Division, on April 16, 1993, issued a Statement of Proposed Audit Changes to petitioner relating to its sale of Mohawk stock which contained an explanation nearly identical to the one set forth in the statement issued for the sale of the GKKS, Inc. stock.

20. On May 27, 1993, the Division issued another Notice of Determination to petitioner in the amount of $1,400.00, plus interest, for a total amount due of $1,660.85 (the same amount of real estate transfer tax assessed for the sale of the GKKS, Inc. stock). Petitioner paid the tax determined to be due pursuant to the Notice of Determination and, therefore, requests a refund of monies paid.

21. After an audit, the Division, on April 16, 1993, issued a Statement of Proposed Audit Changes to petitioner, relating to its sale of the GKKS, Inc. stock, asserting additional gains tax of $34,160.97, plus interest, for a total amount due of $40,208.49. The Statement of Proposed Audit Changes explained, in part, as follows:

> "In accordance with Regulation Section 590.45(c) and (d), 'interests acquired after March 23, 1983, are added together for purposes of determining whether an acquisition of a controlling interest has occurred.' This includes all interests acquired within a three year period. Since the statute looks to the acquisition, it is the act of the transferee which triggers the tax.
>
> "Your tax liability is a result of Joseph L. Kruger's acquisition of a 66 2/3% interest within a three year period. Pursuant to the stock redemptions by GKKS, Inc. of the shares held by the Estate of Morton Goldman and Stephen Schainman, on 11/1/90 and 5/1/90, [sic] respectively, a controlling interest was acquired by Mr. Kruger on 5/1/91. Your liability is to the extent of the interest that was transferred to Joseph L. Kruger by the Estate of Morton Goldman.
>
> "Tax determined to be due under Article 31-B was calculated as follows:
>
> | | | |
> |---|---|---|
> | Consideration* ($2,100,000. x 16.67%) = | $350,000.00 | |
> | Less Original Purchase Price ($50,332 x 16.67%) = | 8,390.34 | |
> | Gain subject to tax | $341,609.66 | |
> | Tax determined to be due (10%) | | $ 34,160.97 |
>
> *Since the arms length shareholder's agreement, dated 5/16/89, establishes the fair market value of a 33 1/3% interest to be $700,000., the fair market value of a 16 2/3% interest is determined to be $350,000.00.
>
> "In addition, interest was assessed for the period beginning May 17, 1991, pursuant to Section 1446(1) of the Tax Law, which provides, in part, that 'if the tax commission determines that there has been an underpayment of tax, the transferor shall pay interest to the commission on the amount of tax not paid'."

22. On May 27, 1993, the Division issued a Notice of Determination to petitioner assessing gains tax in the amount of $34,160.97, plus interest, for a total amount due of $40,525.87 for petitioner's sale of the GKKS, Inc. stock.

23. After an audit, the Division issued a Statement of Proposed Audit Changes to petitioner asserting additional gains tax due, relating to its sale of the Mohawk stock, in the amount of $3,521.31, plus interest, for a total amount due of $4,144.69. The Statement of Proposed Audit Changes contained an explanation similar to the notice which asserted

additional gains tax due on petitioner's sale of the GKKS, Inc. stock. The notice computed the additional tax due as follows:

"Tax determined to be due under Article 31-B was calculated as follows:

Consideration* ($2,100,000. x 16.67%) = $350,000.00

Less Original Purchase Price
($1,888,344. x 16.67%) = $314,786.94
Gain subject to tax $ 35,213.06

Tax due (10% of gain) $ 3,521.31

*Since the arms length shareholder's agreement, dated 5/16/89, establishes the fair market value of a 33 1/3% interest to be $700,000, the fair market value of a 16 2/3% interest is determined to be $350,000.00.

"In addition, interest was assessed for the period beginning May 17, 1991, pursuant to Section 1446(1) of the Tax Law, which provides, in part, that 'if the tax commission determines that there has been and [sic] underpayment of tax, the transferor shall pay interest to the commission on the amount of tax not paid'."

24. On May 27, 1993, the Division issued a Notice of Determination to petitioner assessing gains tax, relating to petitioner's sale of the Mohawk stock, in the amount of $3,521.31, plus interest, for a total amount due of $4,177.41. Petitioner paid the tax assessed pursuant to the Notice of Determination and is, therefore, requesting a refund of the monies paid.

25. Subsequent to the issuance of the notices of determination which assessed gains tax on petitioner's transfers of stock in the two corporations, the Division issued two notices of assessment resolution (see, Division's Exhibits "I" and "L") in response to information received from petitioner's representative. These documents which contained identical explanations stated, in part, as follows:

"You cite the aggregation clause of Tax Law Section 1440.7 as the basis for your disagreement. The aggregation clause of Section 1440.7 (20 NYCRR 590.43), however, does not apply for purposes of determining whether an acquisition of a controlling interest was acquired or for purposes of computing consideration in the case of an acquisition of a controlling interest in an entity with an interest in real property. The aggregation clause of Tax Law Section 1440.7 applies only in the case of successive transfers by one transferor of contiguous or adjacent parcels of real property. It does not apply in the case of successive acquisitions by one transferee of ownership interests in an entity which owns a single parcel of real property.

"The statutory authority for aggregating successive acquisitions of stock in an entity with an interest in real property is found in the regulatory interpretation of Tax Law Section 1440(2), wherein Section 590.45 specifically requires that all ownership interests acquired by one transferee within a 3 year period be added together for purposes of determining whether an acquisition of a controlling interest has occurred.

"Further, for purposes of computing consideration in the case of an acquisition of a controlling interest in an entity which owns an interest in real property, Tax Law Section 1440.1(c) requires that there be an apportionment of the fair market value of the interest in real property to the controlling interest ACQUIRED. If the fair market value of the property apportioned to the percentage interest acquired is $1 million or more, each transferor is subject to tax based upon his/her pro rata interest transferred. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax (20 NYCRR 590.44)."

26. The affidavit of petitioner's executrix, Elise R. Goldman, attached to the written stipulation of facts (as Stipulation Exhibit "B") stated, in pertinent part, as follows:

"As executrix of the estate of Morton J. Goldman, I sold stock in each of the corporations to the respective corporations. My sale was made on 11/1/90. The sale on 5/1/91 was of stock owned by Stephen Schainman. He and I did not act in concert. The facts here make absolutely clear that the transfers were independent of each other.

"The estate's stock was tendered pursuant to a stockholders' agreement entered into May 16, 1989, a copy of which is attached hereto, and made part hereof. Paragraph 2 thereof made it mandatory that I, as executor of my husband's estate, sell all his shares in the two corporations herein involved, namely GKKS, Inc. and Mohawk Country-Home School, Inc., upon his death.

* * *

"My husband died April 3, 1990. Accordingly, pursuant to the mandatory provisions of the contract, the shares owned by the estate in each of those corporations were sold on November 1, 1990.

"There was no plan that either of the two remaining shareholders would subsequently sell his stock to the corporation. Mr. Schainman did not consult me with regard to the sale of his shares.

"Indeed, that sale by Mr. Schainman was detrimental to the estate. Paragraph 3 of the agreement provides that over 70% of the sale price for the estate's shares would be paid in 20 consecutive semi-annual installments represented by notes. However, paragraph 3(c) of the agreement provides that in the event of a second sale, then one-half of the principal amount of each installment thereafter payable is deferred until the date of the last installment payable to the estate. Thus, the result of Mr. Schainman's sale of his stock was that the estate is receiving only one-half the original amount of each note due it and will receive the deferred amount only after 10 years from the date of sale by the estate."

27. The shareholders agreement, entered into on May 16, 1989 among Goldman, Kruger, Schainman, GKKS, Inc., Mohawk and a third corporation, Mohawk-White Plains, provided, in paragraphs 1 and 2 thereof, as follows:

> "1. Lifetime Sale of Stock.
>
> "Goldman, Kruger and Schainman each hereby agrees that he will not sell, transfer, pledge or otherwise encumber any of his shares of stock of the Corporations, except as provided in this Agreement. Should any of them during his lifetime desire to sell his shares, he shall give to each of the Corporations not less than six months written notice, by certified or registered mail, prior to a stated date of sale, which shall be on a subsequent May 1 or November 1 of any year, and shall state in such notice that he desires to sell all of his shares in all three of the Corporations at the prices and on the terms hereinafter specified in paragraph 3. At the same time that such notice shall be given, the selling shareholder shall also send copies of such written notice, by certified or registered mail, to each of the other individual shareholders. Each of the Corporations hereby agrees to purchase its shares from the selling shareholder on the stated date of sale at the price and on the terms set forth below in paragraph 3."
>
> "2. Sale of Stock on Death.
>
> "Goldman, Kruger and Schainman each hereby agrees that, upon his death, the executors or administrators of his estate shall sell all of his shares in all three Corporations for purchase by their respective treasuries at the prices and on the terms hereinafter specified in paragraph 3. Each of the Corporations hereby agrees to purchase its shares from the estate of the deceased shareholder at the price and on the terms set forth below in paragraph 3. The date of such sale shall be the May 1 or November 1 next succeeding the date of death, whichever shall first occur more than six months following the date of death."

28. The affidavit of Joseph Kruger, sworn to the 25th day of April 1994, establishes the following facts:

> "I did not intend to acquire control of the corporations by their purchases of the Goldman shares.
>
> "At the time of Morton Goldman's death, I did not know that Stephen Schainman would subsequently tender his shares in each of the corporations to that corporation, which, under the May 16, 1989 agreement, each corporation was required to buy the tendered shares.
>
> "I did not acquire control of the corporations by acting in concert at any time with Mr. Schainman. Such control was not acquired by reason of the mandatory purchase by the corporations of their respective shares from the Goldman estate. Control was acquired only as a result of Mr. Schainman's subsequent unilateral decision to tender his shares in the corporations."

29. Petitioner submitted (see, Petitioner's Exhibit "1") the affidavit of Stephen M. Schainman, sworn to the 12th day of June 1995, establishes the following facts:

"Prior to the death of Morton Goldman, he, Joseph Kruger and I each owned one-third of the shares of GKKS, Inc. and of Mohawk Country-Home School, Inc.

"A stockholders' agreement provided that each corporation had to buy its own shares when a stockholder offered them. Accordingly, when I offered my shares to the corporations, each corporation bought its shares on May 1, 1991.

"I did not consult Elise Goldman, the executrix of Morton Goldman's estate, in connection with my offer to sell, or sale of my shares of the two corporations. I did not act in concert at any time with her. I made my own independent decision to sell my shares in the two corporations. I did not make any agreement with her or have any plan with her that I would sell my shares in the two corporations."

SUMMARY OF THE PARTIES' POSITIONS

30. Petitioner's position may be summarized as follow:

a. No tax is due under Article 31-B of the Tax Law. It is petitioner's contention that the affidavits of Elise Goldman, Schainman and Kruger clearly show that there was no plan or agreement to effectuate a transfer or acquisition of a controlling interest. Petitioner maintains that the amendments to the gains tax statutes made in 1994 show that the Division's interpretation of the statutes as they existed in 1990 are erroneous.

b. No tax is due under Article 31 of the Tax Law. This is true because a controlling interest was not sold by petitioner. In addition, petitioner contends that there is no provision in Article 31 (while there is such a provision in Article 31-B) which permits aggregation of successive shares of stock. Petitioner also states that to tax petitioner would be to impose the real estate transfer tax twice.

c. To the extent that the meaning of the provisions of Articles 31 and 31-B are in doubt, that doubt must be resolved in favor of the taxpayer.

d. Petitioner maintains that the statutes do not subject these transactions to the real estate transfer and/or gains taxes. Therefore, to the extent that it is the regulations which impose these taxes, such regulations are unlawful since the Division may not extend the Tax Law.

e. Articles 31 and 31-B of the Tax Law, if applied to these transactions by petitioner, are unconstitutional in that such applications would violate the Equal Protection Clauses and the Due Process Clauses of the New York State Constitution and the United States Constitution.

In response, the Division of Taxation alleges as follows:

a. Petitioner's transfers are properly subject to the imposition of gains tax because, as a result of the transfers by petitioner and by Schainman of their shares to Kruger within a three-year period, Kruger acquired a controlling interest in the corporations. Moreover, petitioner's reliance on the aggregation clause provision of Tax Law § 1440(7) is misplaced since the Tax Appeals Tribunal, in Matter of Harris (Tax Appeals Tribunal, December 30, 1993), has held that the aggregation clause is inapplicable in determining whether an acquisition of a controlling interest has occurred. The decision in Harris (supra) also held that the transferor's intent does not determine whether there has been a transaction which is subject to tax. As to petitioner's contentions that the 1994 amendments show that the Division's interpretations are erroneous, the Division states that such amendments dealt solely with the aggregation clause which is not applicable in determining whether a taxable transaction occurred.

b. Article 31 plainly imposes the real estate transfer tax upon the acquisition of a controlling interest in an entity with an interest in real property. The Division states that, contrary to petitioner's contentions, the language of Articles 31 and 31-B are identical with respect to the definition of transfer or conveyance of real property in that both include the transfer or acquisition of a controlling interest in an entity with an interest in real property. Finally, the Division states the real estate transfer tax is not imposed twice and points to 20 NYCRR 575.6(d) which it contends deals directly with the type of situation which is at issue herein.

c. The Division contends that the statutes imposing the real estate transfer and gains taxes are not ambiguous and, therefore, there is no need to construe these statutes in favor of the taxpayer/petitioner.

d. The Division's regulations do not impose the taxes, but merely provide a reasonable interpretation of the statutes in order to effectuate their purposes.

e. Although petitioner claims to be raising the issue of the constitutionality of the application of the taxing statutes, it is, in fact, questioning the facial constitutionality of the statutes. Accordingly, the Division of Tax Appeals lacks the jurisdiction to consider petitioner's arguments. Even if it is determined that petitioner is challenging the statutes as applied, it's

arguments are without merit. With respect to petitioner's due process argument, the Division contends that the State of New York has a sufficient link to the transaction which it is taxing. Also, petitioner had adequate notice of the State's taxing schemes. As to its equal protection contentions, the Division maintains that the statutes do not differentiate between those who make sales of non-controlling interests and those who make identical sales of non-controlling interests together with later, independent sales of controlling interests by others. This is true, the Division states, because the tax is imposed on the acquisition of the controlling interest. All transfers within a three-year period are aggregated to determine whether a taxable acquisition of a controlling interest occurred; there is no exemption.

CONCLUSIONS OF LAW

A. Tax Law former § 1402 imposed a tax on each conveyance of real property or interest therein "when the consideration . . . exceeds one hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof . . . ." Tax Law § 1404 provides that the real estate transfer tax shall be paid by the transferor.

Tax Law § 1401(e) defines a "conveyance" of real property to include, among other things, the "transfer or acquisition of a controlling interest in any entity with an interest in real property."

Tax Law § 1401(b) defines "controlling interest", as pertains to a corporation, to mean "either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation . . . ."

B. 20 NYCRR 575.6(a) provides, in pertinent part, that:

> "In the case of a corporation which has an interest in real property, the transfer or acquisition of a controlling interest in the corporation, as defined in section 575.1(b) of this Part, occurs when a person, or group of persons acting in concert, transfers or acquires a total of 50 percent or more of the voting stock in such corporation."

20 NYCRR 575.6(c) states that

> "[f]or purposes of determining whether a controlling interest is transferred or acquired, only transfers or acquisitions of interests occurring on or after July 1, 1989 are added together."

20 NYCRR 575.6(d) provides as follows:

> "Where there is a transfer or acquisition of an interest in an entity that has an interest in real property, on or after July 1, 1989, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions will be added together to determine if a transfer or acquisition of a controlling interest has occurred. Where there is a transfer or acquisition of a controlling interest in an entity on or after July 1, 1989, and the real estate transfer tax is paid on that transfer or acquisition and there is a subsequent transfer or acquisition of an additional interest in the same entity, it is considered that a second transfer or acquisition of a controlling interest has occurred which is subject to the real estate transfer tax. No transfer or acquisition of an interest in an entity that has an interest in real property will be added to another transfer or acquisition of a interest in the same entity if they occur more than three years apart, unless the transfers or acquisitions were so timed as part of a plan to avoid the real estate transfer tax. An example of this would be if a shareholder acquired 40 percent of the stock in a corporation and simultaneously contracted for the purchase of 20 percent in three years and one day."

C. As indicated in Findings of Fact "6" and "12", the parties herein agree that petitioner's transfers of the stock of both corporations on November 1, 1990 were not transfers or acquisitions of a controlling interest in an entity which had an interest in real property (see also, Division's brief at 17, 18). While it is true that, after the transfer of petitioner's shares, the remaining shareholders (Kruger and Schainman) each owned 50 percent of the stock in each of the corporations, the shares transferred by petitioner were not added to the shares already owned by Kruger and Schainman since 20 NYCRR 575.6(c) provides that, for purposes of determining whether a controlling interest is transferred or acquired, only transfers or acquisitions occurring on or after July 1, 1989 are added together. All of these shareholders had acquired their shares prior to July 1, 1989.

It was, however, upon the transfer of Schainman's shares in the two corporations on May 1, 1991 that the sole remaining shareholder, Kruger, acquired a controlling interest in each, i.e., by virtue of the transfers by petitioner and by Schainman, he acquired a 66 2/3% interest in GKKS, Inc. and in Mohawk. Despite petitioner's contentions to the contrary, the provisions of 20 NYCRR 575.6(d) specifically address a situation such as the matter at issue herein.

In its brief, petitioner alleges that, unlike Article 31-B of the Tax Law, there is no provision in Article 31 which permits an aggregation of successive sale of shares of stock by different transferors to determine whether there has been a transfer or acquisition of a

controlling interest. Petitioner's argument is without merit. First, as the Division correctly points out (see, Division's brief at 18, 19), the statutory language in Articles 31 and 31-B is identical as to the definition of a transfer or conveyance of real property and as to the definition of a transfer or acquisition of a controlling interest in an entity with an interest in real property. Petitioner further contends that it is the regulation (20 NYCRR 575.6[d]) upon which the Division relies to impose the real estate transfer tax upon petitioner's sales of shares and, if the statute does not impose the tax, the Division, by means of a regulation, cannot do so.

When reviewing an administrative determination, the construction given statutes and regulations by the agency which is responsible for their administration will, if not irrational or unreasonable, be upheld (Mobil Intl. Fin. Corp. v. State Tax Commn., 117 AD2d 103, 501 NYS2d 947).

In Blue Spruce Farms, Inc. v. State Tax Commn. (99 AD2d 867, 472 NYS2d 744, 745, affd 64 NY2d 682, 485 NYS2d 526), the court stated:

> "To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction (see, Matter of Lakeland Farms v.State Tax Comm., 40 AD2d 15, 18, 336 NYS2d 972). Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute (Matter of Slattery Assoc. v. Tully, 79 AD2d 761, 434 NYS2d 788) or erroneous (Matter of Kroner v. Procaccino, 39 NY2d 258, 383 NYS2d 295), it should be upheld."

It is not the regulation (20 NYCRR 575.6[d]) which imposes the tax which petitioner maintains it is not subject to. The tax is imposed by Tax Law § 1402 upon "each conveyance" and the term "conveyance" includes, by definition, "the transfer or acquisition of a controlling interest in any entity with an interest in real property (see, Tax Law § 1401[e]). The regulation merely sets forth the manner in which it is determined whether, in fact, a transfer or acquisition is of "a controlling interest." This regulation does not impermissibly extend the application of the taxing statute; it explains how the statute is to be applied.

Petitioner also contends that to tax petitioner as well as Schainman would be to impose the tax twice. However, once again, it is the regulation which provides the clarification, i.e., 20 NYCRR 575.6(e) states that "[t]he tax is only imposed once when there is both a transfer and an

acquisition of a controlling interest in the same conveyance." The transfer of petitioner's shares of both corporations did not result in the transfer or acquisition of a controlling interest; it was only upon Schainman's transfers of his stock that Kruger acquired a controlling interest in the corporations. No real estate transfer tax was due upon petitioner's transfers alone. The tax became due and was imposed by the Division when Schainman sold his shares of the two corporations which thereby caused Kruger to acquire a controlling interest. Moreover, it is clear that petitioner was assessed tax only upon the established consideration of petitioner's shares. Therefore, the Division did not impose the tax twice, but rather taxed petitioner upon the consideration of its shares and, presumably, taxed Schainman upon the consideration for his shares.

D. Tax Law § 1441 imposes a 10% tax on gains derived from the transfer of real property within New York State.

Tax Law § 1440 (former [7]), in effect during the period at issue, provided, in pertinent 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, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property.
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> * * *
>
> "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 . . . ."

Tax Law § 1440(2) defines "controlling interest" to mean "in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation."

E. 20 NYCRR former 590.44(a) provided as follows:

> "Question: How is the phrase 'acquisition of a controlling interest in an entity with an interest in real property' applied?

"Answer: The term 'controlling interest' is defined in section 1440(2) of the Tax Law to mean:

> '(i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (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, association, trust or other entity.'

Thus, for purposes of the gains tax, in the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the voting stock in such corporation. In the case of a partnership, association, trust or other entity, the acquisition occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the capital, profits or beneficial interest in such entity. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax."

20 NYCRR former 590.45 (c) and (d) provided as follows:

"(c) Question: If a shareholder owned a 20-percent interest in a corporation prior to March 28, 1983 and acquires an additional 35 percent on July 10, 1984, has there been an acquisition of a controlling interest?

"Answer: No. For purposes of determining whether a controlling interest is acquired, only acquisitions of interests occurring after March 28, 1983 are added together.

"(d) Question: If a shareholder acquires a 50-percent interest in a corporation and gains tax is paid on the transfer, and one year later the same shareholder acquires an additional 20 percent, is there a second acquisition of a controlling interest?

"Answer: Yes. The 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. An example of this would be if T acquired 80 percent of the stock and simultaneously contracted for the purchase of the remaining 20 percent in three years and one day."

F. Petitioner asserts that each of its sales of corporate stock was exempt from the imposition of gains tax because it was not a transfer or acquisition of a controlling interest and that the tax was imposed solely by virtue of Schainman's subsequent sales of his stock in the corporations. At the time of petitioner's transfers, petitioner is correct, i.e., there was neither a transfer nor acquisition of a controlling interest and, therefore, no tax was due thereon and it was solely by virtue of Schainman's subsequent sale of his shares that tax became due.

Petitioner points to the provisions of Tax Law § 1440 (former [7]) which exempt partial or successive transfers wherein the transferors furnish a sworn statement that the transfers were not pursuant to an agreement or plan (see, Conclusion of Law "D"). Petitioner correctly maintains that it has provided such sworn statements in the form of affidavits of the Executrix, Elise Goldman, and also from Messieurs Kruger and Schainman.

The Division, in response to this argument, states that petitioner's reliance on the "aggregation clause" portion of Tax Law § 1440 (former [7]) is misplaced and that the Tax Appeals Tribunal, in Matter of Harris (Tax Appeals Tribunal, December 30, 1993) rejected a taxpayer's contention that the aggregation clause was applicable in determining whether an acquisition of a controlling interest had occurred. The Tribunal stated:

> "At the time of this transaction, the first sentence of section 1440(7) of the Tax Law defined 'transfer of real property' to mean:
>
> > "'the transfer or transfers of any interest in real property by an [sic] method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property.'
>
> "The structure of this sentence is significant because it switches from the term 'transfer' to the term 'acquisition' when describing a taxable entity transaction, i.e., a transaction involving an ownership interest in an entity that owns real property, rather than a direct ownership interest in real property (see, Matter of Bredero Vast Goed, N.V. v Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). We agree with the Division that the use of the word 'acquisition' rather than 'transfer' reflects a legislative decision to impose tax in entity transactions based on the acts of the transferee or transferees rather than on the acts of the transferors.
>
> * * *
>
> "We conclude that these regulations (20 NYCRR 590.44 and 590.45) are a correct interpretation of section 1440(7) of the Tax Law because they are consistent with the Legislature's choice of the word 'acquisition.'
>
> In contrast, we do not see how the position urged by petitioner and adopted by the Administrative Law Judge, that the transferor's intent determines whether there has been a taxable entity transaction, can be harmonized with the term 'acquisition,' which obviously focuses on the acts of the transferee. Further, petitioner's interpretation would drastically reduce the application of the tax, because an acquisition of a controlling interest would only be taxable if acquired from transferors who intended the transferee to acquire a controlling interest. Such a restricted application is inconsistent with the otherwise expansive definition of

> transfer of real property employed by the statute to maximize revenues (citation omitted).
>
> With respect to petitioner's contention that the aggregation clause must be applied to determine whether a taxable acquisition has occurred, we agree with the Division that the so-called aggregation clause is not applicable. The aggregation clause is a separate sentence in the section 1440(7) definition of transfer of real property which expands upon the basic definition included in the first sentence of section 1440(7) by stating that the '[t]ransfer of real property shall also include partial or successive transfers' (citation omitted). Petitioner's construction would turn the statutory scheme on its head by applying the aggregation clause as a limitation on the basic definition of transfer of real property."

Therefore, since the aggregation clause is not applicable, the intent of the transferors, i.e., petitioner and Schainman is of no import.

In its reply brief, petitioner points to that part of the Tribunal's decision in Matter of Harris (supra) wherein the Tribunal stated:

> "As the record reveals no information about the intent of the transferees, we conclude that petitioner has not established that the transferees were not acting in concert in acquiring 100% of the stock (see, 20 NYCRR 590.44[a])"

In the present matter, petitioner contends that the Kruger affidavit clearly proves that he had no intention of acquiring control of the corporations by his purchases of the Goldman stock.

Petitioner's argument must be rejected. While the Tribunal did note, in Harris (supra), the importance of determining the intent of the transferees, in the matter at issue, there was a single transferee, Kruger. As previously indicated, 20 NYCRR former 590.44(a) states that "for purposes of the gains tax, in the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the voting stock in such corporation." Clearly, one person cannot act in concert; it takes more than one person to do so. 20 NYCRR former 590.45(b) explains when a group of persons is acting in concert and sets forth several examples. It follows, therefore, that when a single transferee (such as Kruger in the present matter) acquires a controlling interest as he did upon acquiring the shares of Goldman and Schainman, his intent is entirely irrelevant.

G. Petitioner further contends that Harris was decided prior to certain amendments to the gains tax statutes enacted in 1994. Chapter 170 of the Laws of 1994 deleted from Tax Law

§ 1440(7), the exception from tax where the transferor furnishes an affidavit that the transfer was not pursuant to a plan to effectuate a transfer which would otherwise be taxable. Petitioner states that if the statute as it existed in 1990, did not mean what it plainly said, i.e., that no tax was due when the transferor furnished the required affidavit, there would have been no need to delete this exception in 1994. But as the Tribunal stated in Harris, which was decided prior to the 1994 amendments, the transferor's intent is not relevant in ascertaining whether there has been an acquisition of a controlling interest in an entity with an interest in real property.

Petitioner also notes that chapter 170 of the Laws of 1994, in section 564 thereof (the "effective clause "), provides that successive transfers before June 9, 1994 should not be aggregated with transfers occurring after that date unless the transfers would have been aggregated under the law and rules in effect immediately prior to June 9, 1994. Petitioner contends that this is evidence that it was the intention of the Legislature to preserve the nontaxability of certain transfers (those where the transferor had furnished the required affidavit) prior to the implementation of the new law. It is petitioner's position that the Legislature recognized in 1994 that the statute, as it existed prior to the 1994 amendments, did not permit the taxing of one seller, not selling a controlling interest and not pursuant to a plan to do so, simply because another independent seller sold a controlling interest within three years thereof. Again, this argument is without merit. The transferor affidavit provisions, referred to by petitioner, relate to aggregation for purposes of determining whether the consideration is $1 million or more. The clause which provides for the aggregation of partial or successive transfers does not apply to the acquisition of a controlling interest in an entity with an interest in real property (see, Matter of Harris, supra).

H. Petitioner contends that, to the extent that the meaning of the statutes (Articles 31 and 31-B) is in doubt, such statutes must be construed in favor of the taxpayer. This contention assumes the existence of some doubt or ambiguity as to the taxability of the transfers at issue.

Courts are required to look to the purpose and intent of the Legislature (1605 Book Center, Inc. v. Tax Appeals Tribunal, 83 NY2d 240, 609 NYS2d 144, cert denied ___US___,

130 L Ed 2d 19; Brusco v. Braun, 199 AD2d 27, 605 NYS2d 13, affd 84 NY2d 674, 621 NYS2d 291). Tax statutes should be construed to insure collection of all designated taxes where supportable theory can be found (1605 Book Center, Inc. v. Tax Appeals Tribunal, supra; McKinney's Cons Laws of NY, Book 1, Statutes § 313). Clearly, Articles 31 and 31-B impose taxes upon certain transfers of real property in the State of New York. The specific statutes and the regulations promulgated by the Division which relate to acquisitions of a controlling interest in an entity with an interest in real property, pertaining to both the real estate transfer tax and the gains tax, do not contain the ambiguities alleged by petitioner.

In its reply brief, petitioner (as did the Division in its brief) cited to 1605 Book Center, Inc. v. Tax Appeals Tribunal (supra) and attempted to draw a distinction between the statutes at issue in the present matter and certain sales tax statutes which imposed a tax upon admission charges for the use of any place of amusement. The court stated, "Thus, without resorting to extrinsic materials, the Legislature's plain expression captures appellant's admission receipts derived from this form of amusement in these places." Petitioner contends that the regulations are extrinsic materials without which the real estate transfer tax and gains tax statutes are unclear. This contention is rejected since a reading of the relevant statutes (see, Conclusions of Law "A", "D" and "E") reveals that transfers or acquisitions of a controlling interest are subject to each of these taxes. The regulations do not impose these taxes; they merely set forth examples and explanations which serve to clarify the statutes. The Division has been statutorily empowered to promulgate regulations (see, Tax Law § 171[1]); moreover, as previously indicated (see, Conclusion of Law "C"), petitioner's contention that it is the regulations rather than the statutes which subject it to the real estate transfer tax and the gains tax has previously been rejected.

I. Petitioner alleges that the taxation of this estate by the Division violates the Equal Protection and the Due Process Clauses of the New York State Constitution and the United States Constitution. The primary basis for petitioner's position is that while certain transfers of a non-controlling interest in real property are not taxable under Articles 31 and 31-B of the Tax

Law, the Division imposed these taxes upon petitioner based upon subsequent events over which petitioner had no control, i.e., the sales by Schainman of his shares in the two corporations. This results, petitioner contends, in a different treatment, under the law, of persons similarly situated.

In response, the Division first contends that petitioner is challenging the facial constitutionality of the taxing statutes and, accordingly, the Division of Tax Appeals is without jurisdiction to consider petitioner's arguments. If, in the alternative, it is determined that petitioner is challenging the constitutionality of these statutes as applied, the Division maintains that petitioner's arguments are without merit (see, Paragraph "31[e]").

In Matter of J.C. Penney Co., Inc. (Tax Appeals Tribunal, April 27, 1989), the Tribunal stated:

> "The Tribunal's enabling legislation does not extend our scope of review to determine the facial constitutionality of Tax Law statutes (Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988); however, we may determine whether Tax Law statutes are constitutional as applied (see, Matter of David Hazan, Inc., Tax Appeals Tribunal, April 21, 1988)."

The basis upon which petitioner contends that it is contesting the constitutionality of Articles 31 and 31-B of the Tax Law as applied (rather than the facial constitutionality of the statutes) is its allegation that it is being treated differently from other similarly situated taxpayers. Petitioner states that, unlike other transferors of a non-controlling interest, it is being taxed solely as a result of a subsequent event (the transfer of Schainman's shares), by an independent party, over which it has no control.

A careful examination of petitioner's contentions with respect to its constitutional challenges reveals that petitioner is, in fact, seeking a ruling that Tax Law § 1401(e) and § 1440(7) are unconstitutional on their face. While petitioner apparently does not object to the imposition of real estate transfer and/or gains tax upon an acquisition of a controlling interest accomplished through a single transfer, it contends that to add together acquisitions of non-controlling interests in order to determine whether a controlling interest has occurred is unconstitutional. What petitioner seeks then is, in essence, a finding that the aforementioned

statutes are unconstitutional. It is not alleging that these taxing statutes were illegally or improperly applied to the estate; it is contending that to aggregate acquisitions to determine if a controlling interest was acquired is unconstitutional. As previously indicated, the Division of Tax Appeals is without jurisdiction to determine the facial constitutionality of Tax Law statutes.

J. Petitioner also challenges the constitutionality of the applicable regulations (see, Conclusions of Law "B" and "E"). As petitioner correctly asserts, the Division of Tax Appeals does have jurisdiction to determine whether the Division of Taxation's regulations are constitutionally valid, both facially and as applied (20 NYCRR 3000.17[e][3]; Matter of David Hazan, Inc., Tax Appeals Tribunal, April 21, 1988, comfirmed 152 AD2d 765, 543 NYS2d 545, affd 75 NY2d 989, 557 NYS2d 306).

The burden on the party attacking the constitutionality of the regulation is the same as the burden on one who challenges the constitutionality of a statute. In Matter of R.A.F. General Partnership

(Tax Appeals Tribunal, November 9, 1995), the Tribunal stated:

> "'Taxing statutes, like other social and economic legislation that neither classify on the basis of a suspect class nor impair a fundamental right, must be upheld if the challenged classification is rationally related to achievement of a legitimate State purpose' (Trump v. Chu, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915). 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it' (Madden v. Kentucky, 309 US 83)."

Petitioner's due process argument is one of substantive application, i.e., it does not contend that its procedural rights of due process were violated, but maintains that it has been deprived of property without compensation (see, Petitioner's brief at 21-22). In National Bellas Hess v. Department of Revenue (386 US 753, 756, 18 L Ed 2d 505, 508), the U.S. Supreme Court stated that "in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.'"(citations omitted). To determine whether the State has "given anything" requires a nexus examination. As the Division correctly asserts, there is no question that New York has a link with the transaction it seeks to tax. The taxable transaction is

the transfer of real property located within the State. The real estate transfer tax is based upon the consideration for the conveyance; the gains tax is based upon the gain from the transfer. While petitioner contends that it has been deprived of property without compensation which, therefore, violates its rights of due process, such contentions contain no specificity as to how it maintains that it is being so deprived. It merely states that to impose a tax upon persons who make a sale of a non-controlling interest, when there is a later independent sale of a controlling or non-controlling interest, is violative of the Due Process Clauses of the New York State and United States Constitutions when there is no tax on the sale of a non-controlling interest absent a later sale. As pointed out by the Tribunal in Matter of Harris (supra), "the use of the word 'acquisition' rather than 'transfer' reflects a legislative decision to impose tax in entity transactions based on the acts of the transferee or transferees rather than on the acts of the transferors." Clearly, petitioner has failed to show how the regulations which implement such legislative intent by adding together certain transfers to determine whether a controlling interest has been acquired, unconstitutionally violates its due process rights.

Petitioner's equal protection argument is quite straightforward, i.e., it contends that an arbitrary classification has been made by the Division by virtue of taxing one seller of a non-controlling interest in a corporation which owns real estate because of a later, unrelated sale by another seller, while not taxing a seller of a non-controlling interest when no subsequent sale (within a three-year period) occurs.

In Matter of Balan Printing, Inc. (Tax Appeals Tribunal, April 17, 1991), the Tribunal discussed, in detail, equal protection review, stating:

> "Administrative actions and classifications are subject to equal protection review (see, Matter of Doe v. Coughlin, 71 NY2d 48, 523 NYS2d 782, 787) under both the United State Constitution (US Const 14th amend) and the New York State Constitution (NY Const, art I, § 11). However, 'the prohibition of the Equal Protection Clause goes no further than the invidious discrimination' (Williamson v. Lee Optical of Okla., 348 US 483, 489). Thus, unless the State draws distinctions between similarly situated taxpayers whereby it classifies on the basis of a suspect class or impairs a fundamental right, equal protection only requires that such uneven treatment be rationally related to the achievement of a legitimate governmental purpose and not be palpably arbitrary (see, Town of Tonawanda v. Ayler, 68 NY2d 836, 508 NYS2d 171; Trump v. Chu, 65 NY2d 20, 489 NYS2d 455). In addition, within the field of taxation more than in other fields, governmental authorities

> possess even more flexibility in making classifications and drawing lines which in their judgment produce reasonable systems of taxation (see, Krugman v. Board of Assessors, 141 AD2d 175, 533 NYSd 495, 501; Shapiro v. City of New York, 32 NY2d 96, 343 NYS2d 323, 329 appeal dismissed for want of a substantial fed. question 414 US 804, pet for rehr denied, 414 US 1087; see also, Madden v. Kentucky, 309 US 83, 87-88). A denial of equal protection will arise only where a purposeful, invidious and intentionally unfair discrimination in the enforcement of a statute is present (Di Maggio v. Brown, 19 NY2d 283, 279 NYS2d 161, 166-167; People v. Friedman, 302 NY 75, appeal dismissed for want of a substantial fed. question 341 US 907; Matter of Doe v. Coughlin, supra). Equal protection does not require identity of treatment. It only requires that classification rest on some real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary (Walters v. St. Louis, 347 US 231, 237)."

Initially, it must be pointed out that it is the regulations (20 NYCRR 575.6[a],[c] and [d] pertaining to the real estate transfer tax and 20 NYCRR former 590.44 and 590.45 relating to the gains tax) which are the subject of this equal protection inquiry. As previously indicated, petitioner's assertions to the contrary, these regulations do not impose the taxes at issue herein; the statutes do. Other than an exception for acquisitions occurring more than three years apart (unless so timed to avoid the tax), all acquisitions are examined to determine whether a controlling interest has been acquired. No distinctions are drawn; no transferees are exempted from the provisions of the regulations. The Tribunal, in Matter of Harris (supra), considered the gains tax regulations at issue in this matter (20 NYCRR former 590.44 and 590.45) and stated, "We conclude that these regulations are a correct interpretation of section 1440(7) of the Tax Law because they are consistent with the Legislature's choice of the word 'acquisition'." These regulations and the regulations pertaining to the real estate transfer tax (20 NYCRR 575.6) contain similar language with respect to the adding together of acquisitions to determine whether a controlling interest was acquired.

The governmental purpose is to tax acquisitions of a controlling interest in an entity with an interest in real property. There is no contention by petitioner that such purpose is anything other than legitimate. Since the regulations draw no distinctions between transferees nor treat any acquisitions differently in determining whether a controlling and, therefore, taxable acquisition has occurred, petitioner's contentions must be rejected. It cannot be found that the

regulations of the Division, facially or as applied to petitioner, violated the Equal Protection Clause of either the New York State or the United States Constitutions.

K. The petition of the Estate of Morton J. Goldman is denied and the notices of determination issued by the Division on May 27, 1993 are hereby sustained.

DATED: Troy, New York
March 21, 1996

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE