

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AMERICAN EXPRESS COMPANY AND AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION	:	DECISION DTA No. 803265
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	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 20, 1990 with respect to the petition of American Express Company and American Express International Banking Corporation, c/o Stroock & Stroock & Lavan, Esqs., 7 Hanover Square, New York, New York 10004-2594 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. The Division of Taxation appeared by William F. Collins, Esq. (Paul A. LeFebvre, Esq., of counsel). Petitioner appeared by Stroock & Stroock & Lavan, Esqs. (Kevin L. Smith, Esq. and William A. Rome, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a brief in response. Oral argument was heard on November 14, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.¹

ISSUES

I. Whether petitioner's June 15, 1983 transfer of its former headquarters located at 125 Broad Street, New York, New York, pursuant to certain documents, was entitled to exemption from gains tax under Tax Law § 1443(6).

¹In accordance with our decision in Matter of American Express Co. and American Express Int. Banking Corp. (Tax Appeals Tribunal, July 3, 1991), President John P. Dugan took no part in deciding the case herein.

II. Whether the March 18, 1983 claimed date of execution of these documents has been confirmed by independent evidence.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Prior to commencement of the proceedings herein, the duly authorized representatives for the parties entered into a stipulation of facts. This stipulation, modified only insofar as to omit specific references to the various exhibits included with the stipulation, is set forth hereinafter.

Stipulated Facts

Background

1. American Express Company and American Express International Banking Corporation (hereinafter jointly called "AMEX") was, from 1974 to 1983, formerly the owner and major occupant of the building at 125 Broad Street, New York, New York (the "Broad Street Property").

2. AMEX was the owner, by assignment, of the rights of the lessee in the ground lease for the Broad Street Property, together with certain franchise and lease agreements relating to the use and operation of the building.

3. AMEX had maintained its principal headquarters at the Broad Street Property since 1974.

4. In 1982 AMEX had outgrown its space at the Broad Street Property and required more space for its expanding world-wide operations.

5. In November 1981, Olympia & York Battery Park Company ("O&Y") entered into a sublease with the Battery Park City Authority ("BPCA") dated as of September 1, 1981 (the "Battery Park Master Sublease"), which provided for O&Y to develop the commercial center at Battery Park City, and obligated O&Y to construct four towers for use as commercial office space.

6. The Broad Street Transaction (described hereinafter) was structured in the form of a sale-leaseback.

7. As part of the proposed sale transaction, AMEX was to obtain the right to occupy a 51-story office building tower which was to be constructed on Parcel C of the commercial center of Battery Park City (the "Battery Park Transaction").

8. O&Y was to purchase the Broad Street Property and then lease the premises back to AMEX for a limited time so that AMEX's business operations could continue to function from the Broad Street Property until AMEX could move into the office building tower which was to be built on Parcel C at Battery Park City.

9. The negotiations for the sale of the Broad Street Property by AMEX to O&Y were contingent upon AMEX obtaining, inter alia: (a) a separate leasehold interest in Parcel C; and (b) the requisite government approvals by the Public Authorities Control Board ("PACB") for its proposed new headquarters site and office building tower at Battery Park City.

10. The authorized representatives of AMEX and O&Y engaged in arms-length negotiations beginning in or around March 1982 for the Broad Street Transaction.

11. Negotiations for the Broad Street Transaction involved, among other terms and documents, the following:

- (a) the sale by AMEX of its rights in the ground lease on the Property and of its interests in the building at the Property and the assignment by AMEX to O&Y of the franchise and lease agreements relating to the use and operation of the building on the Property;
- (b) the sublease by O&Y to AMEX of all of the space within the building located at the Property;
- (c) the management by O&Y or its affiliate of the Broad Street Property during the period in which AMEX remained in occupancy at the Building;
- (d) such other collateral documents as were necessary to carry out the agreements set forth herein in subsections (a), (b) and (c) of this paragraph.

12. The principal documents with respect to the Broad Street Transactions were (a) the Agreement of Sale and (b) the Assignment of Ground Lease and Assumption (hereinafter collectively referred to as the "Operative Agreements"). In addition, the assignment of Chilled Water Agreement, which provided chilled water to the 125 Broad Street Property, the sublease by O&Y to AMEX of all of the space within the building located at the Broad Street Property

and the Management Agreement of O&Y or its affiliate of the Broad Street Property were also principal documents in the Broad Street Transaction.

13. In April 1982, a draft of the Agreement of Sale for the Broad Street Property was circulated among the parties.

14. Additional drafts of the Agreement of Sale were circulated after April 1982 up to and including March 1983.

15. Concurrently with the negotiations for the Broad Street Transaction, the authorized representatives of AMEX, O&Y and BPCA engaged in arms-length negotiations, beginning in or around April 1982, on major aspects of the Battery Park Transaction.

16. Under the terms of the Battery Park Master Sublease, between O&Y and BPCA, O&Y had the right to require BPCA to sever each of the Parcels and obtain a separate, independent lease (a "Severance Lease") therefor.

17. At the same time that O&Y was negotiating the Agreement of Sale of the Broad Street Property, O&Y was also negotiating its Severance Lease for the Battery Park City transaction.

18. The Severance Lease was executed by O&Y and BPCA on June 15, 1983.

19. O&Y, as assignor, on June 15, 1983, contemporaneously with its execution of the severance lease, assigned its leasehold interest in Parcel C to AMEX and two related corporations, as assignees, thereby making these entities the direct tenants of BPCA.

20. March 15, 1983 was designated as the day for the execution of the Operative Agreements of the Broad Street Transaction and the principal documents of the Battery Park Transaction. Subsequently, a three-day adjournment was agreed upon, and the execution of the documents was scheduled for March 18, 1983.

21. On March 18, 1983, the documents relating to the transfer of the Broad Street Property, including the Operative Agreements, and certain documents relating to the Battery Park Transaction were signed and notarized. On the same date as the execution of the Operative Agreements, the parties and BPCA entered into and executed an agreement referred

to therein by the parties and BPCA as the Escrow Agreement (the "Escrow Agreement"), dated March 18, 1983. The parties delivered the Operative Agreements to the escrow agent designated in said Escrow Agreement, Kaye, Scholer, Fierman, Hayes & Handler (the "Escrow Agent") on March 18, 1983.

22. The Operative Agreements were signed by the authorized representatives of the parties, and notarized by Messrs. John Noonan and Stephen P. Norman on March 18, 1983.²

23. The notaries were not parties to the transaction. Mr. John Noonan was a paralegal at the law firm of Olnick, Boxer, Blumberg, Lane & Troy and Mr. Stephen P. Norman was the Secretary of the American Express Company.

24. On March 18, 1983, pursuant to the Escrow Agreement of the same date, O&Y and AMEX delivered the following documents relating to the Broad Street Transaction to the Escrow Agent:

- (a) four copies of the Agreement of Sale;
- (b) four copies of the Assignment of Ground Lease with Assumption;
- (c) four copies of the Assignment of Chilled Water Agreement;
- (d) four copies of the Sublease;
- (e) two copies of the Memorandum of Sublease; and
- (f) four copies of the Management Agreement.

25. AMEX and O&Y delivered to the Escrow Agent the Agreement of Sale, the Assignment of Ground Lease and Assumption, and the Chilled Water Agreement to be held by the Escrow Agent pending the approvals of the PACB and the Board of Estimate.

26. In addition to delivering to the Escrow Agent the documents related to the Broad Street Transaction, AMEX and O&Y also delivered certain documents central to the Battery Park Transaction. Included among these documents were:

²By Order dated December 20, 1989, the stipulation was vacated insofar as it concludes that the Operative Agreements were fully signed on March 18, 1983.

- (a) the Construction Agreement, which bound O&Y to construct the office building tower on Parcel C of Battery Park City which would serve as AMEX's new headquarters;
- (b) four executed copies of the Letter Agreement with respect to Kiosks, or stalls to be located within the Winter Garden Atrium structure on Parcel B of Battery Park City (the "Kiosk Letter Agreement");
- (c) four executed copies of the Letter Agreement from AMEX to O&Y with respect to broker's commission and other broker compensation (the "Broker Letter Agreement"); and
- (d) four executed copies of the Letter Agreement from O&Y to AMEX with respect to the central plant constructed on Parcel D of Battery Park City (the "Central Plant Letter Agreement").

27. The release of the documents by the Escrow Agent and the closing of the Broad Street Transaction were contingent on the fulfillment of the conditions set forth in the Escrow Agreement of March 18, 1983.

28. On June 15, 1983 the documents were released by the Escrow Agent and the Broad Street and Battery Park Transactions formally closed.

29. On June 15, 1983, AMEX delivered to O&Y the Assignment to the Leasehold interest in the Broad Street Property, and AMEX and O&Y executed, delivered and exchanged all other documents collateral thereto for the Broad Street Transaction, as required by the Agreement of Sale, as well as documents for the Battery Park Transaction including the Severance Lease.

Board of Estimate Approval

30. In order to close the Broad Street Transaction, AMEX needed to obtain approval from the Board of Estimate of the City of New York (the "Board of Estimate") of the transfer of a certain Chilled Water Agreement dated June 28, 1974 (the "Franchise").

31. The Franchise permitted AMEX to maintain and use two pipes and a conduit under Broad Street.

32. On March 10, 1983, the law firm of Tufo & Zuccotti, AMEX's counsel with regard to the Board of Estimate approval of the transfer of the Franchise, sent a letter to the Bureau of

Franchises of the City of New York, concerning the Board of Estimate's approval of the transfer of the Franchise.

33. The Assignment of the Franchise was signed by AMEX and O&Y on March 9, 1983 (the "Assignment of the Franchise").

34. After the signing of the Assignment of the Franchise, AMEX submitted it to the Board of Estimate for approval.

35. Prior to granting approval of the Assignment of the Franchise, the Board of Estimate, through its Director of Franchises, requested by letter dated March 11, 1983 that the parties submit a copy of the Assignment of the Ground Lease and Assumption.

36. The Board of Estimate would not approve the Assignment of the Franchise until it was in receipt of a signed copy of the Assignment of Ground Lease and Assumption.

37. Pursuant to the request of the Board of Estimate, AMEX delivered a copy of the Assignment of Ground Lease and Assumption, signed on March 18, 1983. The document was transmitted with a cover letter to the Board of Estimate on March 22, 1983. AMEX's March 22, 1983 letter to the Board of Estimate, which was annexed to the aforementioned document, was clocked in as received by the Bureau of Franchises on the same day.

38. In the letter of March 22, 1983, Tufo & Zuccotti advised the Board of Estimate that AMEX sought to have the Assignment of the Franchise considered by the Board of Estimate at the Board's first meeting in April 1983.

39. The request for approval of the Assignment of the Franchise came before the Board of Estimate on April 14, 1983 and consent was granted on that date.

40. The Mayor's approval of the Assignment of the Franchise was obtained on April 26, 1983.

PACB Approval

41. Completion of the Battery Park Transaction required the approval of the PACB.

42. O&Y, BPCA and AMEX were ready, prior to April 1983, to submit the Battery Park Transaction to the PACB for approval at the April 1983 meeting of the PACB.

43. The Broad Street Transaction, as well as the Battery Park Transaction, was dependent upon PACB approval of the Battery Park Transaction.

44. The minutes of the meeting of the Members of the Board of BPCA reflect that a resolution was passed on March 15, 1983 which granted approval and authority to the officers of BPCA to enter into documents necessary to complete the Battery Park Transaction.

45. The BPCA made timely submission of documents concerning the Battery Park Transaction which it deemed necessary for the meeting of the PACB, originally scheduled for April 13, 1983.

46. The PACB meeting scheduled for April 13, 1983 was postponed by the PACB to April 22, 1983, at which time the PACB granted approval of the proposed Battery Park Transaction.

Commencement of Litigation

47. The New York Tax Law, Article 31-B, §§ 1440-1441-C providing for a tax on gains derived from certain real property transfers (the "Gains Tax") was first introduced in the New York State Legislature on February 28, 1983 as part of the Omnibus Budget Bill.

48. The introduction of the Gains Tax took place nearly a year after the commencement of negotiations on the Broad Street and Battery Park Transactions.

49. AMEX executed and delivered to O&Y the Tentative Assessment and Return, as completed by the Department of Taxation and Finance, dated "6-3-83" and designated Assessment No. A0009, together with a certified check payable to the order of the New York State Department of Taxation and Finance in the amount of \$9,172,460.90, representing payment in full of the Gains Tax set forth on the Tentative Assessment and Return.

50. AMEX paid the tax under protest.

51. The New York State Department of Taxation and Finance adjusted the amount of the Gains Tax owed by AMEX to allow for certain deductions, resulting in a tax reduction of \$2,342,070.80, thereby leaving the sum of \$6,829,390.10 in dispute.

52. On April 4, 1985, AMEX filed a written claim for Refund of Real Property Transfer Gains Tax (New York State Department of Taxation and Finance Form TP-165.8) requesting a refund in the amount of \$6,829,390.10, plus interest.

53. The claim was received by the Department of Taxation and Finance on April 9, 1985.

54. The New York State Department of Taxation and Finance acting through its Audit Division, advised AMEX, by letter dated February 3, 1986, that the refund claim was denied in its entirety.

55. AMEX filed a petition to the State Tax Commission,³ Tax Appeals Bureau in April 1986.

56. The Audit Division answered AMEX's petition on September 17, 1986.

The Issue Before The Commission

57. AMEX has applied for a hearing before the New York State Tax Commission to determine whether AMEX is entitled to a refund or a revision of a determination of taxes paid, pursuant to the exemption provided by section 1443(6) of Article 31-B of the New York Tax Law.

Authenticity of Documents

58. The documents submitted with the stipulation are authentic originals, or, where originals were unavailable for submission, authentic and true copies of originals of the documents referred to as Exhibits throughout the stipulation of facts and the parties agree to their admission into evidence at the hearing held in this matter.

Supplemental Stipulation

³Effective September 1, 1987, the adjudicatory functions of the (former) State Tax Commission were assumed by the newly created Division of Tax Appeals (see generally, Tax Law Article 40). All references hereinafter to the State Tax Commission shall be deemed references to the Division of Tax Appeals.

59. On June 16, 1983, O&Y delivered to AMEX the "Purchase Price" of One Hundred Sixty Million Dollars (\$160,000,000) under Section 4 of the Agreement of Sale by wire transfer of Federal funds which amount constituted the consideration for the Broad Street Transaction.

60. The Purchase Price was transferred into the following designated account and its receipt was confirmed by Morgan Guaranty Trust Company on June 16, 1983:

American Express Company General Funds
Account No. 001-53-311
Morgan Guaranty Trust Company
23 Wall Street
New York, New York

Additional Facts
The January 24, 1989 Hearing

At the January 24, 1989 hearing, petitioner provided the testimony of one David Hershberg, Esq. Mr. Hershberg was AMEX's general counsel as well as its chief in-house representative with respect to the Broad Street and Battery Park transactions.

Mr. Hershberg testified to the complexity of the transactions and attendant negotiations which were commenced in March of 1982 and continued thereafter for nearly a year. He testified that the "deal was done" (negotiations had been completed) before March 15, 1983 and that the parties were bound to the deals with no further negotiation of terms of any consequence contemplated or necessary as of such date. The March 15, 1983 date was set for signing the operative agreements, other "ancillary" documents, and also the escrow agreement whereby the documents could be held "in limbo" pending requisite approvals of third parties as described hereinabove. Mr. Hershberg testified that the March 15, 1983 date was mutually extended to March 18, 1983, on which date the operative agreements as well as the escrow agreement were fully executed (i.e. signed by all parties). Mr. Hershberg described the strong desire of all parties to complete the proposed transactions, and noted that the documents had to be "in place" in order to get on the PACB's April calendar.

Motion and Order

On June 16, 1989, the Division of Taxation brought a motion seeking to reopen the hearing in this matter for the purpose of vacating the stipulation set forth above insofar as paragraphs 21 and 22 of the stipulation conclude that the Franchise as well as the operative agreements (the "Agreement of Sale" and the "Assignment of Ground Lease and Assumption") were executed on (or before) March 18, 1983. More specifically, the Division questioned the absence of Sanford Weill's (AMEX's president) signature from copies of such documents as submitted to the Division with petitioner's Claim for Refund. By order dated December 20, 1989 the Division's motion was granted, with the parties' stipulation vacated to the extent that it concluded the operative agreements were fully signed on March 18, 1983. Pursuant to this Order, the hearing was reopened on February 14, 1990 for the purpose of presenting evidence and argument on the date of actual complete execution of the operative agreements.

The February 14, 1990 Hearing

On the February 14, 1990 hearing date, petitioner provided in evidence ink-signed originals of the operative agreements and of the Franchise. Each of these documents bears all signatures required thereon, including specifically that of Sanford Weill, as well as notarizations where required.

In addition to the originals of the noted documents, petitioner provided the testimony of one Steven Norman, Esq. Mr. Norman is, and was on March 18, 1983, AMEX's corporate secretary.

Mr. Norman was present at the March 18, 1983 meeting, held in AMEX's Boardroom, and testified to what transpired there. He was present only to serve as a notary witnessing the signatures and/or taking the acknowledgements of Sanford Weill and George Carmany. Mr. Norman was not himself a "party" to the transaction or a signatory on behalf of any of the parties thereto. Mr. Norman testified that several duplicate originals of the operative agreements were signed, that each was signed in his presence on March 18, 1983 in the same place (i.e., the Boardroom), that several persons were present (e.g., representatives of the parties, their attorneys, the notaries) and that he was fully familiar with Mr. Weill's signature.

Mr. Norman testified specifically that he saw Mr. Weill present in the Boardroom on March 18, 1983, and that he saw Mr. Weill sign the operative agreements (8 or 10 of each such document) on such date. In turn, Mr. Norman testified he affixed his notarial stamp and signature immediately thereafter in witness. At hearing, Mr. Norman confirmed the signature of Mr. Weill as appearing on the inked copies of the operative agreements as well as on the Franchise.

Sanford Weill did not appear in these proceedings. However, he submitted an affidavit stating that he signed the described documents on March 18, 1983.

Included with the Division of Taxation's (hereinafter the "Division") motion papers and in evidence in these proceedings is petitioner's original Claim for Refund, attached to which is a photostatic copy of the Agreement of Sale (as filed with the Claim for Refund). Also included with the motion papers were copies of the Assignment of Ground Lease with Assumption and the Franchise. These copies (the "Division's copies") are identical in substantive content to the ink-signed originals as submitted on February 14, 1990 by petitioner. They differ only in that the signature of Sanford Weill does not appear on the Division's copies of the documents. The March 18, 1983 notarization for Mr. Weill's signature on the Division's copies, however, is by the same notary (Mr. Norman) and appears on both sets of documents, notwithstanding the absence of Mr. Weill's signature. On the Division's copies, as well as on petitioner's originals, all other signatures appear where called for, together with notarizations, dated March 18, 1983, where called for. Careful comparison of the Division's copies with the petitioner's inked originals reveals slight differences as to the physical placement of the various signatures. Such small differences in placement are inconsequential and are apparently attributable either to photocopying placement and/or to individual executions of multiple original copies of the documents.

Petitioner noted that the key documents for both transfers were placed in escrow to "give finality to the transactions' terms and to preserve the agreements pending approvals." In addition, the escrow agreement referenced the documents deposited therein to be "executed",

and in turn defined "executed" to mean signed by an authorized officer of each party in question, and notarized, where provided for in the document.

Paragraph 18 of the Escrow Agreement relates, inter alia, to the potential enactment of a gains tax and provides, in pertinent part, as follows:

"In the event that as of the date of the fulfillment of the conditions of this escrow, there shall have been (x) enacted by the State of New York any legislation which shall have increased the Real Property Transfer Tax payable in connection with the conveyance of any interest in real estate or (y) the enactment of any legislation by the State of New York which shall impose a gains tax on the transfer of real property or any interest in real property or a tax of similar nature or import, whether similar or dissimilar to the gains tax heretofore enacted as Article 31-A of the Tax Law on July 11, 1981 ('Gains Tax') or (z) proposed for enactment by the State of New York any legislation or program which would increase the Real Property Transfer Tax or impose a gains tax either of which taxes would (i) be retroactive from the date of enactment to the date on which the escrow conditions are satisfied, or (ii) would effect any of the within transactions, then either AMEX or O&Y, by notice to the other parties, may conclusively determine that the escrow conditions have not been satisfied. Within 10 days after such notice is given, any other party may elect to pay such increases by notice to the other parties, in which event such determination shall be of no force or effect."

OPINION

In his determination, the Administrative Law Judge concluded that independent evidence confirmed that the Operative Agreements were signed by all parties on March 18, 1983 and that such documents did, in fact, constitute a written contract between the parties. On this basis, the Administrative Law Judge concluded that the subject transfer was exempt from the gains tax pursuant to Tax Law § 1443(6).

The Administrative Law Judge concluded that the testimony of Mr. Norman, the notary public, was independent evidence that the Operative Agreements were executed on March 18, 1983. In determining that the Operative Agreements constituted a written contract, the Administrative Law Judge noted that the necessary approvals, which came subsequent to the enactment of the gains tax, were in a third party's control and not in the control of the contracting parties. Furthermore, the Administrative Law Judge found that the gains tax contingency language in the Escrow Agreement was also in the control of a third party.

In its exception, the Division argues that petitioner has not established by independent evidence that a binding contract was entered into on or before March 28, 1983 and, accordingly, the Division asserts that petitioner has failed to demonstrate that its transfer is entitled to an exemption from the gains tax.

The Division argues that neither the Escrow Agreement nor the notarizations constitutes independent evidence that there existed a written contract. Further, the Division points to the fact that Mr. Weill's signature was clearly absent from the documents submitted to the Division; however, the missing signature was notarized anyway.

With respect to the Operative Agreements, the Division contends that these agreements contained an unfulfilled condition which was within the control of the parties. Therefore, the Division asserts that the parties had not bound themselves to the transaction and, thus, there was no valid contract between the parties.

The Division argues that the Escrow Agreement and its related documents make it clear that the subject transfer was expressly conditioned upon and subject to PACB approval of the terms and conditions of the Battery Park Transaction and also that the laws of New York required petitioner to submit the proposed transaction to the PACB for approval. The Division, citing to Matter of Bredero Vast Goed, N.V. v. Tax Commn. of State of New York (146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105), urges that since the Operative Agreements expressly made the sale subject to approval by the PACB, it compels the conclusion that the agreement to transfer the property was not binding until such time as the approval was actually obtained. Because the approval did not occur until later in 1983, the Division contends that a binding contract did not exist within the meaning and intent of Tax Law § 1443(6) prior to March 28, 1983. The Division argues that pursuant to the Escrow Agreement the parties had the power to negotiate and nullify the Battery Park Transaction, and, therefore, also had the power to control the Broad Street Transaction, after the effective date of the gains tax.

In response, petitioner contends that the Division has the burden of proving that the determination rendered by the Administrative Law Judge was incorrect as a matter of law.

Secondly, petitioner argues that the subject transfer was made pursuant to a written contract. Petitioner states that in determining whether a written contract exists, it is necessary to focus upon the objective intent of the parties and not, as the Division argues, on whether there is "a sense of binding action by the parties, above and beyond the signing of a contract" (petitioner's brief, p. 26, quoting the Division's brief, p. 7).

Moreover, petitioner argues that the Operative Documents executed on March 18, 1983 constituted a written contract. Petitioner asserts that the operative documents in question are the Agreement of Sale and the Assignment of Ground Lease with Assumption. Petitioner states that to include the Escrow Agreement as part of the Operative Agreements would be improper as a matter of law. Petitioner alleges that the Escrow Agreement in no way diminishes the binding nature of the Agreement of Sale and that there was no question that the material elements of the transfer were agreed upon as contracted to in the Operative Agreements.

Further, petitioner contends that there existed independent evidence that a written contract was executed prior to March 28, 1983. Petitioner points to: (1) the Bureau of Franchise Receipt date stamped March 22, 1983, (2) the notarizations of the Agreement of Sale, (3) the Escrow Agreement (which petitioner contends presupposes the existence of a binding contract), and (4) a letter from John P. Dugan, dated June 6, 1983. Therefore, petitioner argues that there existed a written contract prior to the enactment of the gains tax and, thus, the subject transfer is exempt from the gains tax as determined by the Administrative Law Judge in his determination.

We will first address petitioner's contention that the Division bears the burden of proof to establish that the Administrative Law Judge's determination was incorrect as a matter of law.

The Tribunal's enabling legislation contains no statutory limitations such as those contained in Article 78 of the CPLR which are applicable to judicial review of administrative decisions (see, CPLR § 7803[3] and [4] which limit judicial review of administrative decisions to

questions of whether the administrative action was arbitrary and capricious or supported by substantial evidence).

The Tribunal's enabling legislation, in contrast, provides broadly that the Tribunal "shall issue a decision either affirming, reversing or modifying" the determination of the Administrative Law Judge or "the Tribunal may remand the case for additional proceedings before the administrative law judge" (Tax Law § 2006[7]). The regulations adopted by the Tribunal implement this standard by providing, in pertinent part, that "the tribunal shall review the record and shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the determination" (20 NYCRR 3000.11[e][1], emphasis added). Therefore, our review is de novo and the Division does not have to demonstrate that the Administrative Law Judge's determination was incorrect as a matter of law, as petitioner urges, in order to have the determination reversed or modified (see, Matter of Small, Tax Appeals Tribunal, August 11, 1988).

We now turn to the merits of the case. We reverse the determination of the Administrative Law Judge for the reasons set forth below.

The gains tax is a 10% tax imposed upon the gains derived from the transfer of real property where the real property is located within New York State and the consideration received for such transfer exceeds \$1 million (Tax Law §§ 1441; 1443[1]). Tax Law § 1443(6), in pertinent part, provides for an exemption, the "grandfather exemption" from the gains tax:

"[w]here a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission."

The effective date of the gains tax statute was March 28, 1983 (L 1983, ch 15, § 184). Therefore, in order to qualify for the exemption under Tax Law § 1443(6), there must have been a written contract entered into on or before March 28, 1983 and the date of execution of such contract must be confirmed by independent evidence.

We begin our analysis by noting that the Administrative Law Judge erred by determining simply whether a binding contract between the parties was entered into before March 28, 1983. We believe the inquiry required by section 1443(6) of the Tax Law is whether a binding contract to sell real property was executed prior to the effective date of the gains tax. The case law establishes that this is the issue to be determined under section 1443(6).

In Matter of Dworetz v. State Tax Commn. (128 AD2d 946, 512 NYS2d 745, lv denied 69 NY2d 612, 517 NYS2d 1028), the Appellate Division, Third Department acknowledged, by citing to Quigley v. Capolongo (53 AD2d 714, 383 NYS2d 935, affd 43 NY2d 748, 401 NYS2d 1009), that a right of first refusal was a contract, but concluded that it was not a grandfathered contract because it did not bind the seller to sell the real property. Similarly, Matter of Lever v. New York State Tax Commn. (144 AD2d 751, 535 NYS2d 158) held that an agreement to enter into a contract to sell real property was not a contract that would exempt the transfer pursuant to section 1443(6). This same reasoning led the court in Matter of Bredero Vast Goed, N.V. v. Tax Commn. of State of New York (supra) to reject a partnership buy/sell agreement and a corporate board resolution which was contingent upon a representative's approval as insufficient to grandfather a transfer. Finally, in Matter of Goldome Capital Invs. (Tax Appeals Tribunal, May 16, 1991), we found that a merger agreement, although a contract, was not, absent shareholder approval, a contract to sell the real property. In each of these cases there was an agreement that was related to the sale of the real property, but in each case the agreement did not obligate the parties to sell the real property and, thus, did not exempt the transfer pursuant to section 1443(6) of the Tax Law.

With the issue narrowed to whether there was a binding obligation to sell the real property, it is well settled that this determination is made based upon the objective intent of the parties as manifested through their expressed words and deeds (Matter of Lever v. New York State Tax Commn., supra, 535 NYS2d 158, 160; Matter of Old Nut Co. v. New York State Tax Commn., 126 AD2d 869, 511 NYS2d 161, 162-163, lv denied 69 NY2d 609, 516 NYS2d 1025; see, Brown Bros. Elec. Contrs. v. Beam Constr. Corp., 41 NY2d 397, 393 NYS2d 350, 352). The

focus of the inquiry is upon the totality of the parties' expressed words and deeds given the attendant circumstances, and "disproportionate emphasis is not to be placed on any single act, phrase or other expression" (Brown Bros. Elec. Contrs. v. Beam Constr. Corp., *supra*, 393 NYS2d 350, 352). In addition, statutes creating tax exemptions are to be strictly and narrowly construed, and the petitioner has the burden of showing clear entitlement to the provision of law authorizing the exemption at issue (Matter of Lever v. New York State Tax Commn., *supra*, 535 NYS2d 158, 160; Matter of Yanowicz v. Department of Taxation & Fin., 140 AD2d 866, 528 NYS2d 906, 908).

The Division contends that the unfulfilled conditions of the written agreements were in fact within the control of the two contracting parties; thus, such written agreements cannot constitute a binding contract. The Division's argument against our finding a valid contract focuses on language contained within the Escrow Agreement.

Petitioner argues, and the Administrative Law Judge determined, that an escrow agreement presupposes the existence of a written contract. Petitioner relies on the statement in Animalfeeds Intl. v. Banco Espirito Santo E Comercial De Lisboa (101 Misc 2d 379, 420 NYS2d 954, 957) that:

"[a]n escrow agreement . . . is in essence a contractual undertaking to assure the carrying out of obligations already contracted for."

Although it may be true that an escrow agreement presupposes the existence of a contract, it is not true that an escrow agreement presupposes the existence of a binding contract to sell real property (see, e.g., Matter of Yanowicz v. Department of Taxation & Fin., *supra*, 528 NYS2d 906). Therefore, reliance on Animalfeeds Intl. is misplaced to establish the existence of a contract to sell real property pursuant to the gains tax statute.

Petitioner also argues that the Escrow Agreement must be viewed separately from the Operative Agreements and that the Escrow Agreement does not diminish the binding nature of the Operative Agreements. We disagree with both of these contentions.

To ignore the terms of the Escrow Agreement would be contrary to the direction stated above, i.e., that the intent of the parties is to be determined based upon the totality of their

expressed words and deeds (Brown Bros. Elec. Contrs. v. Beam Constr. Corp., *supra*, 393 NYS2d 350, 352) and would ignore the realities of the Broad Street Transaction.

As the parties stipulated, the sale of the Broad Street Property was contingent upon AMEX obtaining a separate leasehold interest in Parcel C and the requisite governmental approvals for the building proposed on the site (*see*, Stipulation, ¶ 9). However, these contingencies are not set forth in the Operative Agreements, which only mention the Broad Street Transaction and make it appear that this transaction would take place at the time the Operative Agreements were signed (Exhibit "D" to the Stipulation, p. 7) and that this transaction was independent of any other transaction between the parties (Exhibit "D" to the Stipulation, p. 25). The contingencies are imposed on the Broad Street Transaction by the Escrow Agreement. Therefore, since the Operative Agreements do not encompass the entire agreement between the contracting parties, it is necessary to include the Escrow Agreement as one of the operative agreements, though not designated as such by the Stipulation, to view properly the agreement between petitioner and O&Y with respect to the Broad Street Property.

Our review of the entire Escrow Agreement leads us to reject petitioner's second contention, i.e., that the Escrow Agreement did not diminish the binding nature of the Operative Agreements.

The Escrow Agreement makes it clear that, at the time the Operative Agreements were signed, an essential element of the Battery Park Transaction, the Severance Lease with respect to Parcel C, had not been agreed to by the parties. The execution of this Severance Lease between O&Y and BPCA was necessary for O&Y to provide AMEX with a separate leasehold interest in Parcel C and was an explicit condition to satisfy the terms of the Escrow Agreement (Exhibit "6" to the Stipulation, Clause 3).⁴ The Escrow Agreement indicates that petitioner and

⁴As stated in the Stipulation of the parties, O&Y had the right under the Battery Park Master Sublease to require BPCA to sever each of the parcels and obtain a separate lease therefore (Stipulation, ¶ 16). However, this right was originally conditioned upon the substantial completion of the building on two parcels and the full enclosure of the remaining two parcels (Exhibit "I" to the Stipulation, pp. 51, 54; Hearing Exhibit "K," letter dated March 15, 1983 from Eastdil Realty to Battery Park City Authority). Changes in the financing available for the development and AMEX's desire to have a lease directly from BPCA, rather than a sublease from O&Y, prompted the parties to negotiate the severing of the leases more rapidly than originally anticipated under the Master Sublease (Hearing

O&Y each retained control over the terms of the Severance Lease through Clause 9, which imposed as another condition of the escrow, that "[a]ll documents and instruments collateral to and required for the restructuring of the development of [Battery Park City] are in form and substance satisfactory to (x) BPCA and its attorneys, (y) O&Y and its attorneys and (z) to the extent affecting Parcel C or the Severance Lease thereof, AMEX and its attorneys" (Exhibit "6" to the Stipulation, Clause 9). The Severance Lease was executed by BPCA and O&Y on June 15, 1983, and at the same time, O&Y assigned its leasehold interest to petitioner (Stipulation, ¶¶ 18, 19). These facts indicate that at the time the Operative Agreements were signed a significant element of the contingency imposed on the Broad Street Transaction by the Escrow Agreement -- the Severance Lease of Parcel C and its assignment to petitioner -- had yet to be agreed to by, and was still within the control of, petitioner and O&Y.

In addition to the execution of the Severance Lease and its assignment, the Escrow Agreement, through Clause 5 and Schedule IV, subjected the Broad Street Transaction to the condition that 63 other documents relating to the restructuring of Battery Park City be executed and delivered by the relevant parties. Through Clause 9 of the Escrow Agreement, O&Y retained control over the substance and form of these documents, and petitioner retained control over those that affected Parcel C or the Severance Lease. Many of the 63 documents would appear to fall in the latter category; the most significant include: amendments to the Civic Facilities Construction and Maintenance Agreements (Exhibit "6" to the Stipulation, Schedule IV, Nos. 7 & 8); an agreement of sublease between AMEX as sublandlord and O&Y as subtenant with respect to retail space on Parcel C (Exhibit "6" to the Stipulation, Schedule IV, No. 30); an agreement between O&Y and AMEX with respect to an option for additional office space in the buildings to be constructed on Parcels A, B and D (Exhibit "6" to the Stipulation, Schedule IV, No. 33); and an escrow agreement between AMEX, BPCA and Ernst & Whinney,

Exhibit "K," letter dated March 15, 1983 from Eastdil Realty to Battery Park City Authority). BPCA authorized the termination of the lease agreement between it and O&Y and the entrance into the severance leases on March 15, 1983 (Stipulation, ¶ 44, Exhibit "19" to the Stipulation).

as required by the Severance Lease (Exhibit "6" to the Stipulation, Schedule IV, No. 11). This schedule of 63 documents indicates that many of the details of the Battery Park Transaction had yet to be agreed upon by petitioner and O&Y at the time the Operative Agreements were signed. Further, the parties retained the right to add to the schedule "[a]ny additional documents or instruments which any of the parties reasonably require for the restructuring of the development of [Battery Park City]," indicating that at the time of the Escrow Agreement the parties were not certain that they had identified the details that had to be negotiated (Exhibit "6" to the Stipulation, Clause 9).

We conclude that the terms of the Escrow Agreement rendered the Operative Agreements only an agreement to negotiate, i.e., an agreement to sell the Broad Street Property if the Battery Park Transaction could be negotiated and agreed to by the parties. Considered together, the Operative Agreements and the Escrow Agreement indicate "the parties' intent to continue negotiations with a possible ultimate meeting of minds deferred until some future time" and, therefore, lack the finality of assent necessary to qualify for the section 1443(6) exemption (Matter of Lever v. New York State Tax Commn., supra, 535 NYS2d 158, 160)

We also conclude that the gains tax contingency at Clause 18 of the Escrow Agreement in itself rendered the Operative Agreements insufficient to exempt the Broad Street Property. This clause gave either AMEX or O&Y the power, if a gains tax was enacted, to "conclusively determine that the escrow conditions have not been satisfied" (Exhibit "6" to the Stipulation, Clause 18). In response, the other party could elect to pay the tax and cause the transaction to proceed. In our view, retaining this power to terminate the transaction meant that the parties had not entered into a binding commitment to sell the Broad Street Property prior to March 28, 1983.

Although our conclusion that the parties did not enter into a binding agreement to sell the Broad Street Property renders moot the issues regarding the execution date of these documents and the independent evidence to confirm this date, we will address these issues in order to

create a complete decision for review (see, Matter of Riehm v. Tax Appeals Tribunal, ___ AD2 ___, ___ NYS2d ___, January 30, 1992).

At the February 14, 1990 hearing, the Administrative Law Judge heard testimony concerning the signatures placed on the documents constituting the Operative Agreements. After listening to testimony from Mr. Norman, one of the notaries present at the signing of the documents, the Administrative Law Judge concluded that although there existed a discrepancy between the copies of the Operative Agreements and petitioner's Claim for Refund submitted to the Division, as compared to the originals presented by petitioner, the original documents were signed by Mr. Weill. The Administrative Law Judge concluded that the absence of Mr. Weill's signature on the Division's copies of the documents was probably attributable to a missed signature on one of multiple sets of executed originals.

We note that the credibility of witnesses is a determination within the domain of the trier of facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992; see, Matter of Berenhaus v. Ward, 70 NY2d 436, 522 NYS2d 478). While this Tribunal is not absolutely bound by an Administrative Law Judge's assessment, we find nothing in the record herein to justify altering the Administrative Law Judge's assessment here (Matter of Spallina, supra; see, Matter of Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809). Therefore, we conclude that the parties did sign the Operative Agreements on March 18, 1983.

With respect to the independent evidence issue, in Matter of Old Nut Co. v. New York State Tax Commn. (supra), the Third Department provided us with guidance as to what type of evidence is required to constitute independent evidence within the purview of Tax Law § 1443(6):

"the statutory provision . . . require[s] objectively verifiable corroboration of the date of execution, independent of the testimony of the parties to the transaction who are obviously interested as to the incidence of the tax, or of persons under their control" (Matter of Old Nut Co. v. New York State Tax Commn., supra, 511 NYS2d 161, 162-163).

Keeping this standard in mind, we focus upon four pieces of evidence which petitioner alleges constitute independent evidence of it executing the contract on March 18, 1983.

Petitioner first presents as evidence that the contract was executed on March 18, 1983, a copy of a cover letter addressed to Mr. Morris Tarshis, Director of the Board of Estimate, with an attached copy of the Assignment of Ground Lease and a copy of the Certificate of Limited Partnership, which is date stamped March 22, 1983 (Hearing Exhibit "18"). Petitioner states in its brief that: "[i]n and of itself, the Bureau of Franchise receipt of the Assignment satisfies the independent evidence requirement" (petitioner's brief, p. 47).

The parties stipulated that petitioner delivered a copy of the Assignment of Ground Lease and Assumption, signed on March 11, 1983, along with a cover letter to the Board of Estimate on March 22, 1983 and that such documents were clocked in as received that same day by the Board of Estimate (Stipulation, ¶ 37). The receipt by the Board of Estimate is independent evidence only of the execution date of the Assignment of Ground Lease and is insufficient to establish independent evidence of the execution date of the Agreement of Sale.

Secondly, petitioner points to the notarizations as independent evidence that the contract was executed on March 18, 1983. The notarizations were made by Mr. Stephen Norman, Secretary of petitioner, and Mr. Noonan, an employee of petitioner's attorneys. Although we appreciate the responsibilities and duties imposed upon notary publics, we cannot overlook the fact that Mr. Norman is the Secretary of petitioner and as a party to the transaction his testimony is not independent evidence to confirm the alleged execution date (see, Matter of Old Nut Co. v. New York State Tax Commn., supra). Likewise, Mr. Noonan was clearly an employee of petitioner's representatives and, thus, his notarization cannot be deemed independent (see, Matter of Old Nut Co. v. New York State Tax Commn., supra; see also, Matter of Yanowicz v. Department of Taxation & Fin., supra).

Thirdly, petitioner relies on the Escrow Agreement as independent evidence of the execution date of the contract. However, the Escrow Agreement is an agreement between the two contracting parties and, thus, cannot be deemed independent evidence. Further, as discussed

above, the Escrow Agreement does not indicate that the parties were bound, prior to March 28, 1983, to the sale of the real property. Thus, the Escrow Agreement is not external evidence that the parties were bound (Matter of Yanowicz v. Department of Taxation & Fin., *supra*, 528 NYS2d 906, 908).

Lastly, petitioner directs us to the Dugan letter as proof of the March 18, 1983 execution date. The Dugan letter, dated June 6, 1983, is addressed to the Registry of New York City advising such entity to receive the attached documents for filing. Petitioner contends that:

"[t]he fact that the Department of Taxation identifies the date of execution as March 18, 1983 is independent of the parties and is confirmatory of the date of execution" (petitioner's brief, p. 60).

We disagree. The letter does not suggest that Mr. Dugan had any knowledge about the date that the agreements were executed from any source other than the agreements themselves. Thus, the letter in question does not establish that the execution date was prior to March 28, 1983; rather, the letter just states what the documents attached to it, on their face, purport to be. Clearly, this letter does not constitute independent evidence external to the contracts and cannot be given the weight that petitioner urges upon us.

Therefore, since petitioner has not provided any independent evidence to confirm the execution date of the Agreement of Sale, we conclude that petitioner failed to satisfy this requirement of section 1443(6). On this independent basis, petitioner is not entitled to the exemption set forth in Tax Law § 1443(6).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of American Express Company and American Express International Banking Corporation is denied; and

4. The denial of the claim for refund by the Division of Taxation is sustained.

DATED: Troy, New York
April 23, 1992

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

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