STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
JOSEPH H. MURASKIN AND HARRY S. TAUBENFELD	:	DECISION DTA Nos. 809050
for Revision of Determinations or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	& 809055

Petitioners Joseph H. Muraskin and Harry S. Taubenfeld, 575 Chestnut Street, Cedarhurst, New York 11516-2223, filed an exception to the determination of the Administrative Law Judge issued on April 29, 1993. Petitioners appeared by Zuckerbrod & Taubenfeld, Esqs. (Martin Zuckerbrod, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in response and petitioner replied. Oral argument was held on October 14, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly imposed gains tax on the sale, by petitioners, of cooperative apartment 15G at 200 East 36th Street, New York, New York or, in the alternative, whether such transfer was exempt from tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "14" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On November 30, 1988, a Statement of Proposed Audit Adjustment was issued by the Division of Taxation ("Division") to petitioners, Joseph H. Muraskin and Harry S. Taubenfeld, which asserted real property transfer gains tax ("gains tax") due in the amount of $28,958.00, plus penalty of $4,054.12 and interest of $649.64, for a total amount due of $33,661.76 for the transfer of apartment 15G at 200 East 36th Street in New York City. The amount of gains tax due was based upon gross consideration for the sale ofthe apartment ($562,000.00), less broker's fee ($29,100.00) and adjusted original purchase price ($243,320.00) for a gain subject to tax of $289,580.00 (tax imposed at 10% = $28,958.00).[1]

On February 16, 1989, the Division issued to each petitioner a Notice of Determination asserting gains tax due in the amount of $14,479.00, plus penalty and interest, for a total amount due of $17,547.84 for the period ended September 30, 1988.

On November 25, 1985, petitioners entered into a contract with Tamby Associates (the sponsor) to purchase 10,054 shares of 200 East 36th Owners Corp. by which they acquired 30 cooperative apartments at 200 East 36th Street in New York City for the purchase price of $1,900,000.00. Petitioners' representative, Martin Zuckerbrod, was a director of 200 East 36th Owners Corp., but unlike the other officers and directors, he was not a tenant-shareholder. Mr. Zuckerbrod was also a partner, with petitioner Harry S. Taubenfeld, in the law firm of Zuckerbrod & Taubenfeld. The contract provided that $25,000.00 be paid as a downpayment, $275,000.00 would be paid at closing and the balance would be paid in accordance with a promissory note and security agreement. Paragraph 22 of the contract provided as follows:

> "The parties hereto agree that purchasers may assign this agreement to a tenancy in common or, at the purchasers' election and after the purchasers have obtained and furnished seller with a copy of a favorable letter ruling from the Internal Revenue Service stating that the assignment to a partnership or co-

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[1]The Statement of Proposed Audit Adjustment disallowed, as expenses constituting original purchase price ("OPP"), $400.00 in transfer fees, $6,895.00 in New York City Real Property Transfer Tax and $2,629.00 in advertising fees, for a total of disallowed expenses in the amount of $9,924.00, thereby reducing OPP from $253,244.00 to $243,320.00. No issue as to the propriety of such disallowances has been raised herein.

partnership would not violate §216 of the Internal Revenue Code, then purchasers may assign to a partnership or co-partnership of which purchasers are principals."

A favorable ruling was subsequently obtained.

A Certificate of Limited Partnership was filed with the office of the Nassau County Clerk on March 27, 1986. The relevant portions of the certificate appear as follows:

"1. The name of the partnership is MURRAY HILL-36TH ST. ASSOCIATES.

"2. The purpose of the partnership is to acquire 30 cooperative apartments at 200 East 36th Street, New York, NY for investment, appreciation and profit with all of the rights of ownership thereof, including the right of the partners to occupy the property for dwelling purposes, or to rent, lease, mortgage, improve, sell, transfer, exchange, and in general to do all things consistent with ownership to carry out the purposes of the partnership.

"3. The principal place of business of the partnership is at 575 Chestnut Street, P.O. Box 501, Cedarhurst, NY 11516.

"4. The name and place of residence of each General Partner interested in the partnership are as follows:

Name	Place of Residence
Harry S. Taubenfeld	288 Leroy Avenue Cedarhurst, NY 11516
Martin Zuckerbrod	585 Park Avenue Cedarhurst, NY 11516
Joseph H. Muraskin	8 Alden Road Larchmont, NY 10538

"The name and place of residence of each Limited Partner in the partnership are as follows:

Name	Place of Residence
Martin Zuckerbrod	585 Park Avenue Cedarhurst, NY 11516

"The partnership has the right to add additional Limited Partners pursuant to the terms of the Partnership Agreement."

By an agreement dated April 3, 1986, petitioners assigned to the New York limited partnership, Murray Hill 36th Street Associates ("Murray Hill") all of their right, title and interest in the contract with Tamby Associates (see, above) to purchase 9,149 shares of 200 East

36th Owners Corp., together with the proprietary leases to all of the apartments except apartment 15G (there were 905 shares for apartment 15G; therefore, since apartment 15G was retained by petitioners, only 9,149 [10,054 - 905 = 9,149] shares were assigned to Murray Hill).

By an agreement dated April 4, 1986 between petitioners and Martin Zuckerbrod, as general partners, and certain individuals who would later execute the agreement, as limited partners, a limited partnership (Murray Hill) was formed for the purpose of acquiring 28 cooperative apartments located at 200 East 36th Street in New York City.

Pursuant to Article 2 of the agreement, the general partners were to contribute $157,500.00 to the capital of the partnership and were to own a 25% interest in the partnership. A limited partner was to contribute $150,000.00 for each whole unit of the partnership. Article 3 provided that the allocation of profits and losses would be in the ratio of 75% for the limited partners and 25% for the general partners.

Article 7 of the agreement stated that the management and control of the partnership and its business and affairs rested exclusively with the general partners. Article 9 provided that no limited partner would take part in the management of the business or transact any business for or on behalf of the partnership and no limited partner would have the power to sign for or otherwise bind the partnership.

The subscription agreements, signed by the limited partners, provided with respect to the general partners:

> "You [the general partners] shall have the sole responsibility for the supervision and management in these apartments and will make all decisions with respect thereto, including but not limited to, the selection of a professsional [sic] agent to manage the apartments, the terms and conditions of sales, payments of expenses and obligations, the amount of further capital contributions required and choice of professionals, etc. and you shall be entitled to receive an annual fee of $30,000 as compensation for the above services."

A Certificate of Amendment of Limited Partnership, dated December 27, 1988, was filed in the office of the Clerk of the County of Nassau which, among other things, set forth the interest of each general and limited partner of Murray Hill. Pursuant thereto, each general partner (Messrs. Muraskin, Taubenfeld and Zuckerbrod) contributed $57,500.00 and the limited

partners (13) contributed amounts ranging from $37,500.00 to $150,000.00. Messrs. Muraskin, Taubenfeld and Zuckerbrod were each listed as a limited partner with each having contributed $37,500.00 to Murray Hill.

By letter dated April 4, 1986, a joint venture agreement among Messrs. Muraskin, Taubenfeld and Zuckerbrod was entered into, providing as follows:

> "1. The three of us have purchased co-op Apartment 15G at 200 East 36 Street, New York, NY on April 4, 1986, taking title for convenience in the names of Joseph H. Muraskin and Harry S. Taubenfeld, as tenants in common.
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> "2. It is agreed that the three of us shall be liable for and shall contribute equally all funds whenever required to cover the cost of said apartment and any deficit between the aggregate monthly maintenance and rent received therefrom, as well as interest charges, if any, and all other expenses necessarily incurred in connection therewith.
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> "3. We shall hold said apartment for investment for our mutual benefit and shall sell and dispose of same when we deem it advisable.
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> "4. It is agreed that we will share equally all profits, losses and other benefits incurred.
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> "5. We may, if and when we deem it advisable, form a partnership consisting of the three of us entitled MTZ ASSOCIATES, or similar name, for the purpose of carrying out this joint venture and for any additional business purposes agreeable to us."

On November 17, 1986, a Business Certificate for Partners, on behalf of MTZ Associates was filed in the office of the Clerk of the County of Nassau.

On April 4, 1986, the 30 apartments at 200 East 36th Street in New York City were purchased in two separate transactions for a total purchase price of $1,900,000.00. Pursuant to the contract (see, above), $25,000.00 was paid down on November 25, 1985 by petitioners. The balance was paid as follows:

a. $275,000.00 paid by check of Zuckerbrod & Taubenfeld, Murray Hill Associates;

b. Promissory note from petitioners in the sum of $144,022.28;

c. Promissory note from Murray Hill in the sum of $1,455,977.72.

Petitioners entered into a Security Agreement, dated April 1, 1986, with Tamby Associates with respect to their purchase of 905 shares of capital stock of 200 East 36th Owners Corp. (representing apartment 15G). On the same date, Tamby Associates executed an

Assignment of Proprietary Lease whereby its lease from the lessor corporation (200 East 36th Owners Corp.) for apartment 15G was assigned to petitioners. A promissory note, dated April 1, 1986, was executed whereby petitioners agreed to pay Tamby Associates the sum of $144,022.28 in monthly payments through April 1, 2011.

Also on April 1, 1986, Tamby Associates and Murray Hill entered into a Security Agreement with respect to Murray Hill's purchase of 9,149 shares of 200 East 36th Owners Corp. (representing 29 apartments at 200 East 36th Street).

Petitioner Joseph H. Muraskin testified that, shortly after Murray Hill took title to the 29 apartments, a tenant of one of the apartments (10G) indicated that he would like to purchase the apartment. Mr. Muraskin stated that, at that time, Murray Hill really had no investors since it was still in the formation stage, so the tenant was given a favorable price and the apartment was sold.

The closing statement and other relevant documents (Exhibit "Y") associated with the sale of apartment 10G indicate that the closing took place on October 8, 1986. The contract of sale, dated June 20, 1986, indicates that the seller was Murray Hill, c/o Joseph H. Muraskin, Esq., and the purchaser was Richard Mincheff. The purchase price was $125,000.00. The gains tax transferor questionnaire, signed by Mr. Muraskin on January 10, 1989, listed the transferors as Joseph H. Muraskin and Harry S. Taubenfeld. The transferee questionnaire indicates that the transferor was Murray Hill 36 Associates, c/o Zuckerbrod & Taubenfeld.

At the hearing, petitioners produced a stock certificate, dated April 1, 1986, which indicated that they were the owners of 905 shares of 200 East 36th Street Owners Corp., representing apartment 15G. Subsequent to the hearing, stock certificates were submitted for 27 apartments (8,585 shares) indicating that Murray Hill was the owner thereof. Stock certificates for 24 apartments (7,610 shares) were dated April 1, 1986. The remaining certificates (3 apartments -- 975 shares) were dated "June."[2]

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[2]According to the contract of sale (Exhibit "K") between Tamby Associates and petitioners, dated November 25, 1985, 10,054 shares of 200 East 36th Owners Corp., representing 30 apartments (including 15G) were to be sold. Pursuant to the Eighth Amendment to Offering Plan (Exhibit "J"), dated August 22, 1986, 9,575 shares representing

With respect to apartment 15G, petitioners submitted checks (Exhibits "14" and "15"), drawn on the account of MTZ Associates, for months from December 1987 through June 1988, payable to Tamby Associates for mortgage payments and to Alexander Wolf & Co., Inc. for shortfall. The term "shortfall" was defined by Mr. Muraskin as the difference between what the owners were required to pay under the proprietary lease and the amount of rent which could be collected.

At the hearing, petitioner Joseph H. Muraskin testified that it was the original intention of petitioners to syndicate all 30 of the apartments. In their memorandum of law, it was stated that Messrs. Muraskin, Taubenfeld and Zuckerbrod are attorneys who, in addition to their law practice, have independently and together for the past ten years, engaged in the business of syndicating and/or investing in real property. This was accomplished by the principals (Muraskin, Taubenfeld and Zuckerbrod) entering into a contract to purchase the property and then assigning the same or a portion thereof to a partnership or group created by them. The partnership would then sell partnership interests to investors in order to raise the capital required to complete the purchase of that portion of the property assigned to the limited partnership. In each case, the principals retained an interest in the partnership.

However, apartment 15G (this apartment was actually a combination of 15F and G, thereby making it a seven-room apartment) was the largest and the maintenance payments ($1,700.00 per month) were the largest. Mr. Muraskin stated that there was a $600.00 shortfall (difference between required payments and rent collected). Because investors could not deduct passive losses, inclusion of this apartment made the sale of limited partnership interests in Murray Hill very difficult. In addition, more money would have to have been raised to cover the shortfall and it was unclear whether the tenant planned to stay on. Therefore, Messrs. Muraskin, Taubenfeld and Zuckerbrod decided to form a separate partnership to hold and subsequently sell apartment 15G.

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31 apartments were sold to Murray Hill and the shares for apartment 15G were sold to petitioners. The Eighth Amendment to Offering Plan included apartments 8A (250 shares) and 2J (176 shares) which were not included in the contract of sale.

MTZ Associates hired AOI Construction, Inc. to perform certain renovations for apartment 15G. Payment thereof, totalling $61,468.00, was made to AOI Construction, Inc. by checks drawn on an account of MTZ Associates and issued from November 1987 through April 1988.

By an agreement (contract of sale) dated August 22, 1988, petitioners sold 905 shares of 200 East 36th Owners Corp., allocated to apartment 15G located at 200 East 36th Street in New York City, to Simon and Greta Hemus for the price of $562,000.00. The closing took place on September 28, 1988. According to the closing statement (Exhibit "20"), the sellers received the sum of $384,648.62 (a check from Chase Home Mortgage Corporation, in the amount of $151,818.07, was issued to petitioners). The closing statement also indicated that, from the proceeds received by the sellers, the amount of $204,648.26 was paid to MTZ Associates.

For each of the years 1986 through 1991, Murray Hill filed Federal and State partnership returns. The schedules K-1 (Partner's Share of Income, Credits, Deductions, Etc.) indicate that, for the years 1987 through 1991, each petitioner was a general partner with an 8.333333% interest and was also a limited partner with a 2.777778% interest in the partnership (for 1986, each petitioner's limited partnership percentage was 3.703703%).

For the same years (1986 through 1991), MTZ Associates also filed Federal and State partnership returns which indicated that each petitioner and Martin Zuckerbrod were general partners with a 33.33% interest therein.

By letter dated March 21, 1986, the Division's real property gains tax unit advised petitioners, in pertinent part, as follows:

> "It is our understanding that you have purchased 10,054 shares in the 200 East 36th Owners Corp. for the purposes of resale. This letter is to inform you that you are subject to the filing requirements imposed by Article 31-B of the Tax Law on your resale of these cooperative shares.
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> "On your sale of each unit, Transferor and Transferee Questionnaires (forms TP-580 & 581) along with the contract of sale must be filed with this Department. The Gains Tax Affidavit (form TP-584) may not be used to satisfy your filing requirements, because, on its face, the affidavit is not applicable to transfers pursuant to a cooperative plan.

"If the aggregate total consideration you will receive on all of the sales exceeds $1 Million, all of the transfers will be subject to tax."

We modify the Administrative Law Judge's finding of fact "14" to read as follows:

> The Division received a form TP-580, transferor questionnaire, sworn to by petitioners on August 23, 1988, and a transferee questionnaire, form TP-581, sworn to by the purchasers on August 19, 1988. There is no indication in the record as to the date on which these documents were received.
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> On November 18, 1988, the Division received a form DTF-701, transferor questionnaire, from Murray Hill relative to 28 apartments. This form stated the estimated consideration to be received with respect to these 28 units as $2,064,475.00. On the same date, a form DTF-701 was received from MTZ Associates with respect to the sale of apartment 15G. A covering letter to the Division, dated November 14, 1988 and signed by petitioner Harry S. Taubenfeld, objected to the aggregation of the apartments transferred by Murray Hill with the apartment transferred by MTZ Associates.
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> On January 17, 1989, the Division received from Joel E. Sammet & Co., Certified Public Accountants, form TP-580, transferor's questionnaire, for the sale of apartment 10G. The questionnaire indicated that the transferors were Joseph H. Muraskin and Harry S. Taubenfeld, the transferee was Richard Mincheff, the date of anticipated transfer was October 8, 1986 and that the selling price was $125,000.00. A transferee questionnaire, signed by Mr. Mincheff on October 8, 1986, indicated that the transferor was Murray Hill. A contract of sale for this apartment, dated June 20, 1986, listed the seller as Murray Hill. It is concluded that Murray Hill was the transferor of Unit 10G.
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> Mr. Muraskin testified that at the time of the transfer of apartment 10G, a transferee questionnaire was obtained from the purchaser. However, since it was not clear to the principals whether this transaction was subject to tax, they did not file a transferor questionnaire until "a good many months later."[3]

OPINION

The Administrative Law Judge concluded that it was proper to aggregate the consideration received by petitioners from the transfer of apartment 15G with that received by Murray Hill from the transfer of the remaining 29 apartments. The Administrative Law Judge based this conclusion on his determination that petitioners were the controlling force behind all

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[3] We modified the Administrative Law Judge's finding of fact "14" by adding the second sentence to the second paragraph and by adding the last sentence to the third paragraph. The former change was made to reflect more details of the record. The latter was made to state an ultimate factual conclusion.

of the transfers by Murray Hill and that under the standards set forth in Matter of Brooks (Tax Appeals Tribunal, September 24, 1992) aggregation of the transfers was appropriate. The Administrative Law Judge refused to abate the penalty imposed because petitioners offered no explanation for their failure to timely file or pay the tax due, other than their uncertainty as to the taxability of the transfers.

On exception, petitioners argue that the Administrative Law Judge erred in aggregating the consideration received from the transfer of apartment 15G with the transfers by Murray Hill because petitioners did not own a controlling interest in Murray Hill. Petitioners assert that "[i]n virtually every case dealing with aggregation . . . the Courts have found at the very least a 'controlling interest' in both entities by the common beneficial owner was required in order to aggregate" (Petitioners' Brief on Exception, p. 10). Petitioners also argue that the Administrative Law Judge misapplied Matter of Brooks (supra) and that this case does not stand for the proposition that a general partner exercising control over a limited partnership in any way increases his actual or beneficial ownership in the entity.

In response, the Division argues that:

> "at the very least, the application of the Tax Law § 1443(1) $1 million exemption as to the petitioners was required to take into account the aggregate consideration the petitioners would receive upon the transfer of any investor's interest they held with respect to shares allocated to the cooperative conversion at issue. This necessarily results from the operation of the regulation that requires aggregation of all transfers of shares by a single investor, as well as the gains tax look through provision that allows the Division of Taxation to disregard entities to determine the petitioners entire beneficial ownership in cooperative shares of the 200 East 36th Street real property" (Division's Brief on Exception, pp. 4-5).

We agree with the result reached by the Administrative Law Judge, i.e., that the consideration received by petitioners for unit 15G is taxable, but we reach this conclusion for the following reasons.

The Appellate Division's decision in Matter of Howes v. Tax Appeals Tribunal (159 AD2d 813, 552 NYS2d 972) establishes that it is appropriate for gains tax purposes to "look through" an entity that owns real property to determine the beneficial owners of the real property. Further, Howes establishes that it is appropriate to aggregate the consideration

received from the transfer of the ownership interest in the entity with the consideration received from the transfer of other interests in the real property by the same person to apply the $1 million exemption of section 1443(1) of the Tax Law. Petitioner does not dispute this meaning of Howes but argues that the rule of Howes only applies when the beneficial owner of the entity has at least a controlling interest in the entity. Although the petitioner in Howes did own more than a 50% interest in the entity, we see nothing in the court decision which suggests that this result would only apply where the person owned at least a controlling interest in the entity. Moreover, if the Howes rule only applies where a controlling interest is owned, transactions will be structured in two stages in order to avoid the Howes rule. For example, under petitioners' scheme, if A desired to sell two contiguous parcels to B for $750,000.00 for each parcel, A would be well advised to accomplish this result by first transferring one parcel to the AB partnership (in which A holds a 49% interest) in exchange for $382,500.00, followed by a transfer of the parcel by the AB partnership to B for $750,000.00. Simultaneously, A could directly transfer the other parcel to B for $750,000.00. Under petitioner's interpretation of Howes, A would incur no gains tax liability on the transfers to B because A's interest in the AB partnership was less than a controlling interest and the consideration for this would not be aggregated with that from the direct transfer from A to B. Because petitioners have advanced no justification for their rule, we see nothing that counters the significant loophole it would create in the application of the gains tax. Therefore, we conclude that the principle of Howes applies regardless of the percentage interest held in the entity.

We do, however, agree with petitioners that the Administrative Law Judge misapplied our decision in Matter of Brooks (supra). In Brooks, we concluded that the transfer of contiguous parcels by several apparently different transferors should be aggregated because the facts indicated that one person actually controlled all of the transferors. As a result, we determined that the controlling person was the beneficial owner of all of the parcels and that the other titleholders were mere nominees. We find nothing in the instant record like that in Brooks to suggest that the other limited partners in Murray Hill were not independent of petitioners. Accordingly, we conclude that the Administrative Law Judge erred in aggregating the

consideration received for apartment 15G with the entire consideration received by Murray Hill for the remaining apartments. Instead, we believe that only the consideration attributable to the beneficial interests of petitioners and Mr. Zuckerbrod in Murray Hill should be aggregated with the consideration received by these three for apartment 15G. As petitioners and Mr. Zuckerbrod each owned 11% in Murray Hill, the appropriate amount of consideration from Murray Hill to be considered is 33% of $2,189,475.00,[4] or $729,095.18 Adding this amount to the consideration for 15G ($562,000.00) results in an amount greater than $1 million; therefore, the transfer of apartment 15G is subject to tax.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph H. Muraskin and Harry S. Taubenfeld is denied;

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

3. The petitions of Joseph H. Muraskin and Harry S. Taubenfeld are denied; and

4. The notices of determination dated February 16, 1989 are sustained.

DATED: Troy, New York
March 24, 1994

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

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

[4]$2,189,475.00 is the total of the estimated consideration for 28 units owned by Murray Hill, $2,064,475.00, plus the actual consideration, $125,000.00, received by Murray Hill for unit 10G.