

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NET REALTY HOLDING TRUST	:	ORDER AND OPINION
	:	DTA No. 808466
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.	:	

On December 31, 1991, the Division of Taxation made a motion to this Tribunal to stay its decision in this matter.

ORDER

Upon reading the Notice of Motion dated the 26th day of November 1991, the covering letter filed therewith, and the affidavit of Andrew J. Zalewski, sworn to the 26th day of November 1991, and the affirmation of Stephan B. Gleich, sworn to the 9th day of December 1991, in opposition thereto, and due deliberation having been had thereon,

NOW, on the motion of Andrew J. Zalewski, attorney for the Division of Taxation, it is,
ORDERED that said motion be and the same is hereby granted.

OPINION

The Administrative Law Judge in this case granted petitioner's motion for summary determination on the basis that it was governed by a recent Appellate Division, Third Department decision and that the decision was a binding precedent (Matter of Morgan Guar. Trust Co. v. Tax Appeals Tribunal, 166 AD2d 96, 569 NYS2d 502, lv granted 78 NY2d 861, 576 NYS2d 219). She explicitly rejected petitioner's other arguments. Contemporaneously with filing its exception to this determination, the Division of Taxation (hereinafter the "Division") filed a motion requesting a stay of the exception proceedings. The Secretary to the Tax Appeals Tribunal acknowledged receipt of the papers and held further proceedings on the exception in abeyance until an order was issued on the motion. Petitioner submitted a response to the motion and also a

letter requesting that either an order be issued expeditiously or that the Tribunal proceed with the Division's exception.

The Division's position is that a stay of the exception proceedings in this matter is necessary because the State has been granted permission to appeal the Morgan Guar. decision to the Court of Appeals. In its affidavit in support of its motion, dated November 26, 1991, the Division stated that it expected to file its brief with the Court of Appeals on or about January 2, 1992. The Division argues that a stay is appropriate under section 2201 of the Civil Practice Law and Rules because if the Division does not prevail before the Tribunal in this case, and the Court of Appeals reverses Morgan Guar. after the Tribunal decision in this case, the Division will suffer prejudice because it has no right to appeal a Tribunal decision. Petitioner's position is that the issues in the present case are different than those in Morgan Guar. and that, therefore, the granting of a stay is inappropriate. Furthermore, petitioner argues that, in any event, awaiting a decision from the Court of Appeals on a similar case is not a sufficient reason for the granting of a stay.

The Administrative Law Judge reached her determination in this matter based solely on the controlling precedent of Matter of Morgan Guar. Trust Co. v. Tax Appeals Tribunal (*supra*). While petitioner may reiterate its other arguments on exception, the Tax Appeals Tribunal, as part of its decision on the Division's exception, will have to determine whether or not Morgan Guar. controls. Given the Administrative Law Judge's determination, it appears that the Morgan Guar. case will, at the very least, be relevant to the Tribunal's decision. Therefore, the question of whether to grant a stay is not determined by petitioner's assertions that the cases are different.

We conclude that the Division has shown exceptional circumstances that warrant granting a stay of these proceedings, namely, that the Division cannot appeal the decisions of this Tribunal (Tax Law § 2016), that the Division's appeal in Morgan Guar. is pending before the Court of Appeals and that the Division is diligently pursuing this appeal (*cf.*, Robert Stigwood Org. v. Devon Co., 44 NY2d 922, 408 NYS2d 5; Peerce v. Peerce, 97 AD2d 718, 468 NYS2d 872

[where stays were denied because prejudice was not shown by the party requesting the stay]; Matter of Weinbaum, 51 Misc 2d 538, 273 NYS2d 461 [where the party seeking the stay was not prohibited from appealing an adverse decision]). If any of these facts change, or if new circumstances arise, petitioner's remedy is a motion to vacate the stay.

This important procedural issue was one of first instance for this Tribunal. While petitioner's concerns about the time taken to issue an order are understandable, the time taken was necessary.

Accordingly, it is ordered that the motion of the Division of Taxation for a stay of the exception proceedings is granted, and the Secretary to the Tribunal is directed to hold all further proceedings in Net Realty Holding Trust in abeyance and to establish requirements for the Division of Taxation to keep the Tribunal apprised of the status of the Morgan Guar. case before the Court of Appeals.

DATED: Troy, New York
March 12, 1992

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

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

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