STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SAMUEL SHECHTER	:	DECISION DTA No. 808585
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.	:	

Petitioner Samuel Shechter, 31 South Mountain Road, New City, New York 10956 filed an exception to the determination of the Administrative Law Judge issued on June 24, 1993. Petitioner appeared by Kostelanetz & Fink (Kevin M. Flynn, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a letter in response. A reply brief was filed on November 18, 1993. Oral argument was requested and subsequently withdrawn by petitioner through a letter received by the Tribunal on April 22, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether a transfer had occurred for the purposes of Article 31-B.

II. Whether petitioner has shown that the transfer of stock in a corporation having an interest in real property to a partnership was exempt from the transfer gains tax pursuant to Tax Law § 1443(5) or, in the alternative, Tax Law § 1443(7).

III. Whether petitioner has established reasonable cause and an absence of willful neglect to warrant abatement of penalty and penalty interest.

FINDINGS OF FACT

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

Petitioner, Samuel Shechter, has been a developer and builder of residential real estate for more than 40 years. In 1966, petitioner and three other investors purchased four parcels of land comprising approximately 900 acres (the "Property") in the Village of Pomona (the"Village") located in Rockland County. The Property is situated atop Cheesecote Mountain, one of the highest points of elevation within a 30-mile radius of New York City. When the Property was purchased, it was essentially mountainous rock. The Property is bounded on the north and west by beautiful park land, and on the east by Haverstraw Bay. The southern exposure of the Property offers magnificent views of the Manhattan skyline.

Petitioner and the other investors paid about $8,000.00 an acre for the Property. Twenty-five percent of the purchase price was paid in cash, and the balance by a purchase money mortgage to a bank. It was the intention of the investors to build approximately 3,000 homes on the Property. For various reasons, the three other investors withdrew from the project, and petitioner became the sole owner of the Property.

Petitioner's plans to develop the Property met with fierce opposition from the residents of the communities surrounding the Property. In fact, the residents formed the Village specifically to challenge the development of the Property in court. A seven-year legal battle with the Village ensued, but ultimately petitioner prevailed in court, and development of the Property proceeded. Thereafter, petitioner, at great expense, caused rock to be blasted from the Property, brought in roads, water, sewers, gas, and other improvements to the Property, and constructed homes on the Property.

As noted, the cost of developing the Property was substantial, particularly due to the mountainous and rocky nature of the land. Petitioner obtained financing for development and construction of the Property from four separate banks and one private lender. The financing totalled $18,000,000.00. Petitioner was required to personally guarantee all financing. At the time of the hearing herein, approximately $12,000,000.00 was still owed to the lenders that financed the project. Petitioner remains the sole guarantor of the full amount of the outstanding indebtedness on the Property.

In 1983, Redwoods at Pomona, Ltd. (the "Corporation") was formed. Petitioner owned 100 percent of the stock of the Corporation which, in turn, owned the Property. During the early to mid-1980's, petitioner was responsible for all aspects of the development of the Property. By 1986, homes had been built on the Property and were being sold to purchasers. The market for the Property was strong in 1986; lots were being sold for approximately $125,000.00, and lots with homes were being sold in the range of $300,000.00 to $325,000.00.

In 1986, a real estate broker introduced petitioner to an investor named Bernie Gimbel ("Gimbel"). Petitioner and Gimbel entered into direct discussions with respect to Gimbel's desire to acquire a substantial portion of the Property. Those discussions resulted in an agreement which was memorialized in a contract of sale (the "Gimbel Contract") signed by petitioner, on behalf of the Corporation, and Gimbel, on behalf of Gimbel Holding Co., a real estate partnership, on September 17, 1986.

The Gimbel Contract provided for the sale of 169 lots (the "Lots") to Gimbel, which constituted approximately 80 percent of the total lots owned by the Corporation. The purchase price for the Lots was $17,000,000.00, which was to be paid under the contract as follows: (i) $200,000.00 upon the signing of the contract; (ii) $8,400,000.00 by Gimbel securing a mortgage on the Property (the "New Senior Mortgage"), and making payment of these funds to the Corporation at the closing on the contract; and (iii) a purchase money mortgage of $8,400,000.00.

In the negotiations between petitioner and Gimbel, it was stated by the parties, and at all times understood, accepted, and agreed that the sale of the Lots to Gimbel was conditioned upon Gimbel obtaining financing in an amount sufficient to make the cash payment (i.e.,

$8,400,000.00) to the Corporation. Indeed, the Gimbel Contract expressly provided for the same by stating as follows:

> "This transaction is <u>specifically conditioned upon</u> Purchaser obtaining a New Senior Mortgage in the principal amount of $8,400,000.00. In the event Purchaser is unable or fails to obtain a written commitment for a New Senior Mortgage in the principal amount of $8,400,000.00 by February 28, 1987, then either party upon notice to the other may cancel this contract and thereupon the downpayment hereunder shall forthwith be refunded to Purchaser and thereupon this contract shall be null and void and neither party shall have any claim against the other . . ." (emphasis supplied).

In 1986, at or around the time that petitioner had the contract in place for the sale of the Lots to Gimbel, Herman Simon ("Simon"), an attorney and friend of petitioner, advised petitioner to liquidate the Corporation. Moreover, Simon recommended that a plan of liquidation be adopted before the end of the 1986 tax year because a change in the Federal tax law that was to take effect on January 1, 1987 would make a liquidation that occurred in 1987 taxable to the Corporation, whereas if the plan of liquidation was adopted in 1986 it would be nontaxable under the law. Petitioner, who had no training or expertise in taxes, put his reliance and trust in Simon's professional judgment and friendship, and, with the assistance of Simon's former law firm, the Corporation adopted a plan of liquidation.

As part of the overall plan of liquidation, and pursuant to a contract dated December 24, 1986 (the "Partnership Contract"), petitioner transferred his shares in the Corporation to a partnership named Pomona at Redwoods (the "Partnership"). The partnership had been formed in December 1986; its partners were Edward Shechter ("Edward"), petitioner's brother, and RAP Real Estate Development Corp. ("RAP"), a corporation owned by Simon. The interests of Edward and RAP in the Partnership were 90 percent and 10 percent, respectively. As consideration for their respective interests, Edward and RAP contributed capital of $1,000.00 and $111.00 to the Partnership. Additionally, RAP loaned the Partnership $74,889.00. The Partnership had no other assets.

The December 24, 1986 Partnership Contract between petitioner and Pomona at Redwoods for the transfer of petitioner's shares in the corporation provided for a total purchase price of $17,195,000.00 in respect of such transfer to be paid as follows:

(i) $75,000.00 in cash to be paid at closing;

(ii) $1,900,000.00 to be paid by the partnership (purchaser) on behalf of petitioner (seller) in respect of petitioner's real property transfer gains tax liability arising from the subject transfer; and

(iii) $15,220,000.00 to be paid pursuant to the terms of a note to be given by the purchaser to the seller.

The closing of the sale of shares between petitioner and the Partnership occurred on December 24, 1986. Pursuant to the contract, petitioner received $75,000.00 in cash at the closing. Petitioner also received a note from the Partnership in the principal amount of $15,220,000.00 and, in addition, received a purchase money mortgage on the Property to secure the indebtedness evidenced by the note.

The note and mortgage given by the Partnership provided that neither the Partnership nor the individual partners were to become personally liable on the note or mortgage.

The Partnership Contract provided that any payments received by the Partnership from Gimbel (pursuant to the Gimbel Contract) would be paid over to petitioner. The Partnership Contract also noted that the Gimbel Contract contemplated the execution of mortgages in respect of the Gimbel transfer and provided that the Partnership would cause such mortgages to be issued with petitioner as the mortgagee.

Additionally, in connection with the recordation of the mortgage given to petitioner by the Partnership, the contract between petitioner and the Partnership provided as follows:

> "In the event that the Gimbel Holding Co. transaction is not consummated and the Seller [petitioner] has so recorded said mortgage then, Purchaser [Partnership] shall reimburse the Seller for such recording charges. In the event that the transactions with Gimbel Holding Co. are not consummated and the Seller has not so

> recorded such mortgage then, upon the Seller causing such mortgage to be recorded, Purchaser shall pay or cause to be paid such recording fees and taxes or shall reimburse the Seller for such recording fees and taxes. In the event that the transaction with Gimbel Holding Co. . . . is consummated then, the note and mortgage shall be reduced in order to reflect payments received by the Seller herein in connection with such transaction and if the mortgage has been recorded, then at the time of closing of either the Gimbel Holding Co. transaction . . . , the Seller shall deliver in recordable form appropriate releases of lien from the Seller's mortgages in connection with the lots being sold."

The Partnership Contract contained no provisions stating that such contract was contingent upon or subject to the consummation of the Gimbel Contract.

Among the provisions of the Partnership Contract were the following:

> "No extension, termination or other modification of or to any provisions of this Agreement shall be valid unless made in writing and signed by all of the parties hereto.
>
> * * *
>
> "This Agreement contains the entire agreement of the parties relating to subject matter encompassed thereby and there are no agreements, understandings or representations made by any of the parties hereto other than those expressly contained herein."

Immediately following the closing of the Partnership Contract, the corporation was liquidated pursuant to the plan of liquidation and its assets (i.e., the Property) were transferred to the Partnership. The corporation's final tax return listed the Partnership as the corporation's sole shareholder.

On December 30, 1986, petitioner filed a real property transfer gains tax transferor questionnaire (Form TP-580) dated December 29, 1986, in respect of his sale of shares to the Partnership. The questionnaire indicated an anticipated gains tax due of $1,907,139.00. Petitioner also filed, as transferor, a real property transfer gains tax supplemental return (Form TP-583), dated December 29, 1986, which indicated gains tax deferred of $1,832,139.00 and tax due with said return of $75,000.00. Petitioner remitted $75,000.00 with the return.

The Partnership filed a real property transfer gains tax transferee questionnaire (Form TP-581), dated December 24, 1986, in respect of the sale of stock from petitioner to the Partnership.

Petitioner subsequently applied to the Division of Taxation ("Division") for a deferred payment plan for the gains tax arising from his sale of stock to the Partnership.

Gimbel was unable to meet the requirement set forth in the Gimbel Contract that he secure financing for the $8,400,000.00 "New Senior Mortgage" by February 28, 1987. Gimbel therefore exercised his right to cancel the contract.

In response to a Division letter dated April 27, 1987 requesting certain information in connection with petitioner's request for a deferred payment plan, petitioner's former representative stated, by letter dated May 15, 1987, in part, as follows:

> "Please be advised that subsequent to the Closing, there were certain post-closing adjustments (including the non consummation of the sale of 169 lots to Gimbel) which are reflected on a revised computation of the purchase price which is enclosed herewith. However, at this time, the note and mortgage have not been recast in order the [sic] reflect these changes."

Petitioner's former representative communicated with the Division several times in connection with petitioner's request for a deferred payment plan. In addition to the May 15, 1987 letter, petitioner's representative sent letters to the Division dated August 5, August 6, August 7, August 12, and December 18, 1987, and February 23 and April 15, 1988. None of the letters made any statement to the effect that the December 24, 1986 contract between petitioner and the Partnership was in any way subject to or contingent upon the consummation of the Gimbel Contract.

The August 6, 1987 letter from petitioner's former representative to the Division advised that the note given to petitioner by the Partnership in respect of the December 24, 1986 sale had been recast such that the principal amount of the note was increased to $15,399,686.00.

The December 18, 1987 letter provided copies of the note and mortgage as recast and also noted that the term of such mortgage and note had been extended to 10 years. The letter also stated the following:

> "Please be further advised that since the transaction of December 24, 1986, no payments have been made to Sam Shechter under the note and mortgage, and as a result thereof, Mr. Shechter is not in a position to make payment of the installment due on December 24, 1987. Request is hereby made for an extension in the due date of such installment obligation to March 24, 1988."

By letter dated May 12, 1988, the Division reduced petitioner's gain from the December 24, 1986 transaction by $802,578.00. This reduction resulted from certain information supplied by petitioner's former representative by letter dated April 5, 1988. The information resulted in an increase in petitioner's basis in the subject property at the time of the December 24, 1986 transaction.

Petitioner was granted permission to pay the real property transfer gains tax at issue on an installment basis. Petitioner failed, however, to make his first installment payment which was due December 24, 1987. The Division therefore issued a Statement of Proposed Audit Adjustment dated March 14, 1988 demanding payment of such installment. Petitioner failed to make this payment and the Division declared the entire gains tax balance due by the issuance of a Statement of Audit Adjustment dated August 16, 1988.

On November 14, 1988, the Division issued to petitioner a Notice of Determination of Tax Due under Article 31-B which assessed $1,871,056.50 in gains tax due, plus penalty and interest.

In the months following Gimbel's cancellation of the September 17, 1986 contract with the Corporation, petitioner, and not Edward Shechter or Herbert Simon, attempted to locate an alternate buyer for the property in question. Petitioner was unsuccessful in his efforts. To sustain the project after Gimbel withdrew, it became necessary for petitioner to borrow additional funds for which he became the sole personal guarantor.

Petitioner never received any payments from the Partnership with respect to the transfer of his shares other than the $75,000.00 cash payment. In fact, petitioner expected no payments from the Partnership once Gimbel failed to acquire the necessary financing to purchase the Property.

After the sale with Gimbel was cancelled, petitioner's day-to-day involvement with the project was unchanged. He continued to go to work each day, he continued to develop the Property, and he sold lots and homes to buyers. Neither of the partners had any day-to-day role in the project.

Petitioner acquired the partnership interest in the subject Property at some point following Edward Shechter's death in February 1988.

OPINION

Tax Law § 1441 imposes a 10% tax upon gains derived from the transfer of real property located in New York State.

The term "transfer of real property" is defined by Tax Law § 1440(7) which states in part:

> "the transfer or transfers of any interest in real property by any method, including but not limited to . . . acquisition of a controlling interest in any entity with an interest in real property."

When an interest in a corporation which owns real property is at issue, Tax Law § 1440(2) provides that a "controlling interest" is defined as:

> "(i) . . . either 50 percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation . . . ."

The Legislature has provided taxpayers with several exemptions from the gains tax, which are set forth in Tax Law § 1443. In the instant case, petitioner contends that the transaction at issue comes within at least one of two exemptions. The first claimed by petitioner is under Tax Law § 1443(5), which provides a taxpayer is entitled to an exemption:

> "[i]f a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest."

Alternatively, petitioner claims he qualifies for an exemption under subsection (7) which provides:

> "[w]here a transfer of real property consists of the execution of a contract to sell real property without the use or occupancy of such property or the granting of an option to purchase real property without the use or occupancy of such property."

The first issue before us is whether there was a transaction subject to taxation under Article 31-B of the Tax Law. The Administrative Law Judge concluded that petitioner's transfer of shares in the Corporation to the Partnership pursuant to the Partnership contract constituted a transfer of real property subject to tax under Tax Law § 1441. The Administrative Law Judge rejected petitioner's contention that the transfer was contingent upon the ability of Gimbel to obtain financing for the purchase of the property. The Administrative Law Judge found the contract to constitute the entire agreement between petitioner and the Partnership and there was no reference to any such condition.

Petitioner on exception renews its argument that there was an oral "understanding" between the parties that the transfer of shares to the Partnership would not take effect unless the sale to Gimbel occurred.

We agree with the Administrative Law Judge's conclusion that a taxable transaction occurred. In so finding, we address the threshold question of whether petitioner can vary the terms of a written agreement by introducing oral testimony that the contract was subject to a contingency "understood" by both parties. It is well established that in the absence of fraud, accident or mistake, the parol evidence rule prohibits resort to extrinsic evidence to vary the meaning of a contract that is unambiguous (<u>Matter of Emery Air Freight Corp.</u>, Tax Appeals Tribunal, October 17, 1991, <u>affd</u> <u>Matter of Emery Air Freight Corp. v. New York State Tax Appeals Tribunal</u>, 188 AD2d 772, 591 NYS2d 264).

As the Administrative Law Judge noted, the "contract expressly provides that the terms of the contract constitute the entire agreement between the parties (see, Finding of Fact '17')" (Determination, conclusion of law "B"). This merger clause, coupled with the parol evidence rule, operates as an absolute bar, absent mutual mistake or fraud, to the introduction of oral testimony of any contingency (Gluck v. Amsterdam Print. & Litho Corp., 77 AD2d 722, 430 NYS2d 423; affd 53 NY2d 737, 439 NYS2d 338).

The existence of a merger clause notwithstanding, the contract would still be found an integrated agreement after "reading the writing in the light of surrounding circumstances, and [after] determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing" (Braten v. Bankers Trust Co., 60 NY2d 155, 468 NYS2d 861, 864).

A reading of the agreement supports the conclusion that it was a complete, written instrument. The Administrative Law Judge correctly noted that: "[t]he Partnership Contract, pursuant to which the shares of stock were transferred, sets forth the terms of such transfer clearly and unambiguously. The contract is not conditioned upon the completion of the Gimbel Contract" (Determination, conclusion of law "B"). Further, as stated in the findings of fact, the contract does make reference to the possibility of the failure of the Gimbel Contract. We agree with the Administrative Law Judge that "such reference clearly contemplates the completion of the Partnership Contract notwithstanding the failure of the Gimbel Contract" (Determination, conclusion of law "B"). In this provision of the contract, which dealt with the same subject matter, there is no reference to a contingency, nor is there elsewhere in the agreement.

The circumstances surrounding the agreement also support the finding that the contract was not subject to a contingency, but rather was an integrated document. The Administrative Law Judge, in looking at the events following the failure of the Gimbel agreement correctly observed:

> "that, even if the written contract did not clearly and unambiguously provide for the transfer of shares unconditioned on the Gimbel Contract, petitioner's conduct following the transfer and following the cancellation of the Gimbel Contract, gives no indication that he 'understood' the transfer of shares to be so conditioned. Specifically, petitioner filed gains tax documents as transferor of the subject Property with the Division. Additionally, petitioner's former representative was in frequent contact with the Division by letter following the sale of shares. Two of the letters made reference to the failed Gimbel sale. None of the letters gave any indication that the sale of shares was conditioned on the Gimbel Contract. Furthermore, the note given to petitioner by the Partnership was recast in light of the non-consummation of the Gimbel Contract. Indeed, these facts suggest that, consistent with the terms of the Partnership Contract, petitioner understood the sale of shares to the Partnership to have been unconditional" (Determination, conclusion of law "C").

It is not unreasonable to expect that any contingency on which the transaction hinged would have been included in the agreement which is plainly intended to be whole and complete in every respect. Such a fundamental condition would hardly have been omitted. Accordingly, petitioner cannot be heard to claim the contract was subject to Gimbel obtaining financing.

We turn our attention next to the first of petitioner's two alternative claims that the transaction is exempt from the gains tax. The Administrative Law Judge concluded the subject transfer was not merely a change in form or identity of ownership without a change in beneficial interest. The Administrative Law Judge determined that the form of petitioner's transaction controlled and the substance of the transaction would not be considered. The Administrative Law Judge, citing <u>Matter of 107 Delaware Assocs. v. New York Tax State Tax Commn.</u> (99 AD2d 29, 472 NYS2d 467 [Casey, J., dissenting]), noted it was not irrational to bind the taxpayer to the form of business chosen by it. The Administrative Law Judge noted, however, that petitioner had not established that he retained his beneficial interest in the property.

Petitioner on exception contends the Administrative Law Judge erred in not looking beyond the form of the transaction. Petitioner argues that the substance of the transaction shows that it was not a taxable sale of real property.

We agree with the Administrative Law Judge's conclusion. We decline, however, to follow his reasoning.

We begin by noting that petitioner "bears the burden of proving his entitlement to statutory tax exemption by demonstrating that the only reasonable interpretation of applicable law so provides him" (Matter of Howes v. Tax Appeals Tribunal, 159 AD2d 813, 552 NYS2d 972, 973).

In determining whether petitioner's transaction is subject to the gains tax, the focus of our analysis will be on the economic reality of the transaction (Matter of Bredero Vast Goed, N.V. v. Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). The focus on economic reality is a recognition that, with regard to the transfer gains tax, the general rule that form takes precedence over substance in the analysis of tax cases does not apply (Matter of Von-Mar Realty Co., Tax Appeals Tribunal, December 19, 1991, affd Matter of Von-Mar Realty Co. v. Tax Appeals Tribunal, 191 AD2d 753, 594 NYS2d 414, lv denied 82 NY2d 655, 602 NYS2d 803).

The Tribunal in Matter of Von-Mar Realty Co. (supra) followed the Federal rule that the doctrine of substance over form, or economic reality analysis, is used where the Legislature has evidenced an intent to do so (see, Humana Inc. v. Commissioner, 881 F2d 247, 89-2 USTC ¶ 9453; Clougherty Packing Co. v. Commissioner, 811 F2d 1297, 87-1 USTC ¶ 9204).

In Von-Mar, regarding the transfer gains tax, we noted, "the State Legislature, by defining an 'interest in property' to include a controlling interest in an entity and making the beneficial ownership of real property a basic tenet of the taxing scheme, has manifested such an intent to disregard the controlled entity in determining ownership of the property." We went on to add "the focus of the gains tax through entities pervades the entire statutory scheme imposing the tax" (Matter of Von-Mar Realty Co., supra; see also, Matter of Howes, Tax Appeals Tribunal, September 22, 1988, affd 159 AD2d 813, 552 NYS2d 972 [where the Tribunal noted that the focus of the gains tax through entities is exemplified in Tax Law § 1443(5) which requires a determination of the beneficial interest in property]; Matter of Bredero Vast Goed, N.V. v. Tax Commn., supra [here the Court sustained looking through two tiers of entities to find a transfer of real property]). As as result, we conclude that it is appropriate to analyze a transaction under the gains tax law by "looking through" an entity which owns real property to determine the beneficial owners of the property (Matter of Brooks v. Tax Appeals Tribunal, 196 AD2d 140, 608 NYS2d 714).

While the "look through" principle has primarily been applied in aggregation cases for the purposes of finding tax liability, the principle also applies to eliminate tax liability (see, Matter of Von-Mar Realty Co., supra [where the Tribunal noted the analysis is applicable to find an exception to aggregation based on use]).

In looking at the economic reality of a transaction, in order to determine if there has been a change in beneficial interest, we examine the circumstances surrounding the entire transaction (Matter of Bredero Vast Goed, N.V. v. Tax Commn., supra). This includes a showing of control by the transferor of the entities involved (Matter of Brooks v. Tax Appeals Tribunal, supra).

We first note the relationship between petitioner and the two partners in the Partnership. Petitioner's brother, Edward Shechter, was a partner with a 90% interest in the Partnership and a corporation owned by petitioner's friend, Herbert Simon, held the remaining 10% interest. While evidence of familial relationships between parties suggests one party may be controlling the others, it is not dispositive (Matter of Brooks, Tax Appeals Tribunal, September 24, 1992 [where the facts suggested that the father controlled the children]).[1]

To determine if petitioner continued to control the property, we next look at the parties' post-transfer conduct. To assist in our analysis, we refer to the United States Supreme Court decision in Commissioner v. Sunnen (333 US 591). In Sunnen, for the purpose of finding ownership under the Internal Revenue Code, the Court looked beyond the shift of formal legal

[1] In Matter of Lee (Tax Appeals Tribunal, October 15, 1992, affd Matter of Lee v. Tax Appeals Tribunal, ___ AD2d ___, 610 NYS2d 330), we held that the parties were not independent, and a factor contributing to this finding was that the transferors were family members.

title to property to determine if the transferor continued to retain significant control over the transferred property (Commissioner v. Sunnen, supra).[2] In Sunnen, the taxpayer was an inventor-patentee and the president of Sunnen Products Company, a corporation engaged in the manufacture and sale of patented grinding machines and other tools. The taxpayer had entered into licensing contracts with the corporation on patents the taxpayer owned. The taxpayer had rights to royalties as a result of these licensing contracts. He transferred these contracts and rights to his wife and argued he should not be taxed on the royalty income because of the transfer.

The Court considered several facts relevant in finding that the taxpayer still controlled the property. The first being that, as President of the Corporation and 89% shareholder, he could still exercise extensive control over the contracts. He could cancel them, thus cutting off the flow of royalties to his wife. It was also significant to the Court that the taxpayer could regulate the amount of royalties by controlling production and sale. It was noted by the Court that the taxpayer was the ultimate owner of the patents and patent applications. Because the licensing agreements were nonexclusive, the taxpayer could have licensed other manufacturers to exploit his patents. The Court also found that because of the husband-wife relationship, the taxpayer would also be able to enjoy the economic benefits of the property, so the taxpayer retained in substance, all of his rights. The Supreme Court concluded that "taxpayer retained the substance of all rights which he had prior to the assignment" (Commissioner v. Sunnen, supra, at 305) and retained liability for the income tax on the income from the royalties.

In petitioner's brief on exception, he cites the following facts as found by the Administrative Law Judge in support of his position: petitioner's day-to-day involvement with the project was unchanged; petitioner continued to go to work each day; he continued to develop

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[2]While Sunnen deals with Federal income tax law, which we have distinguished in the past from an analytical standpoint from New York gains tax, the decision is relevant for the limited purpose of illustrating what constitutes sufficient control and interest to find a transferor has retained his ownership interest in property.

the property while selling lots and homes; and neither partner had any day-to-day role in the project.

While the above facts indicate petitioner continued to maintain a connection to the property, they do not establish that petitioner retained the substance of all rights over the property sufficient to warrant a finding of beneficial ownership under Tax Law § 1443.5. As correctly noted by the Administrative Law Judge, the mere fact that petitioner continued on in his day-to-day activities regarding the project, does not establish control. The facts presented show nothing more than activities that could be carried on by an agent of the partnership. In addition, unlike the assignee in Sunnen, in this case, the partners, by virtue of the terms of the partnership agreement, are the only individuals with the apparent authority to exercise control over the stock received from petitioner (Petitioner's Exhibit "8"). Petitioner failed to provide evidence to the contrary.

To prevail, petitioner also needed to establish a financial interest akin to the ownership interest he had before the transfer of the property to the Partnership. Petitioner contends that by remaining the personal guarantor on debts of the property after the transfer, as well as incurring further personal debt, he retained his beneficial interest. Petitioner further points to the issuance of a purchase money mortgage and non-recourse promissory note as evidence that he retained his beneficial interest in the property. The Administrative Law Judge correctly found that petitioner has presented no evidence to show he possessed any rights other than those normally associated with a creditor or debtor.

Petitioner also notes that the Partnership has failed to make any payments pursuant to the non-recourse promissory note. The Administrative Law Judge rejected consideration of this fact for the purposes of petitioner's exemption claim under Tax Law § 1443(5). The Administrative Law Judge, citing Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, affd Matter of Cheltoncort Co. v. Tax Appeals Tribunal, 185 AD2d 49, 592 NYS2d 121) noted that the value of consideration has to be determined at the time of transfer in order to finally fix the amount of tax owed.

While we also find the aforementioned factor non-determinative, we disagree with the Administrative Law Judge's reasoning. Matter of Cheltoncort Co. (supra) stands for the proposition that subsequent acts do not operate to change consideration for the purpose of calculating the gains tax. Cheltoncort does not, however, affect our analysis of whether the transaction was merely a change in form as provided in Tax Law § 1443(5). As previously stated, in order to determine whether a transaction was taxable, we must look at the circumstances both before and after its completion. Payment or nonpayment pursuant to an agreement may be considered for this limited purpose.

In this case, we find the fact that payments have not been received pursuant to the terms of the agreement does not affect our decision. The fact is merely reflective of the financial status of the Partnership. It does not prove that petitioner's financial interest went unchanged after the transfer.

Considering the facts presented as a whole, we cannot conclude the transaction is exempt from the transfer gains tax pursuant to Tax Law § 1443(5).

We next turn our attention to petitioner's second exemption claim. The Administrative Law Judge rejected petitioner's argument that the transaction was exempt as merely an option to purchase under Tax Law § 1443(7). The Administrative Law Judge points out that the contract states clearly it is for the sale of shares and there is no reference to an option anywhere in the agreement. Petitioner on exception contends an option was granted to the Partnership for the purchase of the property in exchange for $75,000.00.

The premise of Petitioner's argument is that, because the sale was contingent on the sale to Gimbel going through, the Partnership had no ownership rights to the property until then. Petitioner contends that the Partnership contract was at most an option to purchase and no beneficial interest was transferred.

We disagree.

Section 5-1109 of the General Obligations Law defines an option as an irrevocable offer to buy within a time specified by the parties which becomes an enforceable contract if the option holder gives notice to the grantor of his acceptance.

The purchasers in this case received title to the property, not merely a contract right or option to purchase, which is evidenced by language throughout the December 24, 1986 agreement (e.g., Section VI, subsections 5, 6, Exhibit "J") (see, Matter of Starburst Dev. Corp., Tax Appeals Tribunal, May 5, 1994). Further, petitioner's contention that the December 24, 1986 contract was an option contingent upon the completion of the Gimbel contract has already been rejected supra.

Thus, we find petitioner failed to establish an option existed.

Lastly, we address petitioner's contention that penalties and penalty interest should be abated because he relied on the advice of counsel throughout all phases of the transaction.

The Administrative Law Judge concluded that petitioner had presented no evidence or argument which supported an abatement of penalty for failure to timely pay the transfer gains tax.

We affirm the conclusion of the Administrative Law Judge.

It is well settled law that reliance on the advice of counsel, in itself, is insufficient to warrant the setting aside of assessed penalties and interest because the reasonableness of the particular reliance must be evaluated (Matter of Benacquista, Polsinelli & Serafini Mgt. Corp. v. Commissioner of Taxation & Fin., 191 AD2d 80, 598 NYS2d 829; Matter of 1230 Park Assoc. v. Commr. of Taxation & Fin., 170 AD2d 842, 566 NYS2d 957; Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121).

Considering the fact intensive nature of our review, it was necessary for petitioner to establish what made his reliance reasonable, not merely that he so relied. This petitioner failed to do.

Further, petitioner did not attempt to prove the Partnership's failure to make payments caused petitioner's failure to pay the gains tax (cf., Matter of Fazkap Assocs., Tax Appeals Tribunal, October 6, 1994 [where we abated the penalty because it was proved that the transferee's failure to pay caused the transferor's failure to pay the tax]).

As a final note, we wish to address the Administrative Law Judge's statement in conclusion of law "G" of the determination. The Administrative Law Judge notes, "[t]he Tax Appeals Tribunal has consistently held that the reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy (Matter of Benacquista, Polsinelli & Serafini Mgt. Corp., Tax Appeals Tribunal, February 22, 1991, affd 191 AD2d 80, 598 NYS2d 829; see also, Matter of Birchwood Assoc., Tax Appeals Tribunal, July 27, 1989; Matter of Copley Plaza Co., Tax Appeals Tribunal, June 8, 1989; Matter of Normandy Assoc., Tax Appeals Tribunal, March 23, 1989)" (Determination, conclusion of law "G"). The Administrative Law Judge goes on to conclude that, "[p]etitioner has not pointed to any articulated Division policy to support a finding of exemption from gains tax under circumstances similar to those present herein. Accordingly, penalty and penalty interest is sustained" (Determination, conclusion of law "G").

The Administrative Law Judge's interpretation of the case law is incorrect. The decisions cited hereinabove stand for the proposition that positions taken by taxpayers that are inconsistent with the articulated policy of the Division cannot be considered reasonable cause. However, these cases do not hold that the failure to point to an articulated Division policy for the taxpayer's actions must result in the imposition of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Samuel Shechter is denied;

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

3. The petition of Samuel Shechter is denied; and

4. The notice of determination dated November 14, 1988 is sustained.

DATED: Troy, New York
October 13, 1994

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

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