STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GOLDLEX HOLDING COMPANY	:	DECISION DTA No. 808940
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 Goldlex Holding Company, c/o Louisa Little, 640 Fifth Avenue, 3rd Floor, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on January 26, 1994. Petitioner appeared by Ziegler, Sagal & Winters, P.C. (Stephen S. Ziegler, Lanny M. Sagal and Alan Winters, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner also filed a reply brief. Oral argument, at petitioner's request, was heard on January 19, 1995, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUES

I. Whether certain transfers of real property by petitioner were made pursuant to written contracts entered into on or before March 28, 1983, the effective date of the "gains tax" imposed under Tax Law Article 31-B, thus leaving petitioner exempt from tax on such transfers pursuant to Tax Law § 1443(6).

II. Whether, if it should be determined that the transfers of real property are not eligible for the exemption under Tax Law § 1443(6), the Division of Taxation properly determined that the consideration should be based upon the appraised value of such properties rather than on an

adjustment to the allocation to reflect the arm's-length agreement of the parties.

FINDINGS OF FACT

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

On the basis of the testimony and documents received into evidence at the hearings on October 20, 1992 and January 26, 1993, petitioner, Goldlex Holding Company ("Goldlex"), submitted 44 proposed findings of fact. The Division of Taxation ("Division") did not oppose or otherwise comment upon such proposed facts. The Administrative Law Judge has set forth below and accepted as fact, based on the documentation and the testimony provided, petitioner's proposed findings of fact 2, 3, 6 through 13, 16 through 22, 24 through 39 and 44; has modified and/or clarified proposed findings of fact 1, 4, 5, 14, 15, 23 and 40 through 43 (No. 43 reflects corrections of numerical calculations only) as reflected by the record. In addition, the Administrative Law Judge has supplemented the record with additional Findings of Fact.

Goldlex was formed pursuant to a Joint Venture Agreement entered into on September 19, 1974, by Alexander DiLorenzo, Jr. ("AD") and Sol Goldman ("SG"). The Joint Venture Agreement provided that the venture would continue until terminated by various events, but that in the event of the death of either venturer, the joint venture would not be dissolved but rather it would "thereafter be continued by the remaining venturer, who shall have sole power to manage the affairs of the venture and to make all decisions for which the mutual agreement of the venturers is required hereunder . . . without the consent of the heirs, executors or legal representatives of the deceased venturer, and without liability thereto except for his fraud or willful misconduct."

The Joint Venture Agreement (and a Nominee Agreement entered into at the same time) recited that AD and SG held as tenants-in-common and/or through other entities, interests in various properties listed in schedules to the Nominee Agreement, and provided that upon the

execution of these agreements they would be deemed to hold these properties as nominees on behalf of Goldlex.[1]

The schedules to the Nominee Agreement referred to the following groups of properties:

"Annex 1 - Wellington Associates Properties (owned 100%)

Annex 2 - Sutton Associates Properties (owned 100%)

Annex 3 - Plaza Management Properties (owned 100%)

Annex 4 - Great South Bay Company Properties
(Hampton Management) (owned 75%)

(each of the joint venturer's ownership is 37-1/2% of the whole).

Annex 5 - Imperial Realty Co. Properties (owned 100%)

(25% of Mr. Goldman's 50% interest is being held by him (Goldman) as a nominee for his brother, Irving Goldman).

Annex 6 - Miscellaneous Properties - 7 items (owned 100%)

The six Annexes attached comprise 'Schedule A' and list all the properties owned by the parties which are subject to the terms and conditions of the Joint Venture Agreement."

All of the properties which are the subject of this case are identified in Annex 4 as GSB properties.

At the time Goldlex was formed, SG and AD owned certain groups of properties alone and owned other groups with SG's brother, Irving Goldman ("IG"). The following is a summary of the profit and loss percentages for each of the predecessor tenancies-in-common and entities merged into Goldlex:

(a) In the GSB division, the profit and loss percentages were:

AD	37.5%
SG	37.5

[1]The effect of the Joint Venture and Nominee Agreements was to transfer the beneficial ownership of the properties to Goldlex (see, Finding of Fact "5").

At the time the Joint Venture and Nominee Agreements were executed, the record title to the 21 Great South Bay ("GSB") properties which are the subject of this case, was held as follows:

(1) The title to 20 properties was held by the nominee corporation Southern Associates, Inc. ("Southern"). The title to these properties remained in Southern until the 1988 liquidating transfers of these properties which gave rise to this action.

(2) The title to one property was held in the names of SG, AD and Irving Goldman.

	75.0%

IG's individual ownership percentage was 25%.[2]

(b) In the Imperial division, the profit and loss percentages were:

AD	50.0%
SG	50.0*
	100.0%

* 25% of SG's 50% interest is being held by him as nominee for his brother, IG.

(c) In all of the other divisions of Goldlex, the profit and loss percentages were as follows:

AD	50.0%
SG	50.0
	100.0%

In all Federal information returns (Form 1065) filed by Goldlex and in the schedules thereto analyzing Goldlex's capital accounts, the profits and losses of Goldlex's divisions have been allocated in accordance with the foregoing percentages, consistent with the Nominee Agreement,[3] that is:

(a) The profits and losses of the GSB division have been allocated 37½% to AD (or his successors), 37½% to SG (or his successors), and 25% to IG.

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[2]An affidavit of IG was submitted into evidence. In such affidavit, he states the following:

> "[a]s a former partner in the Great South Bay ('GSB') Division of Goldlex Holding Company ('Goldlex'), I am familiar with GSB, Goldlex and its partners. Originally, I owned a 25% interest in the GSB properties. The remaining 75% was owned equally by Alexander DiLorenzo, Jr. ('AD') and Sol Goldman ('SG'). In 1974, AD, SG, and I agreed that GSB would be operated through Goldlex, with the beneficial interests of the parties remaining the same (i.e., 25% IG, 37.5% SG, and 37.5% AD)."

Although IG refers to himself as a "partner" in the GSB division of Goldlex, no documentary evidence or testimony confirms that GSB was a partnership but rather the testimony and the evidence all point to the fact that GSB was a division or segment of Goldlex.

[3]The Federal partnership returns for Goldlex were submitted into evidence for the years 1975 through 1987. For each of the returns, the rental receipts and expenses for all of the properties held by Goldlex were reported in their entirety on the partnership returns, and then the 25% interest of IG in the Great South Bay and Imperial properties was subtracted from the net income or loss amounts reported by the partnership. To that extent, the statement regarding the allocation of profits and losses of the properties in each of the respective divisions is accurate.

(b) The profits and losses of the Imperial division have been allocated 50% to AD (or his successors), 25% to SG and 25% to IG.

(c) The profits and losses of all other divisions have been allocated 50% to AD (or his successors) and 50% to SG (or his successors).

AD died on September 5, 1975. His estate (the "AD Estate") was the successor-in-interest to AD's interests in Goldlex.

After AD's death, SG assumed full control over Goldlex and attempted to exclude the AD Estate from participating in the management of Goldlex.

In or about late 1975, the administrators of the AD Estate commenced a proceeding in Surrogates Court, Nassau County, disputing the validity of the Joint Venture Agreement.

SG then brought an action against the AD Estate in Supreme Court, New York, New York, seeking a declaratory judgment that the Joint Venture Agreement was valid.

On February 7, 1976, the AD Estate entered into a settlement agreement (the "1976 Settlement Agreement") with SG, which provided, among other things, that:

(a) The AD Estate dropped its objections to the validity of the Joint Venture Agreement.

(b) SG agreed to permit the AD Estate to be a general partner of Goldlex and to have AD's son, Alexander DiLorenzo, III ("ADL"), act on behalf of the AD Estate in the management of Goldlex.

The AD Estate had sought an immediate termination of Goldlex. SG, who was less anxious for such a termination, wanted Goldlex to continue for a limited period to give him time to develop the properties to restore the value lost in the depressed real estate market which existed during this period.

The 1976 Settlement Agreement, which was acknowledged by the parties before a notary on February 7, 1976, provided as follows in Section 3:

> "The joint venture agreement of September 19, 1974, is further amended to provide that it shall terminate, at any time agreed upon between the joint venturers, <u>but in no event later than five years after the date of this agreement</u>, at which time an equitable division of the assets of the joint venture will be made, unless the joint

venturers agree, in writing, to extend the time of termination." (Emphasis added.)

On April 1, 1976, July 1, 1977 and February 27, 1978, agreements were entered into by the AD Estate and SG. (These agreements are hereinafter collectively referred to as the "Split Agreements".) These agreements were intended to implement the termination of Goldlex agreed to in the 1976 Settlement Agreement.

Under the Split Agreements, properties (and in certain cases mortgages receivable) on one list were distributed to the AD Estate and properties (and in some cases mortgages receivable) on a second list were distributed to SG.

The lists were selected by lot under agreements dated July 1, 1977 and February 27, 1978. The agreement of April 1, 1976 set forth two specific lists.

Pursuant to the Split Agreements, Goldlex distributed many properties having an aggregate fair market value of several hundred million dollars.

The 1977 Split Agreement stated:

> "WHEREAS, the parties have agreed (a) to terminate fully all partnerships which exist between them and to divide all property held directly or indirectly by them, and (b) to distribute such property equally between them . . . ."

Paragraph 13 of the 1978 Split Agreement stated as follows:

> "Subsequent Division. To the extent that the distribution of property under this agreement does not effect a complete distribution of all assets held or controlled, directly or indirectly by them, Goldman and Estate agree to proceed forthwith to effect the complete distribution of such remaining properties and other assets."

IG was concerned that SG and the Estate were not giving the implementation of the liquidation of the GSB division a high enough priority. Thus, on the same day that the 1977 Split Agreement was executed by SG and the AD Estate, IG insisted that a supplemental agreement be executed providing for the prompt liquidation of the GSB division. As a result, a separate agreement between the AD Estate, SG and IG was prepared and executed on said day, June 30, 1977 (the "June 30, 1977 Agreement") which stated:

> "It is agreed between the parties hereto that Great South Bay shall be divided forthwith and that the distribution to Irving Goldman shall not be hindered by any other contractual arrangements between Sol Goldman, for himself, and the Estate of Alex DiLorenzo, Jr. Said distribution shall be completed by no later than July 30, 1977."

(There was a similar agreement executed on June 30, 1977 regarding the liquidation of the Imperial division [the "Imperial Agreement"]. The Imperial properties were distributed in 1977 as contemplated by the Imperial Agreement.)

After the execution of the June 30, 1977 Agreement, the parties commenced the preparation of distribution lists and related documents in order to implement the GSB division, just as they had for the liquidation of the other divisions of Goldlex. However, SG failed to distribute the remaining assets of Goldlex in contravention of the 1976 Settlement Agreement, the Split Agreements and the June 30, 1977 Agreement.

Subsequent to the execution of the June 30, 1977 Agreement, the GSB division was in a liquidation mode (i.e., Goldlex ceased to acquire properties, commenced selling properties, and applied the proceeds from such sales and other income to the retirement of obligations). Any excess proceeds were distributed to the partners.

Sometime in late 1977, IG took the position that he was entitled to a 33-1/3% interest in the GSB division, rather than the 25% interest allocated to him under Goldlex's partnership agreement. IG's basis for this contention was his belief that monies from the GSB division had been used to subsidize the properties owned in the other divisions of Goldlex.

In a letter agreement dated April 12, 1978, SG and IG agreed that IG was entitled to a one-third interest in the division of the GSB properties. After the foregoing agreement that IG was entitled to a one-third interest in the GSB division, Goldlex distributed the proceeds from the sales of GSB properties one-third each to SG, IG and the AD Estate.

At various times between 1977 and 1982, the AD Estate agreed that IG had a 33-1/3% interest in the GSB division, subject to the condition that there be a prompt implementation of the June 30, 1977 Agreement to liquidate the GSB division. When, in breach of said prior agreement, SG still would not proceed with the liquidation of the GSB division, the AD Estate would revert to a litigating position and assert that IG had only a 25% interest in the GSB division.

This disagreement as to IG's share of the GSB division was one reason that the liquidation of GSB was not accomplished in the 1978-1982 period.

In a later complaint, the AD Estate also alleged that SG wrongfully disbursed funds and other assets from the GSB division to himself and IG, and made available to himself and IG the credit of the GSB division and excluded the AD Estate therefrom.

On July 26, 1982, SG and IG entered into an agreement providing for the division among them (also by lists chosen by lot) of other properties held as tenants-in-common or partners by only SG and IG. This agreement did not address GSB properties.

Also on July 26, 1982, SG and IG entered into an agreement regarding the liquidation of the GSB division (the "July 1982 Agreement"). The July 1982 Agreement provided, in part, as follows:

> "1. Reassertion of Obligations. (a) Sol and Irving each acknowledges his obligation to comply with an agreement entered into among Sol, Irving and the Estate of Alex DiLorenzo, Jr. dated June 30, 1977 which provided for the forthwith partitioning of the properties held by the Great South Bay Partnership ('Great South Bay Properties').
>
> "(b) Sol and Irving each reaffirm his understanding that an Oral Agreement had been reached among Sol, Irving and the Estate of Alex DiLorenzo, Jr. pursuant to which distributions of assets were to be made on a 33-1/3%, 33-1/3% and 33-1/3% basis. Each acknowledges that in line with this Agreement, divisions of certain Great South Bay assets have taken place in accordance with this formula.
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> "2. Preparation of Schedules. Sol and Irving agree to promptly prepare three (3) schedules, each of comparable value, for distribution to Sol, Irving and the Estate of Alex DiLorenzo, Jr. Upon completion of these schedules, a copy of each is to be forwarded to Sol, Irving and the Estate of Alex DiLorenzo, Jr. together with a notice that unless modifications to such schedules are proposed by the Estate of Alex DiLorenzo, Jr. within 72 hours after the date of receipt of the schedules, a drawing will be held at the time and place fixed in such notice for purposes of partitioning the Great South Bay Properties in accordance with the schedules. The procedure to be followed with respect to the drawing and with respect to the division of assets and liabilities will be comparable to the procedures established under a certain agreement of even date herewith between Sol and Irving.
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> "3. Distribution of Funds. After creating a reserve of funds of Great South Bay necessary to meet certain mortgage obligations and working capital obligations, a distribution of $750,000 will be made on the basis of 33-1/3% to each of the partners . . . . Sol and Irving agree that each will cooperate fully with the other in taking all actions necessary in order to partition the Great South Bay Properties in accordance with the agreement established herein including, if necessary, the vigorous defense or prosecution of any actions required in this connection . . . ."

Thus, in the July 1982 Agreement, IG and SG:

(a) explicitly acknowledged their obligation to comply with the June 30, 1977 Agreement to liquidate Goldlex's GSB division;

(b) reaffirmed an oral agreement among the two of them and the AD Estate that the properties would be distributed in a one-third each ratio, that is, 1/3 to SG, 1/3 to IG, and 1/3 to the AD Estate;

(c) acknowledged that distributions of the GSB properties to SG, IG and the AD Estate on a one-third each basis had already taken place in partial implementation of the prior agreement to liquidate the GSB division;

(d) agreed that SG and IG would promptly prepare lists, and submit them to the AD Estate, and, if the AD Estate did not propose modifications within 72 hours, SG and IG would proceed to implement the liquidation of the GSB division based upon the schedules;

(e) affirmed that the lists would be selected by random lot (which is the method which was used in other divisions of Goldlex assets among the parties, and which was the method used in this transaction);

(f) agreed to take all actions necessary to divide the GSB properties, including "the vigorous defense or prosecution of any actions required in this connection"; and

(g) provided that the GSB division of Goldlex would make a cash distribution of $750,000.00 to the partners on a one-third each basis.

The July 1982 Agreement was executed shortly after a meeting of SG, IG and the AD Estate, at which IG again asserted his claim to damages in regard to diversions of funds from the GSB division, and all three parties agreed to settle IG's claim by granting IG an increase in his interest in GSB from 25% to 33-1/3%.

On or about July 27, 1982, each of SG, IG and the AD Estate received a $250,000.00 liquidating distribution from the GSB division of Goldlex. (The AD Estate's check was

returned by its attorney because he did not know how the amount compared with distributions that may have been made to SG and IG.)

Although the parties continued to exchange lists to divide the GSB properties, SG was still delaying, which prevented the completion of the liquidation of the GSB division at this time.

In 1984, the AD Estate commenced an action in the New York Supreme Court, New York County, against Goldlex, SG, IG, and various of Goldlex's divisions and nominees.

The AD Estate asserted the following three causes of action:

(a) The first cause of action sought an accounting by all of the defendants for the property belonging to the joint venture, Goldlex (including GSB), and alleged a breach of the Pre-1983 Agreements and of fiduciary duty by SG and IG.

(b) The second cause of action sought several hundred million dollars in damages against SG and alleged wrongful acts of duress by SG in failing to timely distribute the properties in breach of the Pre-1983 Agreements. Punitive damages were also sought under this cause of action.

(c) The third cause of action was a derivative claim by the AD Estate on behalf of Goldlex against IG for unjust enrichment by his conversion of its assets to himself.

The factual allegations in the complaint included that the liquidation of Goldlex (including its GSB division) was required by the 1976 Settlement Agreement, the Split Agreements and the June 30, 1977 Agreement (all of which were entered into long before March 28, 1983), and that the defendants had breached such contracts.

The defendants' answer generally denied the allegations made against them, but in each case admitted that the foregoing agreements, which were attached to the AD Estate's complaint, were executed on the respective dates set forth above.

The defendants made a motion to dismiss the complaint.

In its opinion, the court summarized the AD Estate's first cause of action as follows:

"The first cause of action seeks an accounting by all the defendants for the property belonging to the joint venture, Goldlex and Great South Bay Co. and alleges a

breach of fiduciary duty by the Goldmans.

> "The allegations [in the first cause of action] relate to violations of the agreements, including delay or failure in transferring property, wrongful transfers, retention of income and wrongful withholding of funds, misrepresentations of value, tax consequences and intent, acts of waste, wrongful exclusion of plaintiffs from management, disparagement of credit and failure to execute guarantees and indemnifications." (Emphasis added.)

In allowing the complaint to stand, the court stated:

> "The first cause of action contains intertwined allegations but appears to allege three main types of wrongs: (a) failure to distribute properties to plaintiffs, (b) unreasonable delay in the distribution of properties to plaintiffs, and (c) wrongful exclusion of plaintiffs from the management of the joint venture." (Emphasis added.)

With one exception, the court denied all of the defendants' motions. The only motion of the defendants granted by the court was the motion to dismiss the first cause of action as against the corporate nominees of Goldlex (i.e., seeking an accounting from such nominees) on the grounds that the AD Estate's rights with respect to the corporate nominees were limited to a stockholders' derivative action. In its opinion, the court found that the agreements referred to above, which provided for the distribution of Goldlex's real properties, were entered into in the 1976-1978 period.

On or about May 28, 1985, the defendants filed a notice of appeal with the Appellate Division, First Department, requesting that all of the determinations of the lower court, except for its dismissal of the first cause of action as against the corporate nominees, be reversed.

On or about May 31, 1985, the AD Estate filed a notice of appeal with the Appellate Division, requesting that the dismissal by the lower court of its first cause of action as against the corporate nominees be reversed or modified.

The AD Estate distributed its assets, including its interests in Goldlex, to DiLorenzo Properties Company ("DPC") as of December 31, 1985.

On May 27, 1986, the Appellate Division unanimously affirmed all of the determinations of the lower court.

In light of the Appellate Division decision, SG could no longer delay the liquidation of the GSB division. Accordingly, after said decision, the AD Estate, SG and IG prepared various

proposed lists of properties with a view toward completing the liquidation of the GSB division.

During this period, SG became quite ill with kidney disease, and by 1987 he was in the hospital three or four times a week for dialysis. He died on October 18, 1987. SG's interest in Goldlex was thereafter held by his estate (the "SG Estate").

On November 22, 1988, DPC, the SG Estate and IG signed a Termination Agreement (the "1988 Termination Agreement")[4] in connection with the settlement of the foregoing litigation, which agreement implemented, as of December 14, 1988, the completion of the liquidation of Goldlex (and in particular, its GSB division), as required by the agreements previously entered into by the parties.

Under the 1988 Termination Agreement, the GSB properties were divided into three groups, with each group representing approximately 33-1/3% in value of the remaining net assets of Goldlex. The 1988 Termination Agreement employed the same lot drawing method used when the other divisions of Goldlex were divided under the Split Agreements, and as provided under the July 1982 Agreement; that is, each party selected a group of properties in a blind draw. The properties in the first group were distributed to the SG Estate, the properties in the second group were distributed to DPC, and the properties in the third group were distributed to IG.

One of the attachments to the agreement was an Agreement of Mutual General Release among the Estate of SG, IG and DPC. It provided the following:

> "ESG and IG and DLPC each do for themselves and all persons claiming through them, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, hereby release and forever discharge one another and all persons claiming through them, from all manner of claims and liabilities whatsoever which ESG and IG and DLPC and all persons claiming through them, now have or may have from the beginning of the world to the date hereof, excepting only claims and liabilities related to or arising out of . . . [agreements unrelated to the pre-1983 agreements referred to herein]."

Pursuant to the 1988 Termination Agreement and simultaneously with the liquidating

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[4]While in petitioner's proposed findings of fact it refers to the November 22, 1988 termination agreement as the "1988 Settlement Agreement," the substance of the agreement does not primarily address the settlement of the litigation, and there is no compelling reason to alter the title of the agreement.

distributions pursuant thereto, the SG Estate, IG and DPC executed a Stipulation of Discontinuance of the action (with prejudice) commenced by the AD Estate against SG, IG and affiliated parties.

The groups of properties, their value determined by appraisal and their agreed value pursuant to the 1988 Termination Agreement, set forth in the amended New York State real property gains tax questionnaires dated November 22, 1988, were as follows:

GROUP A I. PROPERTIES SUBJECT TO GAINS TAX	(1) APPRAISAL	(2) AGREED VALUE
1-9 7th Ave. (304-310 Flatbush Ave.), Brooklyn, NY	$ 1,200,000	$ 1,090,978
504-12 E. 14th St., NY, NY	2,300,000	2,091,043
471-477 Park Ave. South, NY, NY	2,500,000	2,272,872
400 Walnut St., Bronx, NY	2,300,000	2,091,043
312-34 Flatbush Ave., Brooklyn, NY	1,100,000	1,000,064
500-02 E. 14th St., NY, NY	2,000,000	1,818,298
	$11,400,000	$10,364,298
II. PROPERTIES NOT SUBJECT TO GAINS TAX		
PROPERTIES VALUED AT LESS THAN $1,000,000		
264-266 West 125th St., NY, NY	$ 600,000	$ 545,489
79-85 Crosby St., NY, NY	625,000	568,218
771-783 E. Tremont Ave., Bronx, NY - Sold	267,000[5]	267,000
179-83 Seventh Ave., NY, NY (Condemned)	600,000[6]	600,000
	$ 2,092,000	$ 1,980,707
CASH		$ 275,000
TOTAL FOR GROUP A:	$13,492,000	$12,620,005

GROUP B I. PROPERTIES SUBJECT TO GAINS TAX	(1) APPRAISAL	(2) AGREED VALUE
412-20 E. 86th St., NY, NY	$ 2,200,000	$ 2,592,344
2042-52 Amsterdam Ave., NY, NY	1,200,000	1,414,006
993-97 Third Ave., NY, NY	2,600,000	3,063,679
182 Montague St., Brooklyn, NY	2,600,000	3,063,679
	$ 8,600,000	$10,133,708

[5]Sold.

[6]Condemnation proceeds included in group.

II. PROPERTIES NOT SUBJECT TO GAINS TAX NEW JERSEY PROPERTIES		
44 Passaic Ave., Kearney, NJ	$ 500,000	$ 589,169
	$ 500,000	$ 589,169
PROPERTIES VALUED AT LESS THAN $1,000,000		
728 8th Ave., NY, NY	$ 400,000	$ 471,335
41-02 to 41-24 Greenpoint Ave., Queens, NY	760,000	895,537
350 Fulton, Brooklyn, NY	450,000	530,252
	$ 1,610,000	$ 1,897,124
CASH		$ 0
TOTAL FOR GROUP B:	$10,710,000	$12,620,001

GROUP C I. PROPERTIES SUBJECT TO GAINS TAX	(1) APPRAISAL	(2) AGREED VALUE
107-15 E. 80th St., NY, NY	$ 2,900,000	$ 2,697,928
205-09 E. 38th St., NY, NY	1,500,000	1,395,480
579/81, 583 3rd Ave., NY, NY	2,000,000	1,860,640
	$ 6,400,000	$ 5,954,048
II. PROPERTIES NOT SUBJECT TO GAINS TAX NEW JERSEY PROPERTIES		
109 Trumbull, Elizabethport, NJ	$ 2,000,000	$ 1,860,640
440 Danforth Ave., Kellogg, NJ	1,000,000	930,320
Jackson & Center St., Freehold, NJ - Sold	2,383,000[7]	2,383,000
	$ 5,383,000	$ 5,173,960
PROPERTIES VALUED AT LESS THAN $1,000,000		
183 King St., Brooklyn, NY	$ 800,000	$ 744,256
552-66 Sixth Ave., NY, NY	750,000	697,740
	$ 1,550,000	$ 1,441,996
CASH		$ 50,000
TOTAL FOR GROUP C:	$13,333,000	$12,620,004

For purposes of the amended Questionnaires submitted by petitioner reporting the Goldlex liquidating distribution, the consideration was determined as follows:

(a) As indicated in Finding of Fact "43", appraisals indicated that the groups had the following aggregate fair market values:

[7]Sold.

Group	FMV Per Appraisal
A	$13,767,000[8]
B	10,710,000
C	13,383,000[9]
	$37,860,000

(b) Prior to the appraisals, however, the parties had agreed that the groups were approximately equal in value.

On this basis, the parties believed that the most appropriate method of calculating the fair market value of the groups was by averaging the appraised value of the groups (plus equalizing payments) as follows:

Group	Appraised Value	Equalizing Payment	Total
A	$13,492,000	$275,000	$13,767,000
B	10,710,000	-0-	10,710,000
C	13,333,000	50,000	13,383,000
Total			$37,860,000
		divided by	3
			$12,620,000

(c) The fair market value of each property in a group was determined by assuming that each group had a fair market value of $12,620,000.00, and then allocating a portion of such fair market value to each property in a group based on its relative fair market value within the group.

(d) The Division made an assessment, however, using the appraised values as the consideration.

During July 1989, petitioner filed a claim for refund of real property transfer gains tax seeking a refund of tax paid in the amount of $1,214,684.50.

On August 29, 1989, the Division issued correspondence denying the refund claim sought by petitioner. Such correspondence is reproduced below:

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[8] Includes $275,000.00 equalizing cash distribution to recipient of Group A.

[9] Includes $50,000.00 equalizing cash distribution to recipient of Group C.

"We have reviewed the above referenced refund claim dated July 19, 1989 in the amount of $1,214,684.50.

"The basis of the claim is as follows:

"The liquidating distributions of the properties to the Estate of Sol Goldman, Irving Goldman and DiLorenzo Properties Company were required pursuant to agreements entered into prior to March 28, 1983 and should, therefore, not be subject to the tax imposed under Article 31-B of the New York State Tax Law.

"If it is determined that these distributions are taxable, the appraised values of the properties should be adjusted to reflect the arm's-length agreement of the parties, thereby reducing the tax liability by $19,597.50.

"With respect to the claim that these transfers are exempt from the Gains Tax pursuant to section 1443.6 of the Tax Law, claimant petitioned the Department's Technical Services Bureau for an Advisory Opinion on September 16, 1988. In response to claimant's petition, the Department, on January 13, 1989, issued Advisory Opinion TSB-A-89(1)R (copy enclosed) which concluded that the agreement to liquidate Goldex [sic] and distribute the assets, dated June 30, 1977, was substantially changed after March 28, 1983, the effective date of the Gains Tax Statute, thereby subjecting these transfers to the tax.

"In reviewing the claim for refund, we find no reason to disagree with the above opinion and, accordingly, the claim for exemption under section 1443.6 is denied.

"In addressing the second part of the claim, the liquidating distribution of Goldex [sic] Holding involves, for Gains Tax purposes, nine separate taxable transfers of real property and not the transfers of three groups of properties. For this reason, we feel that the most appropriate way to determine the consideration for each transfer is to use the appraised values of the properties and not the proposed averaging analysis. Therefore, the request for recomputation of tax based on this averaging method is hereby denied.

"Should you disagree with this determination, you may within ninety (90) days apply for a conciliation conference or hearing in accordance with the enclosed form."

A timely conciliation conference was requested and held on May 15, 1990. The statutory notice was upheld by a Conciliation Order dated September 21, 1990. A timely petition was filed with the Division of Tax Appeals seeking review of this matter.

OPINION

The Administrative Law Judge determined that "the issue in this case is not whether [the pre-1983] agreements obligated the parties to sell the real property, but rather, whether the transfers subject to tax in this matter were pursuant to the pre-1983 agreements or the later

Termination Agreement" (Determination, conclusion of law "E").[10] The Administrative Law Judge determined that the liquidation was pursuant to the Termination Agreement executed on December 14, 1988 and not pursuant to the pre-March 29, 1983 agreements. The Administrative Law Judge found that the Termination Agreement:

> "created a new valid contract to distribute the remaining properties and assets of Goldlex . . . . The Termination Agreement contains no language setting forth as its alleged purpose the implementation or modification of the prior agreements . . . . It stands on its own in great detail and dictates the terms by which Goldlex will be terminated, its properties and assets distributed and liabilities satisfied" (Determination, conclusion of law "E").

The Administrative Law Judge concluded by stating that:

> "[t]he fact that the Termination Agreement of 1988 ultimately placed in motion the distribution and dissolution of the Goldlex partnership at the end of the litigation in which the parties were embroiled, clearly supports a finding that the transfers in issue took place pursuant to the Termination Agreement. Thus, petitioner has not shown entitlement to the grandfather exemption" (Determination, conclusion of law "E").

The Administrative Law Judge also found that the Termination Agreement made substantial changes to the pre-1983 agreements.[11] "As one

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[10]Tax Law § 1443(6) provides the following exemption from the tax imposed by Tax Law § 1441:

> "Where 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. A written agreement to purchase shares in a cooperative corporation shall be deemed a written contract for the transfer of real property for the purposes of this subdivision" (Emphasis added).

[11]The regulations at 20 NYCRR 590.21 provide:

"590.21 Amendment of a grandfathered contract.

"(a) Question: If a contract entered into on or before March 28, 1983 is amended after such date, will the contract continue to be exempt by reason of section 1443(6) of the Tax Law?

"Answer: Yes. As long as the amendment is of a nonsubstantial nature. The determination of what constitutes a nonsubstantial change will be made on a case-by-case basis. However, any change in the amount of consideration for the real property automatically results in a transfer which is not pursuant to a written contract entered into on or before March 28, 1983, and thus such transfer is taxable.

"(b) Question: If the closing date provided for in a grandfathered contract is postponed, with additional

example, the Termination Agreement lists as its parties the Estate of SG, DLPC, Goldlex and IG. In fact, IG in this agreement is represented as a partner of Goldlex which was not a fact established by the documentary evidence" (Determination, conclusion of law "E"). The Administrative Law Judge found that the only agreement where IG was a party with SG and AD Estate was the June 30, 1977 agreement. She found that:

> "[a]lthough it may have been viewed by one or two of the parties as having a binding effect, the brevity of such agreement left many details unaddressed. It did not list the manner in which the properties were to be distributed; it did not attach lists of any properties; it did not make reference to other obligations of the Goldlex partnership; it did not speak to any of the provisions dealt with in the Termination Agreement and, in fact, it was breached" (Determination, conclusion of law "E").

On exception, petitioner asserts:

> "1. The Settlement Agreement, the Split Agreements, and the June 30, 1977 Agreements are written contracts which, when read together with the Joint Venture Agreement and Nominee Agreement (all of which are referred to collectively as the 'Grandfathered Agreements'), required the liquidation of Goldlex in accordance with the partners' interests in the respective divisions, as set forth in the Joint Venture and Nominee Agreements.[12] The Grandfathered Agreements were all entered into prior to March 28, 1983, the effective date of the Gains Tax.
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> "2. The July 1982 Agreement between Goldman and Irving (also a pre-March 28, 1983 contract), confirmed the obligation of the parties to

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payments by the purchaser, is the transfer of real property still exempt?

"Answer: Yes, if it is shown that the additional payments do not constitute additional consideration as set forth in the question and answer on postponed closing dates. (See section 590.13 of this Part.)

"(c) Question: If the method of payment described in a grandfathered contract is changed by an agreement between the parties entered into after March 28, 1983, will the transfer of the property still be exempt?

"Answer: Yes, so long as the consideration for the transfer of real property is the same as stated in the contract. The transferor and transferee must complete their sworn questionnaires to reflect this fact. For example, assume a grandfathered contract contained a clause for the cash payment of $2 million and the parties later agreed for the transferor to take back a purchase money mortgage in an amount of $1,500,000, and cash of $500,000. The consideration remains at $2 million."

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"Such a distribution in accordance with the partners' respective interests in each division, is required as a matter of law. (See discussion at Section IV.A.2.c., below.)"

make liquidating distributions of the Great South Bay properties, by first separating the properties into groups followed by the parties selecting the groups in a random drawing. Furthermore, at least with respect to Irving and Goldman, it was agreed that each partner would receive a group of properties representing one-third of the fair market value of the Great South Bay division.

* * *

"4. . . . the settlement of the litigation seeking compliance with the Grandfathered Agreements requires liquidating distributions in accordance with said Grandfathered Agreements.[13] As contemplated by the Split Agreements, the properties were divided into lists which are to be selected at random by the partners. This was the same method used in liquidating the other Goldlex divisions pursuant to the Split Agreements. This method was confirmed by the July 1982 Agreement.

"5. Accordingly, the Properties were distributed in the liquidation of Goldlex as required by, and in accordance with, contracts entered into prior to the effective date of the Gains Tax and, therefore, should be exempt from the Gains Tax" (Rider to the exception, pp. 24-26).

Petitioner asserts that the Termination Agreement to settle the litigation brought to enforce the pre-1983 agreements is, in substance, no different from a court order ordering compliance with the Settlement Agreement.

Petitioner also asserts there was no substantial change to the grandfathered agreements by the Termination Agreement. Petitioner asserts that:

"[t]he only possible material difference between the distribution of the Properties made under the Settlement Agreement and the distribution required by the Grandfathered Agreements is that:

(1) under the Settlement Agreement, the Properties were distributed one-third to each of the AD Estate, Goldman and Irving,

(2) whereas the Grandfathered Agreements, on their face, required a distribution of 37-½% to each of the AD Estate and Goldman, and 25% to Irving.

"The July 1982 Agreement indicates, however, that there was, at most, a 4.167% change after March 28, 1983. This agreement is a binding pre-March 28, 1983 agreement between Goldman and Irving, pursuant to which Goldman agreed to surrender 4.167% of his 37-½% interest in favor

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[13] "Note that a significant portion of the Liquidation and Settlement Agreement deals with matters not directly or necessarily related to the distribution of the Properties in liquidation of Goldlex (as required by the Grandfathered Agreements), e.g., the exchange of general releases, and the procedures for handling contested claims by third parties against Goldlex."

of Irving. Thus, at most, only the AD Estate agreed after March 28, 1983, to transfer 4.16% of its interest to Irving.

"We respectfully submit that the fact that Irving received 4.167% of the Properties in excess of his interest in the Great South Bay division as of March 28, 1983, should not make Goldlex's liquidating distributions ineligible for the grandfather exemption" (Rider to the exception, pp. 26-27).

The Division asserts that the determination of the Administrative Law Judge was correct. The Division challenges petitioner's position asserting that:

"[t]he petitioner has sought to characterize the Termination Agreement as merely a method of settling litigation that existed between the DiLorenzo family members, Irving Goldman and numerous entities and individuals. The petitioner suggests in its filed brief that the Termination Agreement is a 'post-enactment settlement agreement' (petitioner's brief p.32). It is, however, quite clear that what concluded or resolved the litigation concerning Goldlex was a written stipulation for discontinuance entered into by the parties to such litigation (Ex.'43'). The Termination Agreement made only a passing reference to the Goldlex litigation and did not indicate in any way that its purpose was to terminate such litigation. Instead the Termination Agreement was aimed at the termination of Goldlex and distribution of those assets and liabilities that were held by the general partnership

". . . A plain reading of the Termination Agreement makes it clear that the partners of Goldlex who entered such agreement desired to terminate Goldlex and distribute its assets and liabilities in accordance with the terms of such agreement (Ex.'26,' p.2). At no point does the Termination Agreement refer to any pre-1983 agreement identified by the taxpayer. The petitioner's characterizations of the Termination Agreement are erroneous in view of the clear and unambiguous language of the agreement" (Division's Brief, pp. 7-8).

The Division argues that the property was transferred pursuant to the Termination Agreement. The Division asserts that the pre-1983 contracts 'lacked important terms and conditions and failed to convey a sense of binding action by the parties to such agreements' (Division's Brief, p. 10). The Division argues that the agreements did not specifically identify the real property that was transferred pursuant to the Termination Agreement, nor was there detail as to what individuals or entities would receive a share of any distribution that would take place. The Division asserts that even if the pre-1983 agreements were binding contracts, "it is certain that the Termination Agreement created a valid new contract in substitution for any prior obligation between the owners of the petitioner" (Division's Brief, p. 11). Finally, the Division

asserts that petitioner's arguments concerning the impact of the litigation are flawed since the Agreement made only passing reference to the Goldlex litigation and the litigation itself did not seek specific performance of the pre-1983 agreements.

We reverse the determination of the Administrative Law Judge.

The crux of the matter under the grandfather exemption is whether there was a binding agreement in existence prior to March 28, 1983 to transfer the real property (Matter of American Express Co. v. Tax Appeals Tribunal, 190 AD2d 104, 597 NYS2d 485, lv denied 82 NY2d 663, 610 NYS2d 151). The fact that action subsequent to March 28, 1983 is required to effectuate the transfer does not necessarily invalidate the exemption (Matter of Fulton Assocs., Tax Appeals Tribunal, May 11, 1995 [where contracts of sale were executed on December 8, 1989 to effectuate the exercise of an option to purchase created prior to March 28, 1983, the sales were pursuant to the option not the contracts]). In determining whether the parties have entered into a binding contractual agreement:

> "it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds [cites omitted]. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (Brown Bros. Elec. Contrs. v. Beam Constr. Corp., 41 NY2d 397, 393 NYS2d 350, 352).

Here, the pre-1983 agreements indicate clearly that the parties agreed to liquidate the Goldlex GSB properties. Nothing additional had to be done by the parties to make the agreements binding (cf., Matter of American Express Co. v. Tax Appeals Tribunal, supra, 597 NYS2d 485, 488 [conditions in escrow agreement which had to be satisfied before the transactions under the contract could be accomplished and which granted to the parties "the ability to renegotiate the contract terms without being bound by the original agreement" are evidence that the taxpayer "did not have a binding contract until after March 28, 1983"]; Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin., 189 AD2d 39, 594 NYS2d 447, affd 83 NY2d 44, 607 NYS2d 620 [an executed contract is not a contract within the meaning of section 1443(6) absent the shareholder approval required under Delaware law);

Matter of Lever v. New York State Tax Commn., 144 AD2d 751, 535 NYS2d 158 [an agreement to negotiate a contract is not a contract within the meaning of section 1443(6)]). Specifically, the June 30, 1977 agreement between IG, SG and the AD Estate provided that the "Great South Bay shall be divided forthwith and that the distribution to Irving Goldman shall not be hindered by any other contractual arrangements between Sol Goldman, for himself, and the Estate of Alex DiLorenzo, Jr. Said distribution shall be completed by no later than July 30, 1977."

The July 26, 1982 agreement entered into by IG and SG regarding the liquidation of the GSB properties provided for a reassertion of the obligations of each in accordance with their agreement with the AD Estate dated June 30, 1977 and the understanding of IG and SG that IG had a one-third interest in the GSB properties. As the Administrative Law Judge summarized:

> "in the July 1982 Agreement, IG and SG:
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> (a) explicitly acknowledged their obligation to comply with the June 30, 1977 Agreement to liquidate Goldlex's GSB division;
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> (b) reaffirmed an oral agreement among the two of them and the AD Estate that the properties would be distributed in a one-third each ratio, that is, 1/3 to SG, 1/3 to IG, and 1/3 to the AD Estate;
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> (c) acknowledged that distributions of the GSB properties to SG, IG and the AD Estate on a one-third each basis had already taken place in partial implementation of the prior agreement to liquidate the GSB division;
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> (d) agreed that SG and IG would promptly prepare lists, and submit them to the AD Estate, and, if the AD Estate did not propose modifications within 72 hours, SG and IG would proceed to implement the liquidation of the GSB division based upon the schedules;
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> (e) affirmed that the lists would be selected by random lot (which is the method which was used in other divisions of Goldlex assets among the parties, and which was the method used in this transaction);
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> (f) agreed to take all actions necessary to divide the GSB properties, including "the vigorous defense or prosecution of any actions required in this connection"; and
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> (g) provided that the GSB division of Goldlex would make a cash distribution of $750,000.00 to the partners on a one-third each basis" (Determination, finding of fact "25").

Second, it is clear that the 1984 litigation brought by AD Estate sought to compel the

parties to carry out the terms of the pre-1983 agreements to liquidate Goldlex. As the Supreme Court, New York County, summarized: "[t]he allegations [in the first cause of action] relate to violations of the agreements, including delay or failure in transferring property" (DiLorenzo v. Goldman, Sup Ct, NY County, April 29, 1985, McCooe, J., index No. 2778, affd 120 AD2d 996, 502 NYS2d 568). In allowing the AD Estate's complaint to stand, the Court noted that: "the first cause of action . . . appears to allege . . . (a) failure to distribute properties to plaintiffs, (b) unreasonable delay in the distribution of properties to plaintiffs" (DiLorenzo v. Goldman, supra).

Third, it is clear from the totality of the facts in the case and the specific wording in the Termination Agreement, that it was merely the vehicle by which the 1984 litigation was settled by the parties; it was not, as concluded by the Administrative Law Judge, a new, valid contract for the liquidation of the properties which superseded the pre-1983 agreements. The Termination Agreement did not extinguish the previous obligations of the parties with regard to any essential element of the pre-1983 agreements and replace them with new ones (cf., Matter of Schoonmaker v. Commissioner of Taxation & Fin., 202 AD2d 723, 608 NYS2d 357). This is borne out by the uncontroverted facts that:

> "[o]n November 22, 1988, DPC, the SG Estate and IG signed a Termination Agreement (the "1988 Termination Agreement") in connection with the settlement of the foregoing litigation, which agreement implemented, as of December 14, 1988, the completion of the liquidation of Goldlex (and in particular, its GSB division), as required by the agreements previously entered into by the parties.
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> "Under the 1988 Termination Agreement, the GSB properties were divided into three groups, with each group representing approximately 33-1/3% in value of the remaining net assets of Goldlex. The 1988 Termination Agreement employed the same lot drawing method used when the other divisions of Goldlex were divided under the Split Agreements, and as provided under the July 1982 Agreement; that is, each party selected a group of properties in a blind draw. The properties in the first group were distributed to the SG Estate, the properties in the second group were distributed to DPC, and the properties in the third group were distributed to IG.
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> * * *

> "Pursuant to the 1988 Termination Agreement and simultaneously with the liquidating distributions pursuant thereto, the SG Estate, IG and DPC executed a Stipulation of Discontinuance of the action (with prejudice) commenced by the AD Estate against SG, IG and affiliated parties" (Determination, findings of fact "40," "41" and "42," emphasis added).

The fact that the Agreement did not specifically refer individually to each of the pre-1983 agreements is of no moment since, as we have already noted, the Agreement states that it is in connection with the settlement of the litigation brought by the AD Estate to seek "the completion of the liquidation of Goldlex (and in particular, its GSB division), as required by the agreements previously entered into by the parties." Moreover, the Termination Agreement provided, as did the pre-1983 agreements, that the properties were to be divided into lists of equal value and that the distribution of the properties would be by lot.

Finally, we reject the Administrative Law Judge's determination that the Termination Agreement substantially altered the pre-1983 agreements in that it represented IG as a partner. The Agreement merely reflected what SG and the AD Estate had already agreed to with IG, i.e., he had a one-third interest in the GSB properties. Specifically, in the letter agreement dated April 12, 1978, "SG and IG agreed that IG was entitled to a one-third interest in the division of the GSB properties. After [that] agreement, Goldlex distributed the proceeds from the sales of GSB properties one-third each to SG, IG and the AD Estate."

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Goldlex Holding Company is granted;

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

3. The petition of Goldlex Holding Company is granted.

DATED: Troy, New York
June 29, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner