STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RUBIN BROTHERS HOLDING CO. & OTHERS	:	DECISION DTA No. 810562
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.	:	

Petitioners Rubin Brothers Holding Co. & Others, 301 East 48th Street, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on May 16, 1994. Petitioners appeared by Eisen, Hershcopf & Schulman (Edwin R. Eisen and Bernard Schulman, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exception, the Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Oral argument was heard on December 15, 1994 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation properly aggregated certain transfers of interests in real property owned by petitioners at 53 East 57th Street, New York City.

II. Whether the Division of Taxation properly calculated original purchase price with regard to the transfer in issue of real property known as 53 East 57th Street, New York City.

III. Whether petitioners have demonstrated that their failure to pay the proper amount of tax due was attributable to reasonable cause and not willful neglect.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "1" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

We modify the Administrative Law Judge's finding of fact "1" to read as follows:

> On May 21, 1990, the Division of Taxation ("Division") issued to Rubin Brothers Holding Co. & Others ("Rubin Brothers") a Notice of Determination of Real Property Gains Tax Due, assessment identification number L-001679951-1, setting forth tax due of $68,137.20, penalty of $23,847.97 and interest of $17,279.51, for a total amount due of $109,264.68.
>
> An explanation of the assessment was included on an attachment to said notice and set forth the following:
>
> > "The following computation of tax is in regards to the transfer of development rights associated with real property at 53 East 57th Street, as applied in accordance with Section 1440.7 of Article 31-B of the Tax Law and 590.43 of Gains Tax regulations.
> >
> > "The Department has examined the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers of the development rights, fee above the plane and leasehold with option, and has determined that the transfers are to be aggregated.
> >
> > "The $1 million threshold has been reached when all the transfers were aggregated, as follows:
>
> Consideration
>
> | | |
> |---|---|
> | Development rights | $681,372.00 |
> | Fee above the plane | 22,916.66 |
> | Present value of leasehold with option to purchase | 2,379,924.30 |
> | Total Consideration | $3,084,212.96 |

"Tax on the development rights as follows:

Consideration	$681,372.00
Less: Original Purchase Price	0
Gain	$681,372.00
Tax on the above at 10%	$68,137.20

"Penalties and interest are due in accordance with Section 1446 of the Tax Law, from February 1, 1988."

The attachment to the Notice of Deficiency did not specify, nor allude to, any other section of the regulations as a ground for aggregation.

In its petition, petitioners addressed only former 20 NYCRR 590.43, i.e., whether petitioners intended to make the multiple transfers (Exhibit "B").

In its answer, the Division stated:

> "2. . . . with respect to the property known as 53 East 57th Street, New York, New York, Petitioner transferred the (1) development rights, (2) the fee above the plane and (3) a leasehold interest coupled with a purchase contract to a single transferee.
>
> "3. . . . that Division of Taxation properly aggregated said transfers, including the transfer of the development rights, for the purposes of applying the Real Property Transfer Gains Tax" (Exhibit "F").

In its answer, the Division did not specifically refer to any section of the regulations.

In his statement of the issues at the hearing, petitioners' representative addressed only the issues of former 20 NYCRR 590.43.

The Division's representative, in his statement of the issue at hearing, stated, in part:

> "Listen closely to the testimony because what is happening here is we have a transferor who is conveying off various component interests in its property to a major real estate developer who is putting together an assemblage of properties. I don't think there is much dispute, listening to Mr. Eisen's opening statement, what you have is a single transfer of property from the Rubins to Mr. Zeckendorf, who owns or controls or is calling the shots for these entities.

"Of course, after we hear the testimony and see the proof put in by the Petitioners, we will respond to their argument that there needs to be some showing of intent. But if you would please look at the facts and testimony from a single transfer point of view also. That's all I have" (Tr., pp. 44-45).

In its statement of the issue, the Division did not specifically refer to any section of the regulations.[1]

In a related transaction which was the subject of a separate assessment not before this forum, the Division assessed Rubin Brothers, by assessment identification number L-001679952-9, dated May 21, 1990, for tax in the amount of $266,982.32, penalty of $93,443.73 and interest of $62,452.22, for a total amount due of $169,070.68, after payment of $253,807.59.

In an attachment to said assessment, the Division set forth the following explanation:

"The following computation of tax is in regards to two of three transfers associated with real property located at 53 East 57th Street, New York, NY, and is in accordance with Article 31-B of the Tax Law.

"Tax is computed as follows:

Fee above the plane	$22,916.66
Present value of leasehold with option to purchase	2,379,924.30
Consideration	$2,402,840.96
Less: Original Purchase Price (OPP)	0
Gain	$2,402,840.96

"Computation of additional consideration as provided by 590.9 of Gains Tax regulations:

.10 (Selling price - OPP) = .9X

.10 (2,402,840.96 - 0) = .9X

240,284.09 = .9X

240,284.09 / .9 = X

266,982.32 = X

[1]We modified the Administrative Law Judge's finding of fact "1" by adding the last 11 paragraphs to reflect more details of the record.

"X in the equation equals the amount of tax due when the transferee pays the gains tax on behalf of the transferor.

"Interest and penalties are also due in accordance with Section 1446 of the Tax Law, from February 1, 1988.

"Payment made by transferee, 57-57th Associates, in the amount of $253,807.57 received March 15, 1990, is shown."

On January 26, 1993 and January 29, 1993, Rubin Brothers and the Division, respectively, entered into a stipulation for discontinuance of the proceeding with regard to assessment identification number L-001679952-9 in which petitioner agreed to pay additional real property gains tax of $13,174.73, plus interest and penalty.

From the above, it is apparent that the transactions underlying the two assessments are inextricably intertwined, since the aggregation of the development rights subjected to real property gains tax in this matter was with the two transfers which were the subject of the matter described above. Therefore, where necessary and relevant, facts from the matter not in issue and previously settled, concerning assessment number L-001679952-9, will be referred to in this determination.

On August 14, 1987, Rubin Brothers entered into an agreement with WZ 58th Street Associates ("WZ 58th"), a New York general partnership with a principal place of business in care of Zeckendorf Company, 55 East 59th Street, New York, New York, whereby Rubin Brothers transferred to WZ 58th the excess transferable development rights ("TDR") associated with its property at 53 East 57th Street, permitting WZ 58th to construct a building containing more floor area than is available to it under the New York City Zoning Regulations. The difference between total floor area available at the Rubin Brothers' property at 53 East 57th Street as determined by the New York City Zoning Regulations and the actual existing floor area is referred to as "unused floor area". The unused floor area and all development rights available at the Rubin Brothers' property as of August 4, 1987 pursuant to the New York City Zoning Regulations but not exercised as of that date were referred to as the "excess development rights".

It was these rights which were transferred to WZ 58th for the sum of $450,000.00 and the lesser of $275,000.00 or the aggregate of payments of $22,916.66, payable monthly between September 1, 1987 and August 31, 1988. In fact, the additional amount paid totalled $231,372.00 for a total consideration paid by WZ 58th for the development rights of $681,372.00.

By way of background, WZ 58th contained a general partner known as Z 57th Street Limited Partnership ("Z 57th"), which in turn contained a general partner known as Z 57th Street, Inc. Petitioner never explained the identities of these entities.

The development rights were ultimately transferred to 57-57th Associates on November 18, 1987. 57-57th Associates was a development partnership of which WZ 58th was one of the general partners, the other being Bermuda Shops Limited. 57-57th Associates had the same address as WZ 58th, i.e., in care of Zeckendorf Company, 55 East 59th Street, New York, New York.

According to testimony of Abraham Kaplan, vice-president of Z 57th Street, Inc., WZ 58th was obligated to transfer whatever rights it had in adjoining properties to 57-57th Associates.

Rubin Brothers filed a transferor questionnaire which indicated that the transfer of the TDR to WZ 58th was anticipated to take place on November 18, 1987 for a consideration of $681,372.00. A transferee questionnaire was filed by WZ 58th which also indicated the transfer of TDR on the same anticipated date and for the same consideration. The transferee questionnaire was signed by Abraham Kaplan, vice-president of Z 57th Street, Inc. The transferor questionnaire was dated September 19, 1989, while the transferee questionnaire was dated October 30, 1989. A real property transfer gains tax affidavit was filed by Rubin Brothers on or about November 18, 1987 which indicated the transfer of real property (the TDR) to 57-57th Associates, the real property being located at 53 East 57th Street, New York, New York, and that the consideration therefor was $4,522.05. The affidavit also claimed that the transfer was exempt from tax because the consideration was less than $500,000.00 and was not a partial

or successive transfer pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of Article 31-B of the Tax Law.

The agreement for the sale of the TDR indicated that two real estate brokers were to earn commissions on the sale, namely, Mr. Albert Bialek, president of Bialek Associates, Inc., and Mr. Arnold Gumowitz, representing Arnold Gumowitz Real Estate. Additionally, a handwritten notation on the agreement indicates that Rubin Brothers also dealt with one Steven Riker of Abrams, Benesch and Riker. However, it is not known if any additional commissions were due to Mr. Riker.

By letter dated November 2, 1989, Rubin Brothers requested a tentative assessment indicating no tax due on the transaction with WZ 58th and the sale of the TDR.

Mr. Kaplan, vice-president of Z 57th Street, Inc., testified that, prior to the transfer of the TDR on November 18, 1987, the Zeckendorf organization, through one of the realtors named in the TDR agreement, Albert Bialek, sought to purchase the entire fee interest in the Rubin Brothers' property at 53 East 57th Street on two separate occasions.

By letter dated October 27, 1987, Mr. Bialek, acting on behalf of his "customer", William Zeckendorf, Jr., indicated that Mr. Zeckendorf was prepared to purchase the fee ownership in 53 East 57th Street for $9,000,000.00 in addition to the $2,000,000.00 "that he has already agreed to pay for the unused development rights." The October 27, 1987 letter also indicated that Mr. Zeckendorf had agreed to assume Rubin Brothers' obligation to pay Mr. Bialek his brokerage commission.

In a letter, dated November 4, 1987, Mr. Bialek made a second offer on behalf of "our customer", William Zeckendorf, Jr., indicating that Mr. Zeckendorf was prepared to purchase the fee ownership in 53 East 57th Street for $10,000,000.00 in addition to the $2,000,000.00 "that he has already agreed to pay for the unused development rights." Once again, Mr. Bialek indicated

that Mr. Zeckendorf had agreed to assume any obligation on behalf of Rubin Brothers to pay Mr. Bialek his real estate commission. Both of these offers were rejected.

During the same period, the fall of 1987, Rubin Brothers was negotiating to lease its property with Siegel Consultants, Ltd. By letter dated June 14, 1991, from Joan Siegel, president of Siegel Consultants, Ltd., written at the request of Mr. Cyrus Rubin, Ms. Siegel confirmed the negotiations that had transpired between the two companies concerning a proposed lease of 53 East 57th Street to one Bonni Keller, who intended to open a Geoffrey Beene retail shop during the late summer and fall of 1987. The offer at that time was for a 15-year lease commencing at $450,000.00 per year, increasing to $550,000.00 by the end of the 10th year, with adjustments thereafter. Ms. Siegel indicated that her company was an active real estate brokerage company, specializing in leasing Madison Avenue, Fifth Avenue and East 57th Street properties to high-end fashion tenants, representing such clients as Burberry's, Calvin Klein, Fortunoff and Bonni Keller. Rubin Brothers rejected the lease offer because it considered Bonni Keller a risk.

Rubin Brothers is a family partnership which was formed by three brothers in 1940. The original brothers purchased 53 East 57th Street on January 29, 1948. The property remained in the family until the transactions in issue. The current owners of Rubin Brothers are the second and third generation of the brothers.

Although the development rights had been sold, Rubin Brothers continued to try to lease its property. In addition to the negotiations with Siegel Consultants, Ltd. noted above, Rubin Brothers also negotiated with one Helen Wall of Judson Realty in December of 1987, but no offer materialized.

On February 1, 1988, Rubin Brothers entered into an agreement with 57-57th Associates whereby Rubin Brothers agreed to sell and convey to 57-57th Associates that portion of its property at 53 East 57th Street lying above a horizontal plane drawn at elevation 81.14 feet above the datum used by the Topographical Bureau, Borough of Manhattan ("fee above the plane"), in

consideration of $22,916.66. Pursuant to the real property transfer gains tax affidavit filed in this matter, the transfer took place on May 5, 1988.

Also on February 1, 1988, Rubin Brothers entered into an indenture of lease with 57-57th Associates, the term of which was 10 years beginning on February 1, 1988 and expiring on the 10th anniversary but subject to extension. The rent payable under the lease varied in accordance with a schedule set forth therein.

Finally, on February 1, 1988, Rubin Brothers entered into a purchase agreement with 57-57th Associates for certain land, buildings and improvements erected on premises located at 53 East 57th Street, New York City, excluding excess development rights and the fee above the plane, both of which had been transferred previously. Consideration for the transfer was either $5,000,000.00 in cash or certain property of equivalent value (a condominium unit in the building to be built on or near the site of the property being transferred pursuant to the purchase agreement). The purchase agreement provided that Rubin Brothers would deliver to an escrow agent the executed, acknowledged deed for the subject premises along with the return required for payment of the New York City real property transfer tax, an affidavit pursuant to section 1445 of the Internal Revenue Code, and a transferor questionnaire for purposes of the New York State real property transfer gains tax. Purchaser placed in escrow $500,000.00 of the purchase price and agreed to pay an additional $4,500,000.00 at the closing of the premises if the cash option was exercised on the 5th anniversary date of the purchase agreement.

In case the seller decided to exercise the exchange option, the purchase agreement provided that the purchaser would transfer to Rubin Brothers title and fee simple to a conforming condominium unit constructed upon the real property located at Block 1293 on the tax map of the City of New York, Borough of Manhattan (adjacent to petitioner's property). That transfer was to take place on or after the 45th day from the date the purchaser delivered to the seller notice that the purchaser or its affiliate (acting as sponsor of the plan for the conforming condominium unit) had proceeded to amend the plan filed with the New York State Department of Law to declare

said plan effective and certifying that the conforming condominium unit was substantially complete and that purchaser was prepared to close title under the exchange option.

In a transferor questionnaire filed by Rubin Brothers on March 6, 1990, it disclosed the transfer of the leasehold grant on February 1, 1988 for a gross consideration of $2,402,840.66 and an original purchase price of $95,499.00. It declared a gain subject to tax of $2,307,341.66 and tax due of $256,371.00. The consideration included consideration of $22,916.66 for the transfer of the fee above the plane, also transferred on May 5, 1988. By letter dated March 14, 1990, the law firm of Whitman & Ransom remitted $253,807.59 of the tax reported due on the transferor questionnaire, stating therein that the balance would be paid within the week.

Rubin Brothers filed two real property gains tax affidavits for the transfers of the fee above the plane and the leasehold interest on May 5, 1988. It indicated on the affidavit concerning the transfer of the fee above the plane that the transfer was exempt from gains tax based upon the exemption for transfers where consideration is less than $500,000.00. In the affidavit regarding the transfer of the leasehold interest, Rubin Brothers claimed an exemption from gains tax on the basis that it was not a transfer of real property within the meaning of Tax Law § 1440.7. However, as noted above, Rubin Brothers ultimately acquiesced in the aggregation of the transfer of the fee above the plane and the leasehold interest coupled with the purchase agreement and paid the gains tax due thereon.

Although the allocated original purchase price set forth on the transferor questionnaire with regard to both the fee above the plane and the leasehold interest was stated to be $95,499.00, Rubin Brothers' purchase price of the property was also stated to be $246,000.00. The amount set forth on the transferor questionnaire allegedly represented the amount of the original purchase price allocable to the lease, the fee above the plane and the development rights contract pursuant to the provisions of the regulations at 20 NYCRR 590.19 and 590.28.

Mr. Cyrus Rubin, a partner in Rubin Brothers who testified at hearing, indicated that he had worked for Arnold Gumowitz Real Estate, the same company owed a commission as set forth in the sale of the TDR contract. Mr. Rubin was not a broker, but a licensed real estate salesman. Mr. Rubin and Mr. Gumowitz had a "blow off" when Mr. Gumowitz failed to pay Mr. Rubin commissions owed to him.

Mr. Rubin's memory of the chronology of the transactions in issue was clouded. He claimed not to have been interested in any adjoining or contiguous properties, whether they were the subject of any plan by his neighbor, William Zeckendorf, or his affiliated companies and partnerships, although he stopped short of actually denying knowledge of such a plan or development.

Mr. Rubin testified that, despite his background in real estate and substantial holdings, he did not understand what development rights were when Mr. Bialek offered to purchase them on behalf of Mr. Zeckendorf and testified that the term was very unfamiliar to him. However, he stated that after the term was explained to him, he discussed it with his partners and they decided, since they had no intention of expanding their building, to sell those rights and retain the building.

Mr. Rubin acted as a real estate salesperson for Rubin Brothers in addition to his other responsibilities as a partner for petitioner, but he did not recall ever negotiating the purchase agreement for the property entered into with 57-57th Street Associates.

Petitioner submitted the 1992 U.S. Partnership Return, Form 1065, which it said indicated that the value of the property located at 53 East 57th Street, New York, New York, was included in the balance sheet under "building and other depreciable assets" of $64,706.00. The value of the land was stated to be $106,294.00. The total cost listed for both items was $171,000.00.

As set forth above, WZ 58th was obligated to contribute any rights it acquired in adjoining properties to 57-57th Street Associates.

Around the time the Zeckendorf affiliates were bargaining for the purchase of properties in the 57th Street and 58th Street area, they were simultaneously entering into negotiations with a company known as EIE International ("EIE"), a Japanese firm which held a substantial interest in Regent Hotels, for EIE's participation in this joint venture.

Originally, 57-57th Street Associates only held an interest in a hotel on 58th Street through a sister company. Then it purchased (through 58 Associates) the development rights from Rubin Brothers in November 1987. After that, 57-57th Street Associates acquired two brownstones in the area from The Bermuda Shops, a joint venture. At that time, the plan was to acquire properties in the area to build a mixed-use building, a combination of a hotel and residential condominiums. The development plan evolved from a small boutique hotel to the development of a 500-room hotel. The arrival on the scene of EIE played a large part in the change in plans.

57-57th Street Associates negotiated with EIE from January to June 9, 1988. An agreement was allegedly signed on June 13, 1988. That agreement called for WZ 58th to sell its partnership interests in 57-57th Street Associates to EIE or a company under its control.

Following the gains tax filings made by Rubin Brothers in connection with the sale of the fee above the plane and the 10-year lease coupled with the purchase agreement, by letter dated March 22, 1990, the Division informed attorneys for Rubin Brothers that further documentation was needed to establish the claimed $246,000.00 purchase price. No response to this request appeared in the record.

In response to the Notice of Determination issued by the Division on May 21, 1990 to Rubin Brothers, assessment number L-001679951-1, Rubin Brothers Holding filed a request for conciliation conference on July 18, 1990. The Notice of Determination was sustained by Conciliation Order dated December 13, 1991 and petitioners timely petitioned said order before the Division of Tax Appeals on March 2, 1992. The Division filed its answer to said petition on June 26, 1992.

By letter dated February 27, 1990, the Division notified representatives for Rubin Brothers that it was awaiting the required questionnaires and supporting documentation regarding the aggregation of development rights and leasehold for property located at 53 East 57th Street.

By letter dated May 16, 1990, in a letter to the Division from Edwin R. Eisen, Esq., attorney for Rubin Brothers, petitioners took issue with the aggregation of the sale of the development rights and the subsequent agreement for lease of the premises at 53 East 57th Street and the sale of the fee above the plane as well as the purchase agreement. Mr. Eisen ended the letter by concluding that the facts supported his contention that no gains tax is due because the sales should not be aggregated.

The purchase agreement entered into between Rubin Brothers and 57-57th Street Associates, dated February 1, 1988, indicated that the parties chose the same broker involved in the development rights purchase agreement, i.e., Albert Bialek Associates, Inc., by Mr. Albert Bialek.

In addition, Paragraph 17 of the same agreement concerning the brokers in the sale transaction provided that the parties to the agreement would indemnify and defend each other and hold each other harmless against any claim by any other broker or person including A. Gumowitz Real Estate, by Arnold S. Gumowitz, "with whom seller has advised purchaser that a dispute exists" for any commissions in connection with this specific transaction. Mr. Gumowitz was also involved in the TDR transaction and employed Mr. Rubin.

OPINION

Tax Law § 1441 imposes a ten percent tax upon gains derived from the transfer of real property located within New York State where the consideration received for such transfer is one million dollars or more (Tax Law §§ 1441; 1443[1]).

The first sentence of Tax Law § 1440(7) states, in relevant part, that the "[t]ransfer of real property" means the transfer or transfers of any interest in real property by any method, including . . . [transfers by] sale."

The regulation at former 20 NYCRR 590.42 codifies the Division's interpretation of this first sentence of section 1440(7) (Matter of Iveli v. Tax Appeals Tribunal, 145 AD2d 691, 535 NYS2d 234, lv denied 73 NY2d 708, 540 NYS2d 1003). This regulation states, in relevant part:

> "the separate deed transfers of contiguous or adjacent properties to one transferee are, for purposes of the gains tax, a single transfer of real property . . . . However, if the transferor establishes that the only correlation between the properties is the contiguity or adjacency itself, and that the properties were not used for a common or related purpose, the consideration will not be aggregated" (20 NYCRR 590.42 [emphasis added]).

The third sentence of Tax Law former § 1440(7), the so-called "aggregation clause," provides:

> "[t]ransfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article . . . ."

The Division has interpreted the aggregation clause through the regulations at former 20 NYCRR 590.43. The portions of this regulation which are pertinent to this proceeding are subdivisions (a) and (g) which provide as follows:

> "(a) One transferor, more than one transferee, contiguous or adjacent parcels of land?
>
> "Answer: When the sales are pursuant to a plan or agreement, the consideration for each parcel is to be aggregated in determining whether the consideration is $1 million or more.
>
> "A transferor may furnish, along with his questionnaire, a sworn statement that the sales are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of article 31-B.
>
> "Whether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The

> department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated."
>
> "(g) Question: Will the subdividing of real property be subject to aggregation pursuant to section 1440(7) of the Tax Law?
>
> "Answer: Yes. Section 1440(7) of the Tax Law specifically provides that all subdividing of real property is subject to the aggregation rule, except in the case where the subdivided property is improved with residences and is used for residential purposes, other than those pursuant to cooperative or condominium plans."

The Administrative Law Judge concluded that the Division properly aggregated the transfer of the development rights with the subsequent transfer of the fee above the plane and the lease and purchase agreement. The Administrative Law Judge upheld aggregation based on three theories asserted by the Division.

First, the Administrative Law Judge held that the interests were properly aggregated under former 20 NYCRR 590.42. The Administrative Law Judge concluded that all three transfers were made to entities controlled by William Zeckendorf and, thus, were within the regulation.

On exception, petitioners contend that the Administrative Law Judge erred in considering this basis for aggregation, arguing that the Division did not raise this theory until its reply brief filed after the hearing.

In response, the Division argues that it did raise this issue and points to paragraph 2 of its answer and pages 44-45 of the hearing transcript. The Division also states that this is a legal issue, not a factual issue.

We agree with petitioners on this issue.

In view of the specificity of the statement accompanying the Notice of Determination, which relied solely on former 20 NYCRR 590.43, the Division's subsequent statements were not specific enough to provide petitioners with sufficient notice that they must also show that former 20 NYCRR 590.42 did not allow aggregation of the transfers. In these circumstances, we believe

that the Division was required to specifically inform petitioners that the Division was also relying on former 2O NYCRR 590.42 as a basis to support the assessment.

In addition, we do not agree with the Division that the application of former 20 NYCRR 590.42 involves only a legal issue. As Matter of Brooks v. Tax Appeals Tribunal (196 AD2d 140, 608 NYS2d 714) indicates, the question of whether property is beneficially held by a common owner involves an intensive evaluation of the facts of the ownership. Although the question here would be that of the common control of the purchaser rather than the seller, as in Brooks, the factual nature of the inquiry remains the same.

Accordingly, we conclude that petitioners would be prejudiced if the Division were allowed to raise former 20 NYCRR 590.42 as an issue in this proceeding (see, Matter of Angelico, Tax Appeals Tribunal, March 31, 1994).

Next, the Administrative Law Judge held that the transfers were properly aggregated by the Division pursuant to former 20 NYCRR 590.43(g) as a subdivision of real property. The Administrative Law Judge treated this as a separate and independent basis upon which to require aggregation and concluded that this basis for aggregation did not depend on the transferor's intent. We have explicitly rejected this contention and held that a transferor of subdivided parcels can avoid aggregation by demonstrating that he did not have a plan to dispose of all the property in the subdivision (Matter of Deerwood Estates, Tax Appeals Tribunal, November 17, 1994; Matter of Six Stars Realty, Tax Appeals Tribunal, October 7, 1993; see also, Matter of Armel, Tax Appeals Tribunal, July 23, 1992). Because the Administrative Law Judge failed to consider petitioners' intent in deciding that the transfers were aggregated pursuant to former 20 NYCRR 590.43(g), we reverse the Administrative Law Judge's opinion on this issue.

Lastly, the Administrative Law Judge held that the transfer of the development rights could be aggregated with the other transfers under former 20 NYCRR 590.43(a).

The Administrative Law Judge stated that "[t]he facts set forth above with regard to 20 NYCRR 590.43(g) more than amply demonstrate that petitioners' plan was to transfer all the interest in their real property, albeit by partial or successive transfers" (Determination, conclusion of law "C"). The facts that the Administrative Law Judge was apparently referring to were that the contracts in issue were executed within a very short period of time and that the contract for the sale of the development rights and the purchase agreement had co-brokers in common. Other relevant facts are that the Administrative Law Judge found incredible Mr. Rubin's testimony that he was not aware of Mr. Zeckendorf's plan for the tract of land which included the parcel in issue and that the development rights held little value to the partnership. The Administrative Law Judge also noted that Mr. Rubin had difficulty remembering the specific facts of the transactions at issue. Against this background, the Administrative Law Judge concluded that Mr. Rubin's denial of the existence of a plan or agreement to transfer the property by partial or successive transfers was not sufficient to sustain petitioners' burden of proof on this issue.

On exception, petitioners contend that the testimony of Mr. Rubin and Mr. Kaplan clearly and convincingly demonstrated that at the time the development rights were transferred petitioners had no plan to transfer any further property.

The Administrative Law Judge specifically did not find the testimony of Mr. Rubin credible. Further, implicit in the Administrative Law Judge's determination is that he did not find the testimony of Mr. Kaplan credible, i.e., either competent or truthful, to establish the intent of Mr. Rubin with respect to the transfers. We defer to the Administrative Law Judge's evaluation of the credibility of the witnesses (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). We see nothing in the record before us that would justify setting aside the Administrative Law Judge's credibility determination; therefore, we affirm the Administrative Law Judge's determination that the transfer of the development rights was properly aggregated by the Division with the other transfers for the reasons stated in the determination.

Next, the Administrative Law Judge sustained the imposition of penalty against petitioners because having a different interpretation of the Tax Law and regulations did not in itself establish reasonable cause for failing to pay tax. On exception, petitioners contend that "[w]hether or not a penalty is imposed should be based upon the facts and issues of each individual case and not based upon blanket statements . . . . The test is clearly established under the statute but has been muddled by the Division so as to stifle legitimate opposition where the taxpayer believes he has been wronged" (Petitioners' brief on exception, p. 16).

We agree with the Administrative Law Judge that petitioners have not established grounds to abate the penalty and affirm his determination on this issue for the reasons stated in the determination.

On the last issue before him, the Administrative Law Judge held that petitioners had not established any original purchase price for the transfer at issue. The Administrative Law Judge held that the figure submitted by petitioners at the hearing of $171,000.00 was submitted without substantiation or underlying testimony.

On exception, petitioners assert that the $171,000.00 figure was based on the partnership's tax return and that this evidence coupled with the affidavit of petitioners' accountant is enough to establish the original purchase price of the property.

We affirm the determination of the Administrative Law Judge on this issue for the reasons stated in the determination.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rubin Brothers Holding Co. & Others is denied;

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

3. The petition of Rubin Brothers Holding Co. & Others is denied; and

4. The Notice of Determination dated May 21, 1990 is sustained.

DATED: Troy, New York

May 18, 1995

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

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