STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **MORGAN GUARANTY TRUST COMPANY OF NEW YORK** for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	DECISION

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 22, 1988 with respect to the petition of Morgan Guaranty Trust Company of New York, 23 Wall Street, New York, New York 10015 for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 803132). Petitioner appeared by Davis, Polk & Wardwell, Esqs. (John A. Corry, Esq. and Leslie J. Hoffman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was heard on November 15, 1989.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division's motion to strike petitioner's brief on exception and documents attached to that brief should be granted.

II. Whether petitioner's transfer of certain real property escapes taxation under Tax Law § 1441 by virtue of the preemption provisions of the Federal Employee Retirement Income Security Act of 1974.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On November 11, 1987, a Stipulation of Facts pertaining to the petition of Morgan Guaranty Trust Company of New York, duly executed by authorized representatives for petitioner (William Parsons, Jr. and Leslie J. Hoffman, Esqs.) and for the Audit Division (Paul A. Lefebvre, Esq.), was received. This Stipulation of Facts provides as follows:

STIPULATED FACTS

Morgan Guaranty Trust Company of New York (the "Trustee") has served as successor trustee under American Motors Corporation Union Retirement Income Plan (the "Plan") since March 1, 1969.

The Plan is, and at all relevant times has been, a qualified employee benefit plan under the Federal Employee Retirement Income Security Act of 1974 ("ERISA").

On August 13, 1965, KMS Properties, Inc. ("KMS"), a nonprofit corporation whose stock was wholly owned by the Plan, purchased real property located at 444 Saw Mill River Road, Greenburgh, New York (the "American Motors Facility") from American Motors Sales Corporation (the "Employer"), an affiliate of the employer of the employees covered by the Plan.

On the same date, KMS entered into a lease agreement (the "Lease") with the Employer, pursuant to which KMS agreed to lease the American Motors Facility to the Employer for a term of 25 years.

ERISA was enacted on September 2, 1974. Under section 407(a) of ERISA, the Plan was prohibited from holding the real property under the Lease with the Employer. The Plan was required under section 414(c) of ERISA to dispose of the Lease or, alternatively, tax penalties under section 4975 of the Internal Revenue Code of 1954, as amended, could have been imposed. In addition, the Trustee would have been in violation of its fiduciary responsibilities under ERISA. Section 4975 of the Internal Revenue Code imposes a penalty equal to 5% of the "amount involved" for each year, and, in addition, a penalty of 100% of the "amount involved" if the prohibited transaction is not corrected within the required period. The "amount involved" was at least $2,775,640.00 and could ultimately have been much higher if the fair market value of the American Motors Facility had increased during the time that the prohibited transaction occurred.

On December 15, 1983, the Employer received an opinion of counsel (the "ERISA Opinion") which advised that the Lease was a "prohibited transaction" under ERISA and that prior to June 30, 1984 the Plan or the Employer was required either to revise the Lease to provide for higher rental payments, to obtain an administrative exemption, or to dispose of its interest in the American Motors Facility. The Employer was not willing to revise the Lease to provide for higher rental payments or dispose of its interest in the Lease, and the ERISA Opinion advised that there could be no assurance that the Department of Labor would grant an administrative exemption for the Lease.

Pursuant to the ERISA Opinion, and in accordance with ERISA, the Trustee caused KMS to sell the American Motors Facility to the American Motors Realty Corporation for $2,775,640.20 on June 29, 1984.

On July 31, 1984, petitioner paid to the State real property transfer gains tax in the amount of $205,262.62.

On May 13, 1985, petitioner filed with the Department of Taxation and Finance a claim for refund on the ground that imposition of the real property transfer gains tax upon this transaction is preempted by ERISA § 514(a).

ADDITIONAL FACTS

By letter dated January 15, 1986, the Division denied petitioner's claim for refund upon the following basis:

> "It is the opinion of this Department that when reference is made in the above paragraph to '...any and all State laws,' the intent is to refer to any and all State laws which are designed to regulate employee benefit plans.
>
> Accordingly, since the Gains Tax has no regulating effect on any employee benefit plan, and such plan is not exempt under Section 1116(a)(4) of the New York

> State Sales and Use Tax Law or Section 501(c)(3) of the Internal Revenue Code, the refund claim of Morgan Guaranty Trust Company of New York is hereby denied in its entirety."[1]

In response to this denial, petitioner timely commenced the subject proceedings.

OPINION

In the determination below, the Administrative Law Judge concluded that the preemption clause of the Federal Employee Retirement Income Security Act of 1974 (hereinafter "ERISA") preempted the application of the New York transfer gains tax to the sale of certain real property by petitioner, a Trustee of a qualified employee benefit plan (hereinafter "the Plan") under ERISA. The Administrative Law Judge reasoned that because the real property was an asset held by the Plan, imposition of the gains tax upon the transfer of that property would result in a direct tax upon gains of the Plan and would ultimately reduce the amount of funds available for distribution to the Plan beneficiaries. Further, it was noted that the transfer of the real property by petitioner as trustee of the Plan had been necessary in order to avoid the imposition of penalties and the violation of certain fiduciary responsibilities under ERISA. Accordingly, the Administrative Law Judge found that the gains tax was preempted because its application to the transfer at issue directly related to and affected administration of the Plan within the meaning of ERISA's preemption clause.

The Division's primary contention on exception is that ERISA's preemption clause does not mandate the preemption of the gains tax on the transfer of the real property by petitioner. Specifically, the Division asserts that the gains tax is not preempted in this matter because petitioner has failed to demonstrate that application of the gains tax to the sale of the Plan asset burdens the administrative scheme of the Plan or impedes its uniform administration. Further,

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The quoted reference "...any and all State laws" relates to ERISA § 514(a) (29 USC § 1144[a]), which provides that:

> "...the provisions of this title and Title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)."

the Division maintains that in this case the effect of the gains tax upon the Plan is too tenuous, remote and peripheral to warrant a finding that the tax "relates to" the Plan within the meaning of ERISA's preemption clause. Lastly, the Division contends that the Administrative Law Judge failed to consider whether the application of the gains tax in this instance regulates the terms and conditions of the Plan. The Division argues that because the evidence does not support a showing that the gains tax regulates the terms and conditions of the Plan, the finding of preemption was in error.

In response, petitioner contends that the Administrative Law Judge correctly held that the gains tax, as applied to petitioner's transfer of real property, must be preempted under ERISA. Petitioner urges that the preemption of the gains tax in this instance is consistent with the Congressional desire to protect the interests of plan beneficiaries and to avoid application of conflicting and inconsistent State regulations. Petitioner emphasizes that the transfer of the real property was undertaken specifically to avoid engaging in a prohibited transaction under ERISA. Petitioner further argues that application of the gains tax to the transfer of the Plan asset directly and substantially depletes the assets of the Plan, reduces the amount of benefits payable to beneficiaries under the Plan upon distribution, and imposes additional administrative and recordkeeping burdens upon the Plan. Therefore, petitioner concludes that imposition of the gains tax has a direct and significant impact on the Plan.

We reverse the determination of the Administrative Law Judge.

We first address the Division's motion to strike petitioner's brief on exception on the ground that the brief improperly refers to, relies on and is accompanied by documents which were not part of the record before the Administrative Law Judge. The Division also objects to the submission of four documents which petitioner appended to its brief. The documents submitted were: (1) the American Motors - Union Retirement Income Plan; (2) the amended and restated Trust Agreement between American Motors Corporation and Morgan Guaranty Trust Company of New York, as Trustee; (3) Internal Revenue Service forms 5303 and 2848;

and (4) Internal Revenue Service letters to American Motor Corporation relating to its application for Determination of Collectively Bargained Plans.

Petitioner's attempt to insert these documents into the record at this stage of the proceeding must be rejected. The record before us indicates that petitioner's representatives executed a waiver of a hearing and consented to submit its case for determination based upon a Stipulation of Facts. Pursuant to 20 NYCRR 3000.8(b), petitioner's representatives took the opportunity to submit one additional document as an exhibit for inclusion in the record. However, the record indicates and petitioner's representative now concedes in an affidavit that he did not specifically request that the documents at issue here also be included as exhibits to the Stipulation. Petitioner's belated attempt to place those documents in the record at this stage must fail. As we have consistently held, evidence not submitted to the Administrative Law Judge will not be considered by the Tribunal as part of the exception process (see, Matter of Modern Refractories Service Corporation, Tax Appeals Tribunal, December 15, 1988; Matter of Ronnie's Suburban Inn, Inc., Tax Appeals Tribunal, May 11, 1989; 20 NYCRR 3000.13[a][3]).

Petitioner also asserts that despite its failure to introduce the disputed documents into evidence at the appropriate time, it is nonetheless entitled to do so now because the Division has raised for the first time in its brief an issue relating to the effect of the gains tax on the administration of the Plan. That contention is without merit. The Division has consistently taken the position that the ERISA preemption clause does not preempt application of the gains tax to the subject transaction and its argument with regard to the administrative burden of the gains tax is consistent with that original position. Accordingly, we grant the Division's motion to strike from the record the documents appended by petitioner to its brief. We will, however, consider petitioner's brief on exception, ignoring those sections which refer to the improperly annexed documents.

We now turn to the remaining issue of whether the Administrative Law Judge properly found that the preemption clause of ERISA preempts the application of the gains tax to the transfer by petitioner of certain real property.

ERISA is a comprehensive statute enacted to promote and protect the interests of participants and their beneficiaries in employee benefit plans by subjecting the plans to uniform federal regulation (Shaw v. Delta Air Lines, 463 US 85, 90; Sasso v. Vachris, 66 NY2d 28, 494 NYS2d 856, 858; see, 29 USC § 1001). It establishes certain substantive requirements concerning participation, funding and vesting of pension plans (see, 29 USC §§ 1051-1086) and also imposes various procedural standards regarding disclosure, reporting and fiduciary responsibility (see, 29 USC §§ 1021-1031, 1104-1114; Metropolitan Life Ins. Co. v. Massachusetts, 471 US 724, 732).

The ERISA statute also contains an express preemption provision which provides, with exceptions inapplicable here,[2] that it "supersede[s]
any and all State[3] laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA (29 USC § 1144[a], emphasis supplied). This preemption clause has been characterized as "deliberately expansive" in its breadth and scope and is designed to establish employee benefit plan regulation as a matter exclusively of federal concern (Pilot Life Ins. Co. v. Dedeaux, 481 US 41, 46). Because it is undisputed that the Plan involved in this case is covered by ERISA, the issue presented is whether the gains tax impermissibly "relates to" the Plan within the meaning of the preemption provision.

The Supreme Court has consistently stated that the language "relate to" is to be given its broadest common sense meaning such that "[a] law 'relates to' an employee benefit plan, in the

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[2]ERISA's Savings Clause expressly excepts from preemption any laws that regulate insurance, banking or securities (29 USC § 1144[b][2][A]), as well as generally applicable criminal statutes (29 USC § 1144[b][4]). In contrast, Congress has specifically endorsed the preemption of state tax laws insofar as they are found to "relate to" employee benefit plans (29 USC § 1144[b][5][B]; Roemer v. Northwest Airlines, 603 F Supp 7, 12).

[3]The term "state" is defined as including:

> "...a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by...[ERISA]" (USC § 1144[c][2]).

normal sense of the phrase, if it has a connection with or reference to such a plan" (Shaw v. Delta Air Lines, supra, at 96-97). In setting limits on this broad interpretation, the Court has recognized that the preemptive scope of ERISA is not all encompassing and that it does not extend to invalidate state statutes which affect employee benefit plans in "too tenuous, remote or peripheral a manner" (id., at 100, n 21). Only those state laws which purport to "regulate, directly or indirectly, the terms and conditions of employee benefit plans" will be found to be preempted (see, 29 USC § 1144[c][2]; see also, Sasso v. Vachris, supra, 494 NYS2d 856, 858). Where, as here, the law involved is a law of general application and not specifically designed to affect employee benefit plans, the Court has recognized that such indirect or collateral state action may, in the proper circumstances, be found to encroach upon this area of exclusive federal concern (Alessi v. Raybestos-Manhattan, Inc., 451 US 504, 525; see, Pilot Life Ins. Co. v. Dedeaux, supra, at 47-48). Hence, it is clear that the preemptive scope of ERISA is not to be restricted to state laws specifically aimed at employee benefit plans or ERISA subject matter (see, Shaw v. Delta Air Lines, supra, at 98; Alessi v. Raybestos-Manhattan, Inc., supra, at 525; Rebaldo v. Cuomo, 749 F2d 133, 137-138 [2nd Cir 1984], cert denied 572 US 1008).

Preemption is a question of Congressional intent (see, Fort Halifax Packing Co. v. Coyne, 482 US 1, 8; Shaw v. Delta Air Lines, supra, at 95). With regard to the preemption of tax statutes, Congress has specifically endorsed the preemption of state tax laws insofar as they are found to "relate to" employee benefit plans (see, 29 USC § 1144[b][5][B]; Northwest Airlines v. Roemer, 603 F Supp 7, 12 [D. Minn. 1984]; National Carriers' Conference Comm. v. Heffernan, 454 F Supp 914, 916 [D. Conn. 1978]). In analyzing whether application of the gains tax in this case "relates to" an employee benefit plan, we find it helpful to compare those cases where state tax laws have been found to be preempted with those that have withstood the preemption challenge.

Several federal courts have ruled that ERISA's preemptive effect applies to state tax laws. In General Motors Corp. v. California State Bd. of Equalization (815 F2d 1305 [9th Cir 1987], cert denied 485 US 941), the Ninth Circuit examined whether ERISA preempted a premium tax assessed against insurance companies and calculated, in part, with regard to benefits paid to beneficiaries under ERISA plans. There the court held that:

> "[T]he [Supreme] Court's broad reading of the preemption clause leads us to conclude that the tax at issue 'relates to' benefit plans. The tax at issue is computed on the basis of benefits paid by the plans; reference to plan activities in computing the tax is unavoidable. In its broadest sense, therefore, ERISA applies...
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> "We recognize that the preemption clause is not all encompassing and that state laws may affect benefit plans in 'too tenuous, remote or peripheral a manner' to justify preemption. Nevertheless, we conclude that the explicit use of plan payments in calculating the tax satisfies the modest requirements for bringing the clause into play." (Id., at 1309, citations omitted.)

In that case, however, the court concluded that the preempted tax was preserved by ERISA's Savings clause for insurance laws (see, 29 USC 1144[b][2][A]) because the tax was intimately associated with the business of insurance (General Motors Corp. v. California State Bd. of Equalization, supra, at 1310-1311). Similarly, in National Carriers' Conference Comm. v. Heffernan, supra, the court determined that ERISA preempted a Connecticut tax statute which imposed a 2.75% tax directly upon benefits paid pursuant to an ERISA benefit plan. Because the statute was "not merely a general taxing provision that catches employee benefit plans within its wide sweep" but rather was directed exclusively at such plans, the court in National Carriers' Conference found that the statute "related to" ERISA-covered plans, and ruled that it was preempted by ERISA (id., at 915, 918).

In contrast to those cases, the Sixth Circuit in Firestone Tire & Rubber Co. v. Neusser (810 F2d 550 [6th Cir. 1987]) upheld a 2% municipal tax statute which imposed an income tax on all employees without reference to their status as ERISA plan participants. The court observed that the statute was a neutral tax of general application which taxed income without regard to its ultimate disposition and thus was not connected or related to benefit plans. Hence, it was concluded that the state tax law affected the employee benefit plan in too tenuous, remote and peripheral a manner to warrant a finding that the law "relates to" a plan within the meaning of the preemption provision (id., at 554, 556).

While noting that no single test has been formulated to determine when a state tax law falls within the "remote and peripheral" exception to the preemption clause, the court in Firestone found three factors relevant to its analysis: (1) whether the law involves a traditional area of state authority; (2) whether the law affects relationships among principal ERISA parties; and (3) whether the possible effect of the law on an ERISA plan is purely incidental (id., at 555-556). Application of those factors by the court resulted in the conclusion that the tax statute was not preempted by ERISA (id., at 556).

In refining further what constitutes incidental impact for the purposes of ERISA, the Second Circuit has observed that where "a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated" (Rebaldo v. Cuomo, 749 F2d 133, 139, supra). Accordingly, in Rebaldo, the court found that the New York Public Health Law, a law of general application, was not preempted despite its indirect economic impact on hospital rates chargeable to employee benefit plans. In a subsequent Second Circuit decision involving a Connecticut escheat statute (Aetna Life Ins. Co. v. Borges, 869 F2d 142, 146-147 [2nd Cir 1989], cert denied __US__ , 110 S Ct 57), the court explained further that where a law of general application is involved, "what triggers ERISA preemption is not just any indirect effect in administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit". As the court in Aetna noted, a direct impact by a state law in the administration of benefits under an ERISA plan "would create a 'patchwork scheme of regulation' among the several states, significantly interfering with the goal of ERISA to provide uniform national regulation of benefit plans" (id., at 147, quoting Fort Halifax Packing Co. v. Coyne, 482 US 1, 11, supra).

In applying the above principles to the instant matter, we conclude that the imposition of the gains tax on the Plan is too tenuous, remote and peripheral to require preemption pursuant to ERISA's preemption clause. We begin our analysis by examining the gains tax law itself. Tax Law § 1441 imposes a 10% tax upon the gains derived from the transfer of real property within New York. The tax is not directed at ERISA plans nor upon benefits paid under the Plan but rather is a neutral tax of general application (see, Firestone Tire & Rubber Co. v. Neusser, supra). As a law of general application, the gains tax is easily distinguishable from those taxing statutes which have a specific focus on ERISA plans or benefits. The statute involved in General Motors for example, imposed a tax which was computed in part on the basis of benefits paid pursuant to the terms of an ERISA-covered plan, thus requiring explicit reference to plan activities in computing the tax. In contrast, the gains tax is wholly unrelated to the terms and activities of the Plan or to any benefits paid pursuant to the Plan provisions. Further, unlike the tax at issue in General Motors, the gains tax is imposed upon an activity which is merely incidental to the primary purpose and function of an ERISA-covered plan. The tax law involved in National Carriers' Conference is also plainly distinguishable because the tax at issue in that case was directed specifically and exclusively at employee benefit plans and was calculated based upon amounts paid pursuant to those plans. By contrast, the gains tax makes no reference to employee benefit plans or to plan payments.

While acknowledging that the gains tax is a law of general applicability, petitioner nonetheless urges that application of the tax in this case imparts a direct and substantial economic and administrative burden on the Plan. We agree that the obvious impact of this law on the Plan is an economic one; as applied here, the tax requires petitioner to pay a real property transfer gains tax in the amount of $205,262.62. As the above discussion indicates however, economic impact alone is not sufficient to require invalidation of the statute. Instead, we must ascertain if the gains tax impacts on the primary administrative functions of the benefit plan: i.e., we must look to the law's effect on the relations among the principal ERISA entities and the effect of the state law on the ERISA plan (see, Aetna Life Ins. Co. v. Borges, supra; Firestone Tire & Rubber Co. v. Neusser, supra).[4]

Petitioner insists that the gains tax affects the administration of the Plan in several significant ways. Specifically, petitioner argues that because the tax directly and substantially depletes the Plan fund, it may trigger an obligation on the part of the Employer to make additional annual contributions to the Plan or result in a reduction of the benefits payable to the Plan beneficiaries. Further, petitioner argues that because it transferred the real property to avoid engaging in a prohibited transaction under ERISA, imposition of the gains tax as a result of that conduct may be viewed as an impermissible regulation of an ERISA plan.

We are not persuaded by these contentions. The record is devoid of any facts that establish that the amount of the benefits payable to the Plan beneficiaries will be affected in any way by imposition of the tax. As petitioner explained at oral argument, the Plan involved here is a defined benefit plan.[5] This means that if the imposition of the tax causes a reduction in the trust fund the Employer is under a corresponding duty to increase its contributions to the Plan fund to ensure that the fund remains actuarially sound (see, 29 USC § 1002[35]).[6] Consequently, it appears that the beneficiaries would not suffer any reduction in their benefits as a result of the imposition of the tax because as petitioner points out, the Employer must

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[4] The first of the three prong test set forth in Firestone, i.e., whether the state law represents a traditional exercise of state authority, is not particularly useful where the state law at issue is a tax statute. As noted previously, the federal courts have stated that state tax laws may be preempted by the federal ERISA legislation (Firestone Tire & Rubber Co. v. Neusser, supra, at 555).

[5] Obviously, because the Plan is not in evidence, we are unable to assess the accuracy of petitioner's claim that the Plan may be classified as a defined benefit plan. For purposes of the above discussion however, we are assuming petitioner's description is accurate.

[6] In contrast, if the Plan was a "defined contribution plan", any reduction in benefits due to the imposition of the gains tax would not trigger an obligation on the part of the employer to make additional contributions (see, 29 USC § 1002[34]).

increase its annual contribution to the Plan to make up for any loss. Petitioner's argument that such duty would be meaningless if the Employer went into bankruptcy or defaulted on its obligation is pure speculation at best and in the absence of any evidence that the Employer is in fact in financial difficulties does not constitute a direct or significant economic impact on the Plan. Consequently, it appears that petitioner has failed to demonstrate that the application of the gains tax would directly deplete the funds otherwise available for providing benefits. Even if we were to accept petitioner's contention that the imposition of the gains tax would result in some economic impact on the Plan, the Second Circuit decisions in Aetna and Rebaldo instruct that such impact would not in and of itself require preemption. In Aetna, the court noted that while the escheat law at issue would ultimately be reflected in higher premiums and/or lower benefits and profits, these indirect economic effects were not deemed sufficiently substantial to warrant a finding of preemption. Similarly, in Rebaldo, the court held that the fact that the application of the Public Health Law would increase the plan's costs of doing business in New York State was insufficient to preempt the law. Accordingly, even if petitioner had presented evidence demonstrating that imposition of the gains tax would result in a lowering of benefits available to the Plan beneficiaries,[7] it would be insufficient to require preemption here (see, Aetna Life Ins. Co. v. Borges, supra; Rebaldo v. Cuomo, supra).

We are also unpersuaded by petitioner's argument that the gains tax law reaches or regulates the Plan because petitioner was forced to either sell

the property and incur the gains tax or run the risk of violating the ERISA provisions regarding

[7]A similar argument was raised by the petitioners in Mackey v. Lanier Collections Agency & Service (486 US 825) in the context of a challenge to a garnishment statute. The petitioners in Mackey, who were trustees of an employee welfare benefit plan under ERISA, argued that Georgia's general garnishment statute should be preempted because its application to the employee welfare benefit plan would directly reduce the funds otherwise due to the beneficiary - debtors and additionally would result in substantial administrative burdens and costs. The Court was not persuaded by those arguments and concluded that ERISA did not preclude the use of state law mechanisms of executing judgments against ERISA welfare benefit plans (cf., Northwest Airlines v. Roemer, 603 F Supp 7, supra [Minnesota tax statute which provided for collection of delinquent state taxes through garnishment of benefits derived from an ERISA-covered pension plan held preempted]).

investment requirements (see, 29 USC § 1106[a][1][A]; IRC § 4971). Initially, it is important to note that the gains tax did not require the transfer. Instead, the gains tax was imposed upon conduct undertaken by petitioner so as to comply with ERISA and the stipulated facts indicate that petitioner had other options available to it in addition to selling the property. Specifically, the stipulated facts indicate that two other alternatives were considered: obtaining an administrative exemption for the lease arrangement or revising the lease to provide for higher rental payments. It appears that petitioner rejected the first option upon advice of counsel that receipt of the exemption could not be assured. As to the second option, it appears that the parties to the lease were "unwilling" to revise the lease terms. Viewed in that light, we are unable to find support in the record for petitioner's position that the gains tax regulates the Plan because petitioner was "forced" to choose between facing the gains tax or violating ERISA investment rules.

Petitioner also suggests that application of the gains tax would impair the Employer's ability to establish a uniform benefit administration scheme because it would subject the Plan to regulatory requirements in New York that it would not be subject to in other states, thus compelling the Trustee to adopt a course of conduct in New York different from other states. Specifically, it is asserted that Tax Law Article 31-B imposes certain reporting and recordkeeping requirements on the transferor of real property. As the transferor of real property, petitioner is required to file a form with the Department of Taxation and Finance containing certain information in reference to the transfer of the real property (Tax Law § 1447[1][b]) and also furnish certain affidavits and other pertinent information so that the Department of Taxation and Finance can issue a tentative assessment of the tax to be levied (see, Tax Law §§ 1447[2], 1448[2]). Pursuant to Tax Law § 1448(3) petitioner is additionally required to "keep complete records of acquisitions and transfers of interests in real property".

While we accept petitioner's contention that the imposition of the gains tax will require it to keep certain records in New York State which it may not be required to keep in other states, it is our view that these requirements which in essence merely require petitioner to document and to keep complete records of the transfer, are not substantial enough to require preemption. Like the incidental administrative burden imposed by the laws at issue in Aetna and Rebaldo, the recordkeeping and recording requirements imposed by Tax Law Article 31-B cannot be said to affect the primary administrative functions of the Plan. In Aetna, the escheat law was upheld despite the fact that the law would not only require certain administrative and accounting adjustments to comply with the law but would also subject the plan to potentially inconsistent state regulation. The Aetna court emphasized that the administrative impact of the escheat law was limited to incidental effects only and did not impact upon the original determination of the eligibility of an employee for benefits under the plan (see, Aetna Life Ins. Co. v. Borges, supra). Similarly in Rebaldo, the New York Public Health Law survived a preemption challenge even though application of the law resulted in increased operational costs for the employee benefit plans and subjected them to dissimilarities in the cost of doing business. Despite this economic impact, the law was not invalidated since it did not affect the structure, administration or types of benefits provided by the Plan (see, Rebaldo v. Cuomo, supra). In our opinion, the recording and recordkeeping requirements imposed by Tax Law Article 31-B are no more onerous than the administrative burden discussed in Aetna and Rebaldo and do not require preemption here. Certainly the recordkeeping requirements imposed by Tax Law Article 31-B cannot be said to affect the primary administrative function of the benefit plans. These requirements simply do not implicate determination of an employee's eligibility for a benefit or affect in any way the calculation or amount of the benefit or whether the benefits are to be paid. It is clear that the recordkeeping and recording requirements imposed by Tax Law Article 31-B simply reflect the cost of doing business in New York and is wholly unrelated to petitioner's "host of obligations" under the ERISA plan regarding the eligibility of claimants, the calculation of benefit levels, or the processing of claims or disbursement of benefits.

In summary, we conclude that upon the facts presented here the gains tax does not relate to the ERISA-covered plan and accordingly is not preempted by ERISA.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is in all respects granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Morgan Guaranty Trust Company of New York is dismissed; and

4. The Division of Taxation's denial of the refund claim is sustained.

DATED: Troy, New York
May 10, 1990

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner

Dissenting Opinion in the Matter of the Petition of

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

John P. Dugan (dissenting):

I respectfully dissent and would affirm the determination of the Administrative Law Judge. The issue here is whether imposition of the gains tax impermissibly "relates to" the Plan within the meaning of section 514(a) of ERISA.

I am persuaded it does.

In my view, direct state taxation upon the earnings derived from the sale of a Plan asset conflicts fundamentally with the purpose underlying the enactment of ERISA because it directly depletes the funds which presumably would be available to the beneficiaries under the Plan.

My point of departure from the majority is the fact that the gains tax here, unlike any of the state tax laws challenged to date, is applied directly to an intrinsic part of the plan, i.e., to the earnings derived from the sale of a Plan asset by the Plan itself. In this sense the tax is far more "related to" the Plan here, than other state taxes which have been determined to be preempted.

I cannot agree with the conclusion of the majority that imposition of the tax under these circumstances "is too tenuous, remote and peripheral to require preemption." The case law underlying the "tangential" exception does not deal with a tax directly on earnings from the sale of the assets of the Plan and for that reason I find the majority's reliance on that well reasoned rule not persuasive.

Further, I cannot agree with the majority that petitioner has failed to show that imposition of the tax constitutes a direct or significant impact upon the Plan because it has not established that the amounts of benefits payable under the Plan would be affected by the imposition of the tax and in any event the employer has a responsibility to make up for any loss sustained by the

Plan due to the application of the tax.

Where, as here, the tax is imposed directly on the earnings from the sale of a Plan's assets, that in itself is sufficient to reach the conclusion that the tax "relates to" the Plan in an impermissible way and is preempted. That is the bright line test. Under such circumstances, to require, as would the majority, that petitioner also show the degree of impact on benefits is unnecessary. Reference to General Motors Corp. v. California State Bd. of Equalization, 815 F2d 1305 (9th Cir 1987) is instructive. There, the tax at issue was computed in part on the basis of benefits paid by the plans. The court concluded "that the explicit use of plan payments in calculating the tax satisfies the modest requirements for bringing the clause into play (id, at 1309, citations omitted).

On this latter point, and in light of the well documented concerns of Congress with regard to the financial soundness of private pension plans leading to ERISA (see, Shaw v. Delta Air Lines, 463 US 85, 90; Nachman Corp. v. Pension Benefit Guaranty Corp., 446 US 359, 366-367), it would be an anomaly to conclude that preemption applies to state laws affecting administration of the Plan but not to state tax laws applied directly to the earnings from the sale of Plan assets.

The history of the preemption clause, so clearly articulated in the determination of the Administrative Law Judge, makes it clear that Congress rejected efforts by the Departments of Labor and the Treasury to allow states to regulate the tax aspects of retirement plans.

In fact, only state banking, insurance and securities laws are specifically excepted from the preemption (ERISA 514[b][2][A]). State tax laws are not. The application of the preemption language to state tax laws gains sharper focus when viewed in the light Congress' 1980 amendment of section 514 (Public Law No. 97-473) to except Hawaii's Prepaid Health Care Act from being preempted and in so doing specified that ERISA's preemption provision applied to state tax laws.[8]

Finally, requiring the employer to make up for any loss sustained by the Plan as a result of a tax on the assets of the Plan interferes with the operation of the Plan in an impermissible way. In addition, application of Tax Law Article 31-B would impose additional recording and recordkeeping requirements on the Plan which it would not be subject to in other states. While the majority finds these burdens to be insubstantial, it is submitted that these administrative burdens, in combination with the direct economic impact on the Plan assets noted above, demonstrate that application of the gains tax does impermissibly "relate to" the Plan at issue here and should be preempted.

DATED: Troy, New York
May 10, 1990

/s/John P. Dugan
John P. Dugan
President

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[8]ERISA § 514, as so amended, provides:

"(a) EXEMPTION FROM PREEMPTION. - Section 514(b) of Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144(b)) is amended by adding at the end thereof the following new paragraph:

'(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be contrued to exempt from subsection (a) -

(i) any State tax law relating to employee benefit plans... (emphasis added).'"